

THE
Calcutta Weekly Notes.

REPORTS OF IMPORTANT DECISIONS

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

IN

Appeal from India.

VOL. XXVI.

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JUDGES OF THE HIGH COURT.

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the land of the village to the grantee to get it cultivated and populated. It was for the purpose of clearing the jungle, making the land fit for cultivation and bringing in rayyats which carried with it the duty of sinking wells. The birt-holder was to enjoy it free for five or six years. A comparatively small but gradually ascending rent was fixed for the years 1210 to 1214 in proportion to the increasing productiveness of the soil. After 1214, he was to pay the revenue to the sarkar prevalent in the Taluqa and take the daswant prevalent in the Taluqa, the daswant being a deduction in the nature of a rebate. The rent of the tenure could not be capriciously enhanced by the Taluqdar as the assessment of the jama was to be in accordance with the rate prevalent in the Taluqa: Held, in view of the above and other circumstances of the case, that the Judicial Commissioners were right in holding that the grantees had under-proprietary right in the village.

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BENGAL MUNICIPAL ACT (III of 1884, B. C.), s. 15, cl. (2) assessment of income tax upon the joint income of father and son as members of joint family, if entitles both of them to be voters—**Cl. (3)**, son living with father, if a qualified voter as occupying a holding.] The income of a father and his son, as members of a joint Hindu family, were jointly assessed for purposes of income tax. The son brought a suit for a declaration that he was a qualified voter under sec. 15, cl. (2), of the Bengal Municipal Act because he was assessed to income tax, and under cl. (3), because he was a graduate and occupied a holding along with his father: Held—That the income of both the father and the son having been assessed, both of them were qualified to claim to be a voter under cl. (2) of sec. 15. **Narendra Nath Sinha v. Nagendra Nath Biswas**, I. L. R. 38 Cal. 501 (1911), distinguished. From the mere fact of a person living with another individual occupying holding by reason of some connection with or relation to him, such as son or servant, he cannot be considered to be a person occupying a holding within the meaning of the section. Hence the son was not qualified to be a voter under cl. (3) of the section. **Ambika Churn Mozumdar v. Satish Chandra Sen**, 2 C. W. N. 689 (1898), followed. **Macdonell v. Dickson**, 16 R. 143 and **Gobinda Chandra Ganguly v. Kailas Chandra Sanyal**, 15 C. L. J. 689 (1905), referred to. **CHARU CHANDRA MAZUMDAR v. CHAIRMAN OF THE FARIDPUR MUNICIPALITY** ... 412

s. 85 (a)—“Circumstances and property within the the Municipality,” meaning of—Municipal assessment on tea companies, whose gardens and market lay outside the Municipality, when the sale proceeds alone came to Bank within the Municipality, legality of—Separate assessment on several companies who were joint occupants of one holding, if ultra vires—Sec. 87 (d), defect in the assessment list, if vitiates the assessment. Certain Tea Companies, whose head offices

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were in one building in the town of Jalpaiguri, had their gardens outside the Municipal limits, and the tea was sent direct from there to Calcutta and sold there. The sale proceeds used to be sent to a Bank in the town of Jalpaiguri, which placed the amounts to the credit of the respective companies after deducting advances, etc., and the net amounts were ultimately distributed as dividends amongst share-holders. The Jalpaiguri Municipality separately assessed each of the said companies with a personal tax at the maximum rate on the basis of the income received at the Jalpaiguri Bank from the sale proceeds of the tea. The assessment list, however, which was prepared under sec. 87 (d), omitted to show the income upon which the tax was imposed, as ought to have been shown according to the provisions of the section: Held—That the “circumstances and property” of a person depended upon what he got or upon what he spent within the Municipality. In the present case though the original source of the income may be outside the limits of the Municipality, the entire income is brought to be spent and enjoyed within the Municipality. The proceeds of the sale of tea deposited in the Bank at Jalpaiguri, are “the circumstances and property” of the companies, i.e., their “means and property” within the Municipality, irrespective of questions as to whence the income accrues and so forth, and furnish a just measure of their liability under sec. 85 (a). **Deb Narayan v. Chairman of Baruaipur Municipality**, I. L. R. 39 Cal. 141 (1911): s. 85, I. L. R. 41 Cal. 168; 17 C. W. N. 1230 (1913) and **Kameswar Prosad v. Chairman of Bhabua Municipality**, I. L. R. 27 Cal. 849 (1900), and several other cases referred to. The tax imposed was the tax upon persons contemplated by sec. 85 (a) and not the tax upon holdings prescribed by sec. 85 (b). Sec. 85 (a) cannot be limited in its application to a case where only one person occupies an entire holding. The companies undoubtedly were persons and they occupied holdings inasmuch as the possession of the holding by each of them was actual, as of right and not of a transient character. There was nothing in the section which saved them from liability because their occupation was joint. Per **Buckland, J.**—The tax was in the nature of a poll-tax leviable on persons, according to their “circumstances and property” within the Municipality. **Ambika v. Satis**, 2 C. W. N. 689 (1898) and **Govinda v. Kailas**, 15 C. L. J. 689 (1905), and several other cases referred to. Held, further—That though the assessment list under sec. 87 (d) was defective, the defect was one of form and did not invalidate the assessment. Besides, no proceedings were taken under sec. 113, which provides a remedy in such a case. **Chairman of Chittagong Municipality v. Jogesh**, I. L. R. 37 Cal. 44 (1909) and **Chairman of Chapra Municipality v. Basudeo**, I. L. R. 37 Cal. 374 (1910), and other cases referred to. **THE CHAIRMAN, JALPAIGURI MUNICIPALITY v. THE JALPAIGURI TEA CO., LD.** ... 311

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s. 101—"Machinery," meaning of—Balancing tank of Calcutta Municipality with supporting structure, at its pumping station, if machinery and exempted from assessment as such.] Held—That neither the balancing tank at No. 1, Khelat Babu's Lane within the Cossipore and Chitpore Municipality (which is used to regulate the supply of water to the Calcutta Corporation) nor its supporting structure or both combined are "machinery" within the meaning of sec. 101 of the Bengal Municipal Act. There is nothing in the language of the Act or in the objects it was designed to effect to suggest that the word "machinery" was used in any special sense differing from its ordinary sense. The determination in any given case of what is or is not machinery must, to a large extent, depend upon the special facts of the case. The word "machinery" must mean something more than a collection of ordinary tools. It must mean something more than a solid structure built upon the ground, whose parts either do not move at all, or if they do move, do not move the one with or upon the other in interdependent action with the object of producing a specific and definite result. There is great danger in attempting to give a definition of the word "machinery" which will apply in all cases. The word when used in ordinary language *prima facie* means some mechanical contrivances which, by themselves or in combination with one or more other mechanical contrivances, by the combined movement and interdependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result. **THE CORPORATION OF CALCUTTA v. THE CHAIRMAN, COSSIPORE AND CHITPORE MUNICIPALITY** 761

s. 261, manufactory or place of business from which offensive or unwholesome smell may arise—Cases in which the offensive smell arises when the water from a mill comes in contact with the stagnant water of the Municipal drain, if come within the purview of the section—The manufactory or business, if must be per se offensive or unwholesome.] In a rice-mill within a certain Municipality the water, in which the paddy was steeped, was offensive when it flowed from the drain, but not so offensive as when it came into contact with the stagnant water of the Municipal drain and the finding was that the flow of a large quantity of filthy water was the direct cause of the bad smell: Held—That the finding was sufficient to bring the case within the category of places of business from which unwholesome or offensive smell may arise and therefore within the purview of sec. 261 (Bengal Municipal Act), which covers not only cases which are per se offensive or noxious but also a manufactory or place of business from which offensive or unwholesome smells may arise. **Wanstead Local Board of Health v. William Hill**, 19 Com. Ben. (N. S.) 479 (1863), and **Wethington Local Board of Health v. Cor-**

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BENGAL TENANCY ACT (VIII of 1885), as amended by Act I, B. C., of 1907, ss. 3 (3), 4, 116, Sch. III, Art. 1 (a)—Khamat land, tenant of, for a term—Suit to eject after expiry of term—Limitation—Tenant of non-occupancy raiyat—Effect of repeal of s. 45.] It is only under Chap. VI of the Bengal Tenancy Act that the status and rights of a non-occupancy raiyat can be acquired, and as that chapter does not apply to the private lands of a proprietor, a tenant of such land for a term of 9 years did not acquire the status of a non-occupancy raiyat, and, at the expiry of his term, became liable to be ejected as a trespasser. Art. 1 (a) of Sch. III of the Bengal Tenancy Act did not apply to the landlord's suit to eject such a person. Art. 1 (a) of Sch. III of the Act did not extend the limitation of six months to suits to eject persons who had not been non-occupancy raiyats within the meaning of the repealed sec. 45. Sec. 3 (3) is merely a definition and sec. 4 merely a section specifying the classes of tenants to which the Act applied. Secs. 3 (3) and 4 did not separately or conjointly create or confer upon any one any status or any right. **Ganpat Mahton v. Rishal Singh**, 20 C. W. N. 14 (1914) and **Dwarka Nath Chowdhuri v. Tafazar Rahman Sarkar**, 20 C. W. N. 1097 (1916), referred to. **JAGARNATH DAS v. JANKI SINGH** ... 833

s. 15, omission by heirs of a tenure-holder to give the prescribed notice to the landlord, if entitles the landlord to recognize one of the heirs as the representative of the tenancy—Sale of entire tenure in execution of a rent decree obtained against the said representative, if affects the rights of the other heirs.] On the death of a permanent tenure-holder his heirs did not give the notice under sec. 15, Bengal Tenancy Act, to the landlord. The landlord, however, chose to recognize one of the heirs as the representative of the tenancy and obtained a rent decree against him alone. In execution of that decree the tenure was sold, and the other heirs brought a suit for recovery of their shares saying that their interest in the tenure was unaffected by the sale: Held—That the shares of the heirs who were not parties to the rent decree did not pass under the sale, and only the right, title and interest of the tenant who was the sole Defendant in the rent suit passed. It is not sufficient to show that the landlord has chosen to obtain a decree for rent against one out of several heirs. It has to be established that all the tenants have held out one of them as their representative in their transactions with the landlord. **Netal v. Hari**, I. L. R. 26 Cal. 677 (1899), **Jeo Lal v. Gunga**, I. L. R. 10 Cal. 996 (1884), **Rupnarain v. Juggo**, 10 W. R. 304 (1866) and **Ananda v. Haridas**, I. L. R. 27 Cal. 545 (1900), and other cases referred to. Failure on the part of heirs to comply with the requirements of sec. 15, Bengal Tenancy Act, does not necessarily

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entitle the landlord to treat one of the several heirs of the original tenure-holder as representative of the tenancy. <i>Khetter Mohan v. Pran Kristo</i> , 3 C. W. N. 371 (1899), distinguished. <i>SRIMATI FAJUNNESSA v. RAMTARAN CHOWDHURY</i> 138		and <i>Bamandas v. Sadhu Majhi</i> , 64 Ind. Cas. 445; since reported in 26 C. W. N. 945 (1921), followed. <i>Secretary of State v. Kajimuddi</i> , I. L. R. 26 Cal. 617 (1899) and <i>Radha Kishore v. Umed Ali</i> , 12 C. W. N. 904 (1908), dissented from. <i>Pirithi Chand v. Basarat Ali</i> , I. L. R. 37 Cal. 30; s. c. 13 C. W. N. 1149; 10 C. L. J. 343 (F. B.) (1909), referred to. <i>PRASANNA KUMAR SEN v. DURGA CHARAN CHAKRABARTY</i> ... 947	
s. 29 (b). enhancement of rent by contract by more than two annas in the rupee—Tenant proving previous rent, onus on Plaintiff to justify the enhancement—S. 103—Decisions under s. 105, if bars the entertainment of a defence to a suit already instituted—S. 105, decision under, if can have retrospective effect—S. 110.] In a suit for arrears of rent, the Plaintiff claimed an enhanced rent on the basis of a kabuliya. The tenant proved the previous rent and that the enhancement claimed was in excess of two annas in the rupee. The Plaintiff claimed the benefit of a decision under sec. 105 of the Bengal Tenancy Act pronounced subsequent to the institution of the rent suit and before the trial thereof: Held—That as the previous rent of the tenant had been proved, it was for the Plaintiff to justify the enhancement of the rent claimed which was obviously in excess of the enhancement allowed by sec. 29 (b). <i>Bengal Tenancy Act. Manindra Chandra Nandy v. Upendra Chandra Hazra</i> , I. L. R. 36 Cal. 604 (1908), followed. Even assuming that the expression "entertain an application or suit" in sec. 109 includes an application or suit made or instituted before the date of the application, suit or proceeding under secs. 105 to 108, it is clear that what is barred is the entertainment of an application or suit and not the entertainment of a defence to an application or suit. <i>Apurba Krishna Roy v. Shyama Charan Pramanik</i> , 24 C. W. N. 223 (1919), distinguished. The fair rent settled under sec. 105 cannot possibly have retrospective effect on liability for rent incurred in respect of a period prior to the decision under sec. 105. <i>RAJENDRA NARAIN MAZUMDAR v. SHEIK KALIM</i> 758		s. 103B (3).—Presumption as to correctness of entry, if arises, when the entry in the record-of-rights relates to land not within the scope of the Act—S. 102 (b), proper entries—Weight to be attached to entry not properly made—"Chandina" land, meaning of. Certain lands were described in the record-of-rights as chandina, by which the settlement authorities meant bazar lands not subject to the provisions of the Bengal Tenancy Act. In a suit for khas possession of the lands, it was pleaded by the Defendant that the entry being with respect to lands which did not come within the scope of the Bengal Tenancy Act, the Revenue Officer had no jurisdiction to make the entry, and as such no presumption as to its correctness arose under sec. 103B (3). The landlord did not produce his papers which would have shown the origin and nature of the tenancy and the Defendant stated the lands to be jets or homestead lands: Held—That though it cannot be said that no presumption arose under sec. 103B (3), the presumption cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the record-of-rights. The non-production of papers by the Plaintiff coupled with the statement of the Defendant was sufficient to rebut the statement in the record-of-rights. <i>Bipradas Pal Choudhury v. Azam Ostagar</i> , I. L. R. 46 Cal. 441 (1918), discussed. <i>RAJA SASI KANTA ACHARJYA BAHADUR v. SANDHYA MONI DAS</i> 483	
ss. 50 and 115—Presumption—Record-of-rights—Presumption under s. 50, if arises after finality of record-of-rights. After the record-of-rights becomes final in respect of a tenancy under Chap. X of the Bengal Tenancy Act, the tenant is precluded by sec. 115 from claiming the presumption under sec. 50 of that Act. <i>BAMANDAS VIDYASAGAR BHATTACHARJA v. SADHU MAJHI</i> ... 946		s. 104H, sub-ss. (3) and (4). Jurisdiction of Civil Court to settle fair rents payable by a proprietor in respect of tenure and raiyati holdings purchased by him—Raiyati holdings purchased before the Bengal Tenancy Amendment Act (I. E. B. & A., of 1908), if sublets as such. A proprietor purchased a tenure and two raiyati holdings in execution of a decree for arrears of rent. In settlement proceedings, the Revenue Officer ignored the existence of these tenancies. Thereupon the proprietor brought suits for declaration of his tenancy right to the lands and for settlement of fair rents in respect thereof, but the Court held that it was beyond its jurisdiction to settle the annual rents: Held—That sec. 104H, sub-sec. (3) allows a suit, amongst others, on the grounds (d) that land has been wrongly recorded as part of, or omitted from the lands of, an estate or tenancy, and (e) that the tenant belongs to a class different from that to which he is shown in the record-of-rights as belonging. Therefore the proprietor was entitled to maintain a suit on the grounds (d) and (e). The Court therefore had power, under sub-sec. (4) of the section, to	
ss. 50 and 115—Enhancement suit—If presumption under s. 50 arises after a record-of-rights becomes final. After a record-of-rights becomes final, a tenant is debarred by the provisions of sec. 115 of the Bengal Tenancy Act from claiming the presumption under sec. 50 of that Act. The expression "thereafter" in sec. 115 means "after the particulars have been finally recorded after recourse to all the provisions contained in chap. X of that Act for the attainment of finality in this respect." <i>Harihar Pershad v. Ajub Majhi</i> , I. L. R. 45 Cal. 590 (1913), <i>Mohall-dhar v. Radha Mohan</i> , 51 Ind. Cas. 552			

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settle the fair rent payable by the proprietor as holder of the tenure. With regard to the raiyati holdings, as they were acquired before the present Bengal Tenancy Amendment Act of 1908 came into force, the only effect of their purchase by the proprietor would be the extinction of the occupancy right, the holding itself subsisting as a raiyati holding. *Mosajan v. Minnat Ali*, I. L. R. 24 Cal. 521 (1896) and *Jawadul Huq v. Ram Das*, I. L. R. 24 Cal. 143 (1896), referred to. That the proprietor was entitled to settlement of fair rents payable by him as holder of the raiyati jotes. *PRAFULLA NATH TAGORE v. THE SECRETARY OF STATE FOR INDIA* ... 100

s. 148A—Suit by some of the co-sharer landlords for their share of rent only—Position of the purchaser in execution of the decree in such suit—Such purchaser if a necessary party to a suit by some of the other co-sharer landlords for the entire rent—S. 163, position of the purchaser at a sale in execution of the decree in the later suit—His right to khas possession—S. 88, sub-division of the tenancy 'without the consent of the landlord'—Landlord's consent means consent of all the landlords.] Some co-sharer landlords having an 8 as. share in the landlord's interest brought a suit for rent against the tenants of an occupancy holding in respect of their 8 as. share, and obtained a decree and in execution of that decree put up to sale only an 8 as. share of the holding. It was purchased by A. who obtained possession thereof. Some of the other landlords then brought a suit for the entire rent of the whole occupancy holding against the original tenants, making the other co-sharer landlords Defendants in the suit. The purchaser at the previous sale was not, however, made a party to the suit. The suit was decreed *ex parte* and in execution of the decree the entire occupancy holding was put up to sale under sec. 163 of the Bengal Tenancy Act. The purchaser at the said sale not having obtained actual possession brought the present suit for recovery of possession on declaration of his title by purchase at the rent sale. Held—That the other landlords were not bound to recognize A., the purchaser at the first sale, as their tenant as the purchase made by him was merely of the right, title and interest of the tenants in an 8 as. share of the holding. On the other hand A. was bound by the later rent sale, his position being that of an unregistered transferee. *Asgar Ali v. Asaboddin Kazi*, 9 C. W. N. 334 (1904), followed. In the suit by the other co-sharer landlords for the rent of the entire holding A., the purchaser, was not a necessary party, because at the first sale only the interest of the tenants in an 8 as. share passed to the purchaser. Under the provisions of sec. 88 of the Bengal Tenancy Act any sub-division of the tenancy required the consent of all the landlords. In the absence of any sub-division of the holding with the consent of all the landlords, the right of the landlords to put up the entire holding to sale was not affected by the purchase made by A. A co-sharer

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landlord has a right to claim the whole rent on behalf of the entire body of landlords, sec. 148A being only an enabling section. *Pramada Nath Roy v. Ramani Kant Roy*, I. L. R. 35 Cal. 331; s. c. 12 C. W. N. 249 (P. C.) (1907), referred to. The mere fact that something was claimed that was not properly due would not make the decree any the less a rent-decree. *SASTI CHARAN CHAKRABARTY v. AKUBJAN BIBEE* ... 639

s. 153—"Amount of rent annually payable by the tenant," meaning of—Suit for rent—Defendant denying Plaintiff's title to a fractional share of the admitted rent of the holding—Decision, if appealable.] A decision in a suit for rent that the Plaintiff was entitled to the whole rent as claimed by him and not only to a two-fifths share of it as claimed by the Defendant was a decision of the question of the amount of rent annually payable by the tenant within the meaning of sec. 153 of the Bengal Tenancy Act. *Prasanna Kumar v. Srinath*, I. L. R. 15 Cal. 231 (1887), was overruled by the Full Bench in *Narain Mahtton v. Manoff*, I. L. R. 17 Cal. 489 (P. B.) (1890). The expression "amount annually payable by the tenant" signifies the amount annually payable by the tenant to the landlord who has instituted the suit for the recovery of rent. *SUDHANNA SANTRA v. BASANTA KUMAR SARKAR* ... 96

ss. 159, 161, 167—Title and interest acquired by adverse possession in part of lands of defaulting tenure or holding, if incumbrance which must be annulled under s. 167.] The word "incumbrance" as used in secs. 159, 161 of the Bengal Tenancy Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding and such incumbrance cannot be annulled in any manner other than what is provided in sec. 167. At the time when the Bengal Tenancy Act was passed the term "incumbrance" had a well recognised meaning in connection with provisions in statutes in pari materia; and since the Bengal Tenancy Act came into operation the word "incumbrance" has been interpreted to include a statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding. *ISHAN CHANDRA BAKSHI v. SAFATULLA SIKDAR* ... 703

s. 160—Occupancy right, if may be acquired by settled raiyat so as to be protected.] A raiyat holding at a fixed rate from the inception of the tenancy may subsequently acquire a right of occupancy, s. 6, by continuous occupancy for twelve years, so as to be protected under sec. 160, Bengal Tenancy Act. *Bhut Nath Naskar v. Surendra Nath Dutt*, 13 C. W. N. 1025 (1909), and *Akhil Ch. Sen v. Tripura Ch. Chaudhury*, S. A. No. 847 of 1913. Dated 26th May 1915. Unreported. *SARBESWAR PATRA v. MAHA RAJA SIB BIJOY CHAND MAHATAP* ... 15

ss. 161, 167—Suit by purchaser of putni taluk at rent sale to eject persons holding land as lakhiraj from time immemorial—Onus of proving

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origin of lakhiraj since creation of taluk—Adverse possession, if incumbrance.] In a suit under sec. 167 of the Bengal Tenancy Act by the purchaser at a rent sale of a putni taluk which was created in 1807 to recover lands which the Defendants were holding as lakhiraj for periods greatly exceeding twelve years, and apparently from as far back as anything could be traced: **Quære**.—Whether an interest not directly created by the taluqdar but allowed to grow up by his sufferance and negligence is an incumbrance as defined in sec. 161 of the Act. But assuming for the purpose of the decision that it was: **Held**—That it lay upon the Plaintiff to show an origin of the holdings as lakhiraj, either by creation or by the sufferance of a putnidar subsequent to 1807, the proper presumption being that they ran back to a period antecedent to the creation of the putni taluq. **RIPRADAS PAL CHOWDHURY v. KAMINI KUMAR LAHIRI** ... 465

... s. 167—Omission to annul encumbrance within one year how affects suit—Possession, suit for—Darmiras tenure sold for arrears of rent—Same under-tenure again sold 12 years after for arrears of rent under decree obtained against the purchaser at the first sale who never obtained possession—Suit by mirasdar for possession—Right acquired by original darmirasdar by adverse possession against purchaser if an encumbrance.] The Plaintiffs were the owners of a miras tenure and under them was a darmiras tenure held by the Defendants. This under-tenure was sold in execution of a rent decree and purchased by a third party who never obtained possession and in execution of a rent decree obtained against the latter the under-tenure was again sold more than twelve years after and purchased by the Plaintiffs who sued for possession: **Per Walsmley, J. (Woodroffe and Suhrawardy, JJ., contra)**.—That Art. 137 of the Limitation Act applied to the case and the suit was barred. **Per Suhrawardy, J.**—Art. 140 of the Act applied to the case. **Per Woodroffe, J.** (to whom the case was referred under sec. 98, C. P. C.).—That none of the articles of the Limitation Act applied to the case but the suit was barred under sec. 167 of the Bengal Tenancy Act. Where a rent-decree has been properly obtained the tenures itself passes to the purchaser and not the right, title and interest of the judgment-debtor only and the rights of the purchaser must be determined by the provisions of the Bengal Tenancy Act under sec. 158B and sec. 159. The Plaintiffs by their purchase acquired the under-tenure with power to annul encumbrances and the interest acquired by the Defendants by adverse possession against the recorded tenants, of which the Plaintiffs were aware, was an encumbrance which the Plaintiffs could have and should have annulled under sec. 167, Bengal Tenancy Act, within one year; and not having done so their right to recover possession was lost. The word encumbrance as used in secs. 159 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse

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possession of the land of a defaulting tenant. **Per Woodroffe and Suhrawardy, JJ.**—Art. 137 of the Limitation Act does not apply to a case where the tenure itself and not the right, title and interest alone of the judgment-debtor is purchased. **JNANENDRO MOHAN DUTT v. UMESH CHANDRA GUHA** ... 985

... s. 163, cl. (c) —“Rent,” whether includes interest—Period up to which the decree-holder is entitled to rent—S. 67, scope and effect of] Certain putnidars obtained a decree for rent of a darputni, which they got sold in execution, and the sale was subsequently confirmed. After the rent decree was satisfied, the putnidars applied for payment to them (out of the surplus sale proceeds) of the rent which had fallen due between the institution of the suit and date of the confirmation of sale and claimed interest on the said rent: **Held**—That the putnidar was entitled to rent only up to the date of sale. **Bijoy Chand Mahatap v. Shashi Bhusan Bose**, 18 C. W. N. 136 (1913), followed. As soon as rent falls due and is not paid, it becomes an arrear under sec. 5, and carries interest under sec. 67. The money payable as interest, therefore, becomes part of the rent. The Legislature could never have intended in sec. 163, cl. (c) to exclude interest accruing upon the rent and to put the decree-holder under the necessity of bringing a fresh suit for the interest only. **Bijoy Chand Mahatap v. S. C. Mukerjee**, 11 C. W. N. 1106 (1906) and **Profulla Tagore v. Matabuddin**, 22 C. W. N. 323 (1917), followed. **RAM LAL DAS v. BANDIRAM MUKHOPADHYA** 511

... s. 170 (3)—Execution of decree for rent obtained against Hindu widow—Reversionary heir, if may deposit to prevent sale—Revision—Civil Procedure Code (Act V of 1908), s. 115.] The words “an interest in the tenure or holding voidable on the sale” in sec. 170 (3) of the Bengal Tenancy Act mean “an interest which is in existence at the time of the sale and which will become liable to be avoided on the sale taking place at the option of some one.” Where a decree for rent put into execution was one obtained against a Hindu widow, the reversionary heir expectant of her husband on her death did not have an interest in the tenure or holding voidable on the sale within the meaning of sec. 170 (3) of the Bengal Tenancy Act. Where the Court of execution allowed the reversioner to make a deposit under that section, he exercised a jurisdiction not vested in him by law or was acting in the exercise of his jurisdiction illegally or with material irregularity within the meaning of sec. 115 of the Civil Procedure Code. **MAHENDRO NATH NANDA v. BAIDYA NATH TRIPATHI** ... 167

... s. 179—Covenant in a permanent lease that the lessee or his representatives should not transfer without the lessor's permission and reserving a right of pre-emption in favour of the lessors, validity of—Such covenant, if void as offending against the rule of perpetuity.] In a certain permanent lease there was a con-

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dition that if the lessee or any of his representatives intended to transfer the whole or any portion of the lease, the transfer would be made in favour of the lessors for proper price, that the lessee would not be able to transfer in favour of a third party without the lessors' permission or wishes; that, in the case of transfer to a co-sharer of the lessee, lessors' permission would not be necessary, and that in case of any act against the aforesaid conditions, the said act would be invalid: Held—That the covenant was void as offending against the rule of perpetuity, and was not therefore binding on the lessee. SWARNA KUMAR GHOSE v. PRAHLAD CHANDRA SARKHEL 874		15th day of the following month or in the event of the landlord refusing to accept rent by depositing it with the Rent Controller within a fortnight of its becoming due. Where such of these conditions as are applicable are not fulfilled any other plea that may be raised should not be considered. Subsequent acceptance of rent does not create a waiver so as to make the statute applicable. Where there is an agreement to extend the time for payment before the rent actually becomes due under the lease then it might well be that the time within which under sec. 11 (5) rent has to be paid to the landlord is such extended date, but where the default has already taken place the subsequent acceptance of rent by the landlord does not take the matter out of the provisions of sec. 11, sub-sec. (5). JETHA BHULCHAND v. F. C. GRACE 678	
Sch. III, Art. 6 —Application for execution more than three years after the date of a rent decree, if barred, when there were acknowledgments within three years of the date of the decree—Limitation Act (IX of 1908), s. 19, if applies to cases under the Bengal Tenancy Act—Bengal Tenancy Act, s. 184, scope and effect of.] A rent decree for less than Rs. 500 was passed in January 1916, and application for execution was made in March 1919. There were some acknowledgments of liability within three years of the date of the decree: Held—That sec. 19 of the Limitation Act applies to such cases, and an acknowledgment of liability under that section made by a judgment-debtor, in respect of, the decree-holder's right to execute a rent decree, gives the decree-holder a fresh starting point for counting the period of limitation prescribed by Art. 6 of Sch. III of the Bengal Tenancy Act. Harihar Lal v. Gunender Pershad , 9 C. W. N. 1025 (1905), followed. PARESH NATH PAL CHOWDHURY v. ISMAIL SARDAR 486		s. 2, cl. (e)— Workshop, if "premises"—S. 15—Application for standardisation of rent in respect of workshop does not lie.] A workshop does not come within the definition of "premises" in sec. 2 of the Calcutta Rent Act, and the fact that the Engineer in charge has a retiring room or that a particular room is used as an office does not make any difference. INDIAN ENGINEERING AND MOTOR CO., LD., v. GLADSTONE WYLLIE & CO. ... 102	
BOND, whether imposed personal liability—Interest.] Held, on a construction of the bond in question in the case, that it imposed personal liability upon the executants. PANNA LAL v. Nihal Chand ... 787		s. 4, sub-s. 3, cl. 4 —Lease for three years with option in tenant to renew for another such period, if a lease for five years and upwards—Civil Procedure Code (Act V of 1908), s. 115—Proper case for revision by High Court.] Shortly before the passing of the Rent Act the Petitioner entered into an agreement with the Opposite Party for a lease of certain premises at stipulated rent for three years with option in the Petitioner to renew it for a further period of three years. After the passing of the Rent Act, an application was made to the Rent Controller for fixing a standard rent. This was refused on the ground that the lease was only for five years and upwards: Held—That the fact that there was option for renewal for a further period of three years after the expiration of the first three years did not make the lease one for five years and upwards within the meaning of sec. 4 sub-sec. 3. That the Rent Controller refused to exercise jurisdiction vested in him by law and the High Court could properly interfere in revision. BASANTA CHARAN SINHA v. RAJANI MOHAN CHATTERJI ... 711	
CALCUTTA IMPROVEMENT TRIBUNAL— Power of President to execute order for costs.] The President of the Calcutta Improvement Tribunal is a Civil Court with power to make an order for costs and as such has an inherent power to execute an order for costs made by him. BATA KRISHNA PRAMANIK v. A. K. ROY ... 30		s. 8—Standardisation of rent by the Rent Controller—Certificate to be issued under s. 8—Rent increased by the Tribunal, whether a fresh notice is necessary to be served on the tenant.] A notice under sec. 8 of the Calcutta Rent Act, 1920, is not necessary when the standard rent as fixed by the Controller has been further increased by the President of the Tribunal, the landlord having complied with the provision of sec. 8 as regards the increase allowed by the Controller. I. J. COHEN v. G. DIAS ... 991	
CALCUTTA RENT ACT (III, B. C. of 1920). See Rent Act, Calcutta.			
Suit for ejectment of tenant—Conditions precedent to enable tenant—to get advantage of the provisions of the statute—Non-payment of arrears and current rent in due time, effect of.] Where the benefit of the Rent Act is claimed the Defendant must show that he has paid arrears within three months of the Rent Act coming into force and subsequently paid his rent regularly within the time fixed in the contract with his landlord or in the absence of any such contract by the			

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s. 11, Provide, "bona fide" and "required," meanings of—Sub-s. (5) "pays rent to the fullest extent allowable by the Act," when rent has not been standardized—Sub-s. (4) "refused to accept the rent offered," tenant if bound to offer and have a refusal every month, to be entitled to deposit rent with the Rent Controller.] The Defendant was a monthly tenant under the Plaintiff. The Plaintiff in 1919 wanted to let out the premises to a third party and gave Defendant notice to quit, to which the Defendant paid no attention. The Plaintiff subsequently wanted rent at the rate of Rs. 150 per mensem, and the Defendant agreed to pay Rs. 110 per mensem, which the Plaintiff refused to accept and the Defendant deposited the rent with the Rent Controller. In November 1920, the Plaintiff gave the Defendant notice to quit as he required the premises for his own use and occupation and as he had made arrangements for letting out the residential house in which he had been then living. The Defendant did not quit and therefore the present suit was brought. In the suit the Plaintiff's evidence was that his wife having given birth to a child and suffered from malarial fever thereafter on account of the insanitary surroundings of their residential house, was advised by the doctor, who treated her, to remove to the house in suit. The doctor gave his evidence and substantially corroborated the Plaintiff. Held—That the Plaintiff could not be said bona fide to require the house for his own use and occupation. The reason given in the notice of November 1920 was that he required the house in suit because of some arrangements he had made with some other tenants for letting out his present residential house and not that he required it on the ground of his wife's health. In the said notice no reference was given to the personal aspect of the matter, but it was based entirely upon the arrangements made with some other tenants. To allow a landlord who has premises sufficient for his requirements to eject tenants because he chooses for his own convenience, to deprive himself of the use of premises which he is occupying would be to defeat the objects of the Act. It is not sufficient that a Plaintiff in order to defeat a plea under the Calcutta Rent Act should merely say that he desires the premises bona fide for his own occupation. The word in the Act is not "desire" but "require." This involves something more than a mere wish and involves an element of need to some extent at least. It is not necessary for a tenant to offer rent to his landlord every month and obtain every month a refusal from him before he is entitled to pay to the Rent Controller. The tenant is justified in paying the rent to the Controller month by month once there has been a refusal by the landlord to accept it. As the rent had not been standardized by the Rent Controller nor had there been any agreement between the parties to pay increased rent, the question as to whether the Defendant had paid rent to the fullest extent allowable by the Act did not arise. The Defendant was therefore entitled to re-

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lief under the Calcutta Rent Act and not liable to be ejected. REKHIABCHAND DOOGAR v. J. R. D'CRUZ ... 499

s. 15—Application for standardisation of rent—Locus standi of applicant—Application in revision against Rent Controller's decision if lies on the Appellate Side of the Court.] The Petitioner, a woman of the town, applied to the Rent Controller under sec. 15 of the Act for standardisation of the rent of the premises occupied by her. This application was dismissed on the ground that the Petitioner had no locus standi. It appeared, however, that the landlord Opposite Party did not set up the invalidity of the tenancy but invited the Court to fix the standard rent at a certain amount: Held—That in the circumstances of the case the Rent Controller should have entered the application. That an application in revision against the order of the Rent Controller made under sec. 15 lies on the Appellate Side of the High Court. KALI DASSI v. KANAI LALL DE ... 52

s. 15—Order of Rent Controller refusing application for standardisation of rent on the ground of confusion in the number of premises in question—Scope and effect of s. 15—Jurisdiction of High Court to revise orders made under s. 15—Government of India Act, s. 107.] The Controller of Rents refused an application under sec. 15 of the Calcutta Rent Act for the standardisation of the rent of certain premises on the ground that there was no satisfactory evidence to prove the Municipal number of the premises in question: Held—That sec. 15 of the Calcutta Rent Act makes it obligatory on the Rent Controller to grant a certificate certifying the standard rent. That in the present case the rooms let were certain, easily ascertainable and subject to no doubt, and the order of the Rent Controller rejecting the application for fixing a standard rent was liable to be set aside. That the Rent Controller was a Court subordinate to the High Court which had jurisdiction to revise orders made under sec. 15 of the Rent Act under sec. 107 of the Government of India Act. Re ALLEN BROS. & CO. v. BANDO & CO. ... 845

CESS ACT (IX of 1880, B. O.), s. 41, cess if payable for lands held on payment of rent in kind.] In a suit for arrears of rent the claim for the tenant's share of the cess was disallowed on the ground that there was no provision for payment of cesses when rent was payable in kind: Held—That cess is payable in respect of all lands held by a cultivating raiyat, whether the rent is payable in cash or in kind. JOGESH CHANDRA ROY v. ANNADA CHARAN CHOWDHURY ... 368

CHANDINA LAND, meaning of. See Bengal Tenancy Act. RAJA SASI KANTA ACHARJYA BAHADUR v. SANDHYA MONI DASIA ... 483

CHUR LAND thrown up in river within the boundaries of a permanently settled estate, if liable to assessment with revenue—Act IX of 1847, s. 6—Ren. II of 1819, Arts. 3, 31—Reg. I of 1793, Arts. 3, 6—Reg. XIX of

CHUR LAND—concl'd.
 1793, s. 1—Reg. XI of 1825, s. 1 (1), (4).] The intention and effect of Act IX of 1847 was merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed. The Secretary of State for India v. Srimati Fahamidunnissa Begum, L. R. 17 I. A. 40: s. c. I. L. R. 17 Cal. 590 (1899), followed. The question whether chur lands formed since the Permanent Settlement in beds of rivers belonging to a permanently settled zemindari are assessable as "land added to the estate" within the meaning of sec. 6 of the Act IX of 1847 has to be determined by reference to the pre-existing law and particularly to Reg. II of 1819. The effect of Reg. II of 1819 is to declare that chur formed since the Decennial Settlement upon land which at the time of the Settlement had been river-bed are to be treated as unsettled; and this express provision cannot be excluded by showing that the river-bed from which the churs have been thrown up was at the date of settlement the property of the zemindar and that the settlement was imposed upon the zemindari as a whole. In view of Art. 3 of Reg. II of 1819, a river-bed was not intended to be treated as "waste land" coming within the protection of Art. 31 of the Regulation. The Secretary of State for India v. Srimati Fahamidunnissa Begum, L. R. 17 I. A. 40: s. c. I. L. R. 17 Cal. 590 (1899), distinguished on the ground that the land which was held to be exempt from assessment in that case was land which was specifically comprised in the settlement, but which, having since been submerged, had formed again. **THE SECRETARY OF STATE FOR INDIA v. MAHARAJA-DHIRAJ SIR BEJOY CHAND MAHATAB BAHADUR, MAHARAJA OF BURDWAN** 619

CHOWKIDARI CHAKRAN LANDS within the ambit of a putni, resumed by Government—Respective rights of putnidar and Zamindar in such lands.] The interest of the putnidar in resumed Chowkidari Chakran lands comprised in his putni is derived from the putni itself and nothing else and the Zamindar cannot claim a share in the profits derived from the settlement of such lands and thus in effect to vary the putni. The law to the contrary laid down in *Moharaja Bijoy Chand v. Krishna*, 34 C. I. J. 275 (1920), and the decisions followed therein is not correct, in view of the decisions of the Privy Council in *Ranjit Singh Bahadur v. Kali Dasi Debi*, L. R. 44 I. A. 117: s. c. 21 C. W. N. 609: I. L. R. 41 Cal. 841 (1917) and *Ranjit Singh Bahadur v. Maharaj Bahadur Singh*, I. L. R. 46 Cal. 173: s. c. 23 C. W. N. 198 (P. C.) (1918). **NARPAT SINGH v. RAJA BHUPENDRA NARAIN SINGH** ... 943

CIVIL COURTS ACT (XII of 1887), s. 13 (2). Assignment of business within local limits of one Sub-Judge to another by District Judge, if transfer of business. See Civil Procedure Code, sec. 150. **MUNSHI MD.**

CIVIL COURTS ACT—concl'd.
KAZEMALI v. MUNSHI NIAMUDDIN AHMED ... 216
CIVIL PROCEDURE CODE (Act V of 1908), s. 11.] See Res Judicata.

s. 27, "suit duly instituted," meaning of—Dismissal of a suit for not putting in deficit court fees—Or. 47, r. 4, cl. (a), reversing of that order without notice to the Defendant, legality of—**Ss. 148 and 149,—Court's power to extend time for putting in deficit court fees after expiry of the period of limitation.]** A suit was instituted on the last day for filing the suit under the Limitation Act. The plaint was insufficiently stamped and the deficit Court fees not having been put in within the time fixed by the Court, the suit was dismissed. Thereafter on an application for review, the order of dismissal was set aside without any notice to the Defendant and time was granted for putting in the deficit Court fee: **Held—That** at the time the order of dismissal was set aside, there was no opposite party on whom the notice could be served, as the summons in the suit had not yet been issued on the Defendant and as, until the suit was registered, the suit could not be said to have been duly instituted. The order of dismissal passed at that stage of the case can be reviewed without notice to the Defendant. **Musstt. Gulaboo v. Ramdyal Singh, 8 W. R. 304 (1867) and *Sahebzada Md. Zahuruddin v. Nuruddin*, 14 Mad. L. J. 7 (1903), referred to. The principle of *Joy Rama v. Esharee Nand*, 18 W. R. 475 (1872) and *Janakinath v. Prabhasini*, I. L. R. 43 Cal. 178: s. c. 19 C. W. N. 1077 (1915), applied. Once the order rejecting the plaint is set aside in review, the Court has full power, under secs. 148, 149 of the Civil Procedure Code, to extend the time for payment of the deficit Court fee, and the plaint having been originally filed within the period of limitation, the suit was not barred. **SUHENDRO PRASAD LAHIRI CHOWDHURY v. ATTABUDDIN AHMED** ... 391**

s. 34—Discretion of Court as to interest.] The Courts in India having allowed interest at the rate of 8½ per cent. per annum on a land during the period of the pendency of the suit: **Held—That** the Civil Procedure Code gives the Court discretion in the matter and the Judicial Committee was not prepared to dissent from the view taken by the Courts in India. **PANNALAL v. NIHAL CHAND** ... 737

ss. 36, 37—Party within jurisdiction—Pleader appointed not by party but by agent acting under special power of attorney—Pleader, if must be appointed by recognised agent.] Certain decree-holders who were resident within the local limits of the jurisdiction of the Court to which the application for execution was to be made executed a special power of attorney in favour of one R authorising him on their behalf inter alia to "execute vakalat to vakils to sign execution petitions and put in affidavits and to conduct all necessary proceedings," and the application for execution was signed and filed by a pleader who was appointed by a vakalat

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executed by R. Held—That the pleader was duly appointed on behalf of the decree-holders within the meaning of sec. 36 of Act XIV of 1882, sec. 37 not applying to the case. The possessive pronoun "his" in the expression "pleader duly appointed to act on his behalf" refers to the party and not to his intermediary or agent. **THIRUVENKATASAMI IYENGAR v. PAVADAI PILLAY** ... 376

s. 47—Suit to recover possession of undivided share, decreed—Partition pending suit—Execution of decree—Decree-holder, if may obtain possession of the allotted share in execution—Decree, if must be amended for the purpose—Separate suit, if necessary.] Pending a suit to set aside a sale for arrears of revenue of an undivided share in a Mahal and for joint possession thereof, the Collector effected a partition of the estate under the Estates Partition Act, and gave the purchaser separate possession of specific lands. The Court decreed the suit without being informed of the completion of the partition by the Collector. This decree, being reversed by the High Court was ultimately restored with certain modifications by the Privy Council. The decree-holder having applied for execution of the decree and for possession of the lands which had been substituted by the partition for the undivided share decreed by the Court: Held—That the decree could be executed by giving the decree-holders possession of the substituted lands, the question as to what were the substituted lands being a matter which arose within the meaning of sec. 47 of the Civil Procedure Code between the parties relating to the execution and satisfaction of the decree; neither an application to the Judicial Committee to vary their decree nor a separate suit for establishment of title was necessary. **RAI BAIJ-NATH GOENKA v. MAHARAJA SIR RAVANESHWAR PRASHAD SINGH** ... 906

s. 73 and Or. 38, r. 5, money deposited by sureties for release of an attachment before judgment, whether can be treated as "assets held by Court"—Rateable distribution of such money among different decree-holders, if allowable—S. 115, High Court's power of revision.] In a money-suit certain property belonging to the Defendant was attached before judgment and then released on two persons standing sureties for the amount of the claim. The suit was ultimately decreed and the decree-holder applied for execution, whereupon the sureties deposited the decretal amount in Court. On that very day just before the deposit was made, the Petitioner who also held a money-decree against the same judgment-debtor, applied for execution of his decree and prayed for rateable distribution of the amount deposited. The application was refused by the Trial Court and the money paid out to the attaching creditor on the latter giving an undertaking to refund the amount in case the High Court reversed the order rejecting the Petitioner's application for rateable distribution: Held—That the amount deposited was subject to rate-

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able distribution under sec. 73, C. P. Code. The natural interpretation of the wide language of the section would include any asset in the possession of the Court and at the disposal of the Court for the purpose of satisfying a decree against a judgment-debtor. There is no reason why it should be restricted to what is paid in by virtue of a process taken in execution. Besides, the assets in the present case though not strictly speaking realised in process of execution were realised by a process in the nature of an anticipatory execution. **Harai Sasu v. Fazlur Rahaman, I. L. R. 40 Cal. 619 (1913) and Sorabji v. Kala Raghunath, I. L. R. 36 Bom. 156 (1911), referred to. Thiraviyam v. Lakshmana, I. L. R. 41 Mad. 616 (1917), discussed.** In cases like these where no appeal is allowed, it has been the practice of the High Court, to interfere under the powers conferred by sec. 115, C. P. Code. **GHISULAL AGARWALLA v. TODAR-MULL AGARWALLA** ... 169

s. 92.] Suit by public if barred by the decision in a previous suit between a manager appointed under the Religious Endowments Act and some claimants as Mohants.. **SAHAYRAM CHAKRAVARTI v. KHAGENDRANANDA ASRAM** ... 504

s. 92.] Suit for declaration of public right of way—Advocate-General's permission if necessary when leave of Court is taken under, Or. I, r. 8. See under Right of Way. **HARISH CHANDRA SAHA v. PRANNATH CHAKRAVARTI** ... 587

s. 98—Reference of point of law to third Judge—Procedure when third Judge does not decide question referred, but an altogether new one.] Per Woodroffe, J.—That the difference of opinion not having arisen in a Letters Patent Appeal, sec. 98, C. P. C., covered the case and the objection that the reference was not in order and should have been decided by the opinion of the senior Judge failed. That under the present law the third Judge cannot dispose of the appeal generally but can only decide the point of law referred and then dispose of the appeal, the referring Judges having indicated how it should be disposed of according to the possible answers to be given. As the question of law actually referred to the third Judge was not decided by him, and the reference consequently proved infructuous, the Division Bench disposed of the appeal under cl. (2) of sec. 98, C. P. C., the decree appealed against being confirmed. **JNANENDRA MOHAN DUTT v. UMESH CHANDRA GUHA** ... 985

s. 109, cl. (c), scope of "Order" in cl. (c), meaning of, as distinguished from "final order"—Jurisdiction of High Court to grant leave to appeal to King in Council against interlocutory order—Fit case for the exercise of such jurisdiction.] The term "order" in cl. (c) of sec. 109 is intended to cover not merely a "final order" but is wide enough to include an interlocutory order. It has a different meaning to the expres-

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sion "final order" in cl. (a). In a fit case the High Court has jurisdiction to grant leave to appeal to His Majesty in Council under cl. (c) of sec. 109 from an interlocutory order. *Radha Krishna Ayyar v. Swaminatha Ayyar*, L. R. 48 I. A. 31; s. c. 25 C. W. N. 630 (1920), *Banarsi Pershad v. Kashi Krishna Narain*, L. R. 28 I. A. 11 at p. 13; s. c. I. L. R. 23 All. 227; 5 C. W. N. 193 (1900), and *Damra Coal Company v. Benares Bank*, 21 C. L. J. 281 (1914), referred to. *SHIVA PRASAD SINGH v. RANI PRAYAG KUMARI DEBI* ... 819

s. 110—Petitioner if has to show that any substantial question of law is involved, where though the High Court's decree purported to dismiss the appeal, it yet substantially overruled the decision of the lower Court. In a certain suit the lower Court held amongst other things that in view of the frame of the suit it was not open to it to direct a conveyance to the Plaintiffs of the mortgaged properties. On appeal, the High Court dismissed the Plaintiff's appeal with costs and affirmed the decree of the lower Court with one variation, namely—"that the decree as also the mortgaged properties will be included in the conveyance to the Plaintiffs." Held—"That though the decree of the High Court purported to dismiss the appeal with costs, it was impossible to hold that it affirmed the decision of the Court below. Therefore it was not necessary for the Petitioner to show that any substantial question of law was involved in the appeal to His Majesty. *NAGENDRABALA DASI v. DINANATH MAHTSH* ... 651

s. 115—Revision by High Court. See Under Civil Procedure Code. *GHUSULAL AGARWALLA v. TODARMALL AGARWALLA* ... 169

s. 115—Revision by High Court of order allowing reversioner to make a deposit against sale in execution of rent decree against Hindu widow. See Under Bengal Tenancy Act, sec. 170 (3) *MOHENDRA NATH NANDA v. DAIDYA NATH TRIPATHI* ... 167

s. 144, application for restitution of money paid to mortgagee auction-purchaser after the date of sale and before confirmation of the sale—Jurisdiction of Court to order restitution in execution proceedings—Separate suit for restitution, if necessary. A mortgagee got a mortgage decree and in the sale in execution thereof purchased the mortgaged property "for whatever was due to him on the decree at the time of the sale," without offering any specific bid. In subsequent proceedings by the judgment-debtor to set aside the sale, the mortgagee auction-purchaser and the judgment-debtor came to a settlement to the effect that if a specified sum was paid off before a certain date, the sale would stand cancelled, but on default the sale would stand confirmed. The judgment-debtor, however, did not pay the entire sum but made part payments on two occasions and the auction-purchaser, with the sanction of the Court, from time to time extended the time on the above

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conditions. Finally, default having been made, the sale was confirmed under sec. 65, C. P. C., and the judgment-debt was satisfied in full by the purchase of the mortgaged property. The judgment-debtor subsequently made an application, in the execution proceedings, for restitution of the sums paid by him to the decree-holder purchaser. The lower Appellate Court held that the remedy of the judgment-debtor was by way of a regular suit: Held—"That it is competent to the execution Court, in the exercise of its inherent power, to make an order for restitution with a view to secure complete justice between the parties concerned, even in cases not comprised within the terms of sec. 144, C. P. C. *Dinesh Prosad v. Sankar Chaudhuri*, 2 C. L. J. 537 (1904), *Prayag Nath Singh v. Sheo Prosad*, 16 C. L. J. 135 (1911) and *Rai Raghurib v. Jai Indra*, L. R. 46 I. A. 228 (1919), distinguished. *Boni Madhav v. Pran Singh*, 15 C. L. J. 187 (1911), *Narendra Chandra v. Jogendra Narayan*, 19 C. W. N. 537; s. c. 20 C. L. J. 469 (1914), *Ashutosh v. Upendra Prosad*, 21 C. W. N. 564; s. c. 24 C. L. J. 467 (1916), *Atul Chandra v. Kunja Behari*, 27 C. L. J. 451 (1917) and *Amirannessa v. Kurimannessa*, 18 C. W. N. 1299 (1914), followed. *Collector of Meerut v. Kalka Prosad*, I. L. R. 28 All. 665 (1906) and *Sukhdeo v. Rito Singh*, 2 P. L. J. 361 (1917), referred to and approved. As precisely the same relief would be obtained whether the application was made in a separate suit or in the execution proceedings, the litigant should not be driven to a separate suit, merely because the case may not fall within the purview of the appropriate section of the Code. *Prayag Naran v. Kamikhyia* L. R. 36 I. A. 197; s. c. 14 C. W. N. 55 (1909), *Shama Pattar v. Abdul Rajab Sahib*, L. R. 39 I. A. 218; s. c. I. L. R. 35 Mad. 605; 16 C. W. N. 1009 (1912), and *Parbhudayal v. Kolyan Das*, L. R. 43 I. A. 43; s. c. I. L. R. 38 All. 163; 20 C. W. N. 425 (1915), referred to and followed. It being clear that if the matter had not been overlooked at the time of the confirmation of the sale an order for restitution would have been made, any Court can rightly consider itself to possess an inherent power to rectify the mistake or omission which had been inadvertently made. *Debi Baksh v. Habib Singh*, L. R. 40 I. A. 151; s. c. I. L. R. 35 All. 331; 17 C. W. N. 829 (1913), referred to and followed. The Court has an inherent power to recall money improperly paid out. *Mrinalini v. Abinas Chandra*, 11 C. L. J. 533 (1910), and other cases referred to. The difficulty of invoking the inherent power of the Court under sec. 151, C. P. C., when there is an express provision to the contrary in a statute, does not arise in the present case, as sec. 144 does not define the full measure of the power of the Court to make an order for restitution. Sec. 144 may be taken as a guide to determine in what class of cases an order for restitution may be made so that complete justice may be made between the parties and they may be restored to the status quo ante. *Sabitri v. Savi*, L. R. 48 I. A. 76; s. c. 25 C. W. N.

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557 (1921), referred to. RAI CHARAN
BHUIYA v. DEBI PRASAD BHAKAT ... 408

"Assignment" of business within local limits of one Subordinate Court to another by District Judge if "transfer" of business—Civil Courts Act (XII of 1887), s. 13 (2).] A decree was passed by the third Subordinate Judge's Court in respect of a claim the cause of action whereof arose within certain local limits. Subsequently the business arising within these limits was assigned to the fourth Subordinate Judge's Court by the District Judge under sec. 13 (2) of the Bengal and Assam Civil Courts Act (XII of 1887). Held—That the fourth Subordinate Judge's Court could not entertain an application to execute the decree. An "assignment" of business under sec. 13 (2) of Act XII of 1887 is not the same thing as "transfer" of business within the meaning of sec. 150 of the Civil Procedure Code. MUNSHI MD. KAZEMALY v. MUNSHI NIAMUDDIN AHMED ... 216

Or. II, r. 2
—Suit for interest on bond—Decree satisfied—Subsequent suit for principal barred.] A hypothecation bond contained a clause stipulating that if interest was not paid for six months the creditor might sue either for interest alone or for both principal and interest without waiting for the expiration of the period fixed for repayment (which was three years) and the debtor was "to have no objection whatever." More than three years after, no interest having been paid, the creditor brought a suit for interest alone and obtained a decree for sale of the mortgaged property. The decretal amount was deposited in Court and satisfaction entered. On a subsequent suit by the creditor for the principal sum and arrears of interest: Held—That the provisions of Or. II, r. 2 of the Civil Procedure Code were applicable and the subsequent suit was not maintainable. The cause of action referred to in the rule is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. MUHAMMAD HAFIZ v. MIRZA MUHAMMAD ZAKARIYA ... 297

Or. V, r. 15,
service of notice on son of Defendant, whether sufficient service—Propriety of inference from the relations of father and son—Bengal Tenancy Act (VIII of 1885), s. 46, suit for ejectment of non-occupancy raiyat on ground of refusal to agree to enhancement—Mode of service of the agreement on the raiyat.] In a suit for ejectment of a non-occupancy raiyat the statutory agreement was served on his son, and the lower Courts thought that it was sufficient compliance with the requirements of Or. 5, r. 15, C. P. C., as the son was presumed to have duly brought it to the notice of the Defendant: Held—That this clearly is a consideration which cannot be permitted to weigh with the Court when the question

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is whether or not the requirements of the statute have been carried out. It has to be definitely found that the Defendant could not be found after reasonable and diligent enquiries, and that the person on whom the notice was served was an adult male member residing with him. It is essential that the requirements of the statute in these matters should be strictly carried out. BHARAM CHAND GUIN v. KANAK SARKAR ... 359

Or. VI, r. 17
—Amendment of plaint, when permissible—Limitation Act (IX of 1908), Arts. 39 and 120.] Courts will allow amendment of pleadings subject to three general conditions, viz., (1) when there is bona fides on the part of the applicant, (2) where the amendment does not cause such prejudice to the other party as cannot be compensated by costs, (3) where it does not convert a suit of one character to a suit of another character. Where the Plaintiffs originally sued for damages and injunction against the Defendant and then by an amendment prayed for declaration of title and then further by another amendment prayed for recovery of possession if in the opinion of the Court he was out of possession, and it was found that the dispossession of the Plaintiffs was more than six years before the institution of the suit: Held—That the limitation applicable to the claim for damages being three years and that for declaration of title six years the second amendment ought not to have been allowed as its effect was to enlarge the period of limitation to 12 years from the date of the dispossession and to take away from the Defendant his right to defeat the suit as originally framed on the ground of limitation. That the amendment altered the nature of the suit, and upon the evidence it appeared that there was no bona fides on the part of the Plaintiffs. GYANENDRO NATH CHAKRAVARTI v. PARESH NATH PAL ... 73

Or. XVI, r. 4
—Sale of immoveable property in execution of an order for payment of expenses of witness, legality of—S. 36, scope and effect of.] In a certain suit the Plaintiff was ordered to pay a certain sum as expenses for one of his witnesses. The order was executed and certain immoveable property of the Plaintiff sold in execution. The present suit was instituted for a declaration that the sale of the immoveable property was without jurisdiction and illegal: Held—That the sale of the immoveable property in execution of the order was illegal. Or. 16, r. 4 is not to be treated as a short and summary procedure for realisation of the expenses of a witness in addition to other modes of execution of orders under the provisions of sec. 36 of the Code. That section does not make any order capable of execution which was not so before. The section only means that the procedure prescribed for execution of decrees shall apply to execution of such orders as can be executed under the Code. There being a specific provision in that behalf in Or. 16, r. 4, the amount ordered to be paid

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ought to have been levied in that manner, and the immoveable property of the debtor could not have been put up to sale. **MD. WARISH SADAGAR v. RAHAMAN ALI MEAH** ... 877

2.] Certification of payment out of Court to decree-holder—Such certification, if can be made in the application for execution—Period of limitation for certifying payment of money payable under a decree. See Limitation Act. **BAHY MD. SAHA v. AIJANMAI** ... 529

2.] Certification of payment, if can be made at any time. See Limitation Act. **MADAN MOHAN BANIKYA v. HARULAL KUNDU** ... 534

6 and 22, application for transfer of decree and for issue of notice upon judgment-debtor—Limitation Act (IX of 1908), Art. 182 (5), later application to the Court which passed the decree whether "an application in accordance with law or a step in aid of execution." An application for transfer of a decree was made on the 4th November 1910, in which there was also a prayer for issuing notice on the judgment-debtor. The notice having been twice returned unserved, the decree-holder applied on the 24th January 1911 for issue of another notice which was served and the decree was duly transferred. On the 7th January 1914 an application for execution was made to the Court to which the decree was transferred: Held—That the application for execution, dated the 7th January 1914 having been made more than three years after the application (for transfer of the decree), dated the 4th November 1910 was barred by limitation. Or. XXI, r. 22 Civil Procedure Code, provides that the notice upon the judgment-debtor to show cause against execution shall be issued by the Court executing the decree. The Court which transferred the decree had therefore no power to issue that notice. Further, an application for transfer of a decree is not an application for execution. **Chatterpat Singh v. Rai Bahadur Saita Soomorimuli**, 20 C. W. N. 889 (F. B.) (1916), referred to. Therefore the application made by the decree-holder on the 24th January 1911 to issue notice upon the judgment-debtor cannot be held to be an application "in accordance with law" for execution or to take some step in aid of execution of the decree within the meaning of Art. 182 (5) of the Limitation Act and therefore could not save limitation. **HAZARILAL v. BAIDYANATH SAHA** ... 292

Or. XXI, r. 58—Mortgage decree, for sale—Claim to mortgaged property, if lies—Claim once allowed but disallowed upon fresh application for execution—Revision—Civil Procedure Code (Act V of 1908), s. 115. A claim is not entertainable under Or. XXI, r. 58 of the Civil Procedure Code to property which has been ordered to be sold under a mortgage decree: and where such a claim was once allowed, but subsequently the decree-holder having again applied for execution

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of the decree by sale of the property a further claim to the property by the successful claimant was disallowed by the executing Court: Held, on an application for revision under sec. 115 of the Civil Procedure Code, that in view of the authority of the case, **Deepholtz v. Peters**, I. L. R. 14 Cal. 631 (1887), the High Court could not interfere. **MAHABIR PRASAD SINGH v. JOGENDRA NATH MONDAL** 50

Or. XXI, r. 89—Sale in execution of decree—Judgment-debtor privately selling the property so sold to a third person after the execution sale but before confirmation of sale—Such subsequent purchaser, if entitled to apply under Or. XXI, r. 89, to have the court-sale set aside.] Where a judgment-debtor, after the sale in execution of his immoveable property but before the confirmation of the sale, sold such property to a third person, and such subsequent purchaser applied to have the court-sale set aside under Or. XXI, r. 89 of the Civil Procedure Code: Held—That he was not entitled to make the said application. The interest, if any, which he held in the property was not by virtue of a title acquired by him before the execution sale: his interest, if any, was by virtue of a title acquired after such sale and consequently he was precluded by the very terms of the rule from applying under Or. XXI, r. 89 of the Civil Procedure Code. **Anantha Lakshmi Ammal v. Kunan Chankurath Sankaram Nair**, 24 Mad. L. J. 205; [1913] Mad. W. N. 101, **Ishwar Das v. Asaf Ali Khan**, I. L. R. 34 All. 186 (1911), **Pthanwanti Kner v. Sheo Shankar Lal**, 4 P. L. J. 340 (1917), **Pandurang Laxman Uppade v. Govind Dadh Uppadhe**, I. L. R. 40 Bom. 547 (1916) and **Dulhin Mathura Koer v. Bangshidhari Singh**, 15 C. L. J. 83 (1911), referred to. **SARADAKRIPA LALA v. HARENDRA LAL DAS** ... 119

Or. XXI, rr. 98, 99, 101, 103, order under, dismissing case for default—Suit by party against whom order made—Limitation—Limitation Act (IX of 1908), Art. 11A.] In view of the decisions under secs. 332 and 335 of Act XIV of 1882 and the fact that the language of these sections has not been altered in the new Code, Art. 11A of the Limitation Act will apply only to an order under r. 98, r. 99 or r. 101 of Or. 21, which has been made upon investigation. **Kunji Behary Lal v. Kandh Prasad Narain Singh**, 6 C. L. J. 362 (1907), followed. **Nagendra Lal Choudhury v. Fani Bhusan Das**, I. L. R. 45 Cal. 785; s. c. 23 C. W. N. 375 (1918), **Venkataratnam v. Ranganayakamma**, 5 C. L. R. 41 Mad. 985 (F. B.) (1918), **Pannusami Pillai v. Samu Ammal**, 31 Mad. L. J. 247 (1916) and **Satindra Nath Banerji v. Shiva Prasad Bhakat**, 26 C. W. N. 128 at p. 127 (1921), distinguished. An order dismissing an application for default is not an order passed upon investigation. **SM. NIRODE BARANI DASI v. MANINDRA NARAYAN CHANDRA** ... 853

Or. XXXII, r. 3—Appointment of certificated guardian as guardian ad litem—R. 4, sub-r. (3),

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Court's power to appoint a guardian without his consent—Decree against a minor where his guardian was appointed without his consent, if binding upon him—Classes of guardians to whom sub-r. (3) applies—Guardian and Wards Act (VIII of 1890), s. 10, sub-sec. (3)—Willingness of the guardian to act, essential—S. 99, applicability of.] The generality of the language used in Or. XXXII, r. 4, sub-r. (3), makes it clear that the Legislature has prescribed that no person who is competent to act as guardian of an infant, either under sub-r. (1) or under sub-r. (2), shall be appointed guardian for the suit without his consent. The willingness of the proposed guardian is essential even in cases of appointments of guardians under the Guardians and Wards Act as guardians *ad litem*. When a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect upon him. The provision as to the consent of the person proposed to be appointed guardian for the suit is mandatory and imperative. *Khairajmal v. Diām*, L. R. 32 I. A. 23; s. c. I. L. R. 32 Cal. 296; 9 C. W. N. 201 (1904), *Rashidannessa v. Mahammad*, L. R. 36 I. A. 163; s. c. I. L. R. 30 All. 872; 13 C. W. N. 1182; 10 C. L. J. 318 (1909) and several other cases referred to. *Waliar v. Banke*, L. R. 30 I. A. 182; s. c. I. L. R. 30 Cal. 1021; 7 C. W. N. 774 (1903), distinguished. The fact that the guardian preferred an appeal cannot be taken as an index that he consented to his appointment as guardian for the suit, when in fact he never appeared during the trial of the suit. *Sharoo v. Raghunatha*, 18 Mad. L. T. 401 (1915), referred to. *ANNADA PRASAD GHOSH v. UPENDRA NATH DEY SARKAR* ... 781

Or. XXXIV, r. 2, cl. (c)—Decree of first Court allowing redemption within six months of the date of the decree—Appeal by the judgment-debtor against the decree and cross-objection by the decree-holder both dismissed—"Six months' time," whether to run from the date of the original decree or of the Appellate decree.] A decree declared the right of the decree-holder to recover possession of certain property subject to the right of the judgment-debtor to redeem on payment of a certain sum within six months of the date of the decree. Against that decree, the judgment-debtor appealed and the decree-holder filed a petition of cross-objection, but both were dismissed and the decree of the first Court confirmed. Then within six months of the date of the Appellate decree but more than six months after the date of the original decree, the judgment-debtor paid into Court the sum necessary for the redemption. The decree-holder applied for execution of the decree: Held—That where in a suit on a mortgage the decree of the Appellate Court simply dismisses the appeal leaving the decree of the first Court untouched, the time for redemption runs from the date of the decree of the first Court. *BASANTA KUMAR ADAK v. SM. RADHA RANI DAS* ... 440

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rr. 7 and 9. See Under Mortgage PRASUNNA KUMAR MONDAL v. NIL-AMBAR MONDAL ... Or. XXXIV, 123

r. 5—Successive mortgages—Respective rights of first and puisne mortgagees. See under Mortgage. *MUSAMMAT SUKHI v. MUNSHI GHULAM SAFFAR* ... 279

Or. XLI, r. 10, rejection of an appeal for failure to furnish security for costs—S. 104 and Or. XLIII, r. 1, such order if appealable—S. 2 (2), such order of rejection if comes within the definition of "Decree." In an appeal the lower Appellate Court called upon the Appellant to furnish security for costs under Or. XLI, r. 10 of the Civil Procedure Code, and the order not having been complied with dismissed the appeal. Against this order an appeal was preferred to the High Court: Held—That an order of rejection of an appeal under Or. XLI, r. 10 is not appealable either as a decree or as an order. If it is treated as an order, it is not included in the list of appealable orders set out in Or. XLIII, r. 1, nor is it covered by the provisions of sec. 104. That the order further did not fall within the definition of a "decree" contained in sec. 2 (2), because the Court did not deal with the merits of the controversy between the parties. *Lekha v. Bhanna*, I. L. R. 18 All. 101 (F. B.) (1895), *Secretary of State for India in Council v. Jillo*, I. L. R. 21 All. 133 (1896) and *Firozi Begum v. Abdul Latif Khan*, I. L. R. 30 All. 143 (1905), approved and followed. *ROMES CHANDRA DAS v. MANINDRO LAL DAS* ... 1020

Or. XLVII, r. 1—Review, grounds for admitting applications for—Previous decision, error in, if "sufficient reason" for review.] R. 1 of Or. XLVII of the Civil Procedure Code must be read as in itself definitive of the limits within which review is permitted, and reference to practice under former and different statutes is misleading. The words "any other sufficient reason" in Or. XLVII, r. 1, mean a reason sufficient on ground at least analogous to those specified immediately previously, that is to say, to excusable failure to bring to the notice of the Court new and important matters or error on the face of the record. Upon an application for review the Court cannot proceed to deal with the case on the merits as if on an appeal. *CHHAJJU RAM v. NEKI* ... 697

Or. XLVII, r. 1—Grounds for review. See Review. *CHHAJJU RAM v. NEKI* ... 697

Sch. II, r. 17, agreement to refer to arbitration—Mahomedan Law, mother as "de facto" guardian if can execute the agreement on behalf of her minor children—A party to the agreement if can subsequently question the validity of the agreement and withdraw therefrom—Subsequent assent of the "de jure" guardian if can validate the agreement—Subordinate Judge if may allow mother to act for her infants in partition proceedings—Kazi, who is.] A Mahomedan mother on behalf of her minor children

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entered into an agreement with some others to refer to arbitrators a dispute about some properties and they all made an application to Court under r. 17 of the Second Schedule to the C. P. Code. The guardian of the minors' properties appointed by the District Judge subsequently gave his assent to the agreement to refer and participated in the said application under r. 17. The Court thereupon acted upon the agreement and referred the dispute to arbitration: Held—That the mother was not competent to bind the infants by the agreement to refer to arbitration. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The natural guardian can perform acts which are purely advantageous to the infant, but can impose no obligations on the infant. *Imambandi v. Mutsaddi*, I. L. R. 45 Cal. 878: s. c. 23 C. W. N. 50 (P. C.) (1918), followed. A party who entered into the agreement to refer, under a misconception as to the legal authority of the mother, may afterwards withdraw therefrom. The legal guardian's assent subsequently given to the agreement to refer and his participation in an assent to the application under r. 17 cannot validate the agreement which formed the basis of that application. Per Beachcroft, J.—The fact that the Subordinate Judge subsequently found the mother fit to act for the minors would not validate an arrangement which in its inception was invalid, there being no appointment of the mother to act for the infant in the partition proceedings by the District Judge who takes the place of the Kazi in Mahomedan law. *MOHSI-NUDDIN AHMED v. KHABIRUDDIN AHMED* ... 246

Sch. II, para. 21, filing award in matter referred to arbitration without intervention of Court—Agreement for reference to arbitration stipulating that heirs and representatives of the parties would be bound by the award—Award, if null and void when during pendency of the proceedings, some of the parties died and representative of one of them was not substituted and no guardian ad litem of the minor son of another was appointed.] Some parties referred their disputes to certain arbitrators stipulating in the agreement that they and their heirs and representatives would be bound by the award. After the hearing of argument was closed it was brought to the notice of the arbitrators that two out of the parties had died and the arbitrators allowed time for filing fresh achnamahs and for appointment of a guardian for the minor heir of one of the deceased parties, but nothing was done. The arbitrators then made their award and on application being made to Court, the Court made the order for filing the award: Held—That having regard to the subject-matter of the arbitration and the terms of the reference the legal representatives of the deceased persons would be bound by the reference to arbitration made by their predecessors. *Rashidunisa v. Mahomed Ismail Khan*, I. L. R.

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31 All. 572: s. c. 13 C. W. N. 1182 (P. C.) (1909) and *Manindra v. Mahananda*, 15 C. L. J. 360 (1911), distinguished. It is true as a general principle that a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the Civil Procedure Code. If there is a binding reference to arbitration all that it is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. There is no rule of procedure by which the arbitrators could substitute representatives or appoint guardian ad litem for infants. The question whether the award would be binding or not must depend upon the circumstances of each case. The interests of the minors not having been prejudicially affected and having been properly looked after by the adult members who were present, the award ought not to be set aside on the ground of the defect in procedure not affecting the merits where substantial justice has been done. *BINAYAK-DAS ACHARYA CHOWDHURY v. SASI BHUSAN CHOWDHURY* ... 804

Sch. II, cls. 20 and 21—Private arbitration award filed and judgment pronounced and decree following, if can be re-opened in subsequent suit to set aside the award and decree—Res judicata.] Matters heard and determined in proceedings under cl. 21 of Sch. II of the Civil Procedure Code are res judicata and cannot be reopened in a subsequent suit between the same parties and brought for the purpose of setting aside the award and the decree following upon the judgment pronounced in accordance therewith. A proceeding under cl. 21 of Sch. II, C. P. C., is a suit within the meaning of sec. 11 of the Civil Procedure Code. *GURU CHARAN SIKKER v. UMA CHARAN SIKKER* ... 940

Sch. II, para. 18—Suit pending decision of arbitrators—Award of arbitrators whether a bar to the suit where no application for stay of suit made—Proper procedure.] The Plaintiff and the Defendant were owners of adjoining parcels and the controversy between them constituted a boundary dispute. On the 19th May 1915 they executed a deed of agreement and referred the matter in dispute to three arbitrators who held an enquiry. On the 4th November 1917 one of them announced a decision which was signed only by himself and was unfavourable to the Plaintiff. On the 8th March 1918 the Plaintiff commenced a suit to establish his title and enforce his claim. The arbitrators were apprised of the institution of the suit and on the 30th March 1918, they published their joint award. The Defendant who did not receive notice of the suit till the 4th April entered appearance on the 11th April and filed his written statement on the 26th April: Held—That as the Defendant did not take recourse to the proper procedure, namely, apply for stay of the suit, cancellation of the award as made without jurisdiction and thereafter remission of the matter to the arbitrators, the award had been rightly rejected by the Court below as

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made without jurisdiction and the suit was properly tried on the merits by the Court. *Ram Chandra v. Krishna Lal*, 17 C. W. N. 351 (1913). *Dinabandhu Jana v. Durga Prasad Jana*, I. L. R. 46 Cal. 1041: s. c. 23 C. W. N. 716; 29 C. L. J. 399 (1919). *Ram Prasad v. Mohan Lal*, I. L. R. 47 Cal. 752 (1920). *Jokiram v. Ghaneshyam*, I. L. R. 47 Cal. 849: s. c. 25 C. W. N. 62 (1920) and *Ram Chand v. Gobindram*, [1918] 13 S. L. R. 193, considered. That the Defendant should not be given an opportunity at this late stage to comply with the requirement of the law as the death of one of the arbitrators rendered a reconsideration by the original arbitrators impossible, the agreement not containing any provision for a reconstitution of the committee of arbitrators upon such a contingency. *SARAT CHANDRA SEN v. RAJ KUM MOOKERJEE* ... 967

CONSTRUCTION OF WILL—One part of the

Will purporting to give an absolute estate and another part imposing restrictions on the powers of alienation and mode of enjoyment, whether passes an absolute or a limited estate—Succession Act (X of 1865), s. 125; applicability of—Central idea and isolated expressions in a Will, which to prevail.) In a Will the testator provided that after his death his daughter would be malik vested with the power to transfer by sale and gift the entire properties and would enjoy and hold possession of the same down to her son, son's son and so on. The Will next provided that the daughter should live in the testator's ancestral bhita, and perform the pujas inaugurated by him, otherwise she would not be entitled to hold possession or transfer any portion of the property. The Will also provided that she would be entitled to transfer the property only if it was unavoidable necessary for the education of her son or if they fell into great calamity. In a suit for possession by the sons of the daughter, the Court of first instance held that the Will conferred an absolute estate on the Plaintiffs' mother, who having left a maiden daughter still living, the Plaintiffs had no title to the property. On appeal the lower Appellate Court held that the questions raised should be decided after taking evidence and remanded the case for trial upon the merits: Held—That the words in the earlier part of the Will, without anything to qualify them, would no doubt create an absolute estate and there was power of alienation expressly given. There is no doubt that if an estate conferred by Will is held to be absolute, the conditions as to the mode of its enjoyment are void. But considering all the terms of the Will it is clear that the provisions made in the earlier part of the Will are qualified by the provisions made in the other parts of it. Three things appear to have been uppermost in the mind of the testator: that his daughter and her sons, etc., should reside in his bhita, that power of alienation should be given only for meeting the education expenses of her son or in case of great calamity, and that she should hold the properties subject to performance of the pujas. Taking into consideration the central ideas of the Will, instead of isolated expressions, it is clear that

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the Will did not give an absolute estate to Plaintiff's mother. *Lala Ram Jewan Ram v. Dal Koer*, I. L. R. 24 Cal. 406 (1897). *Amarendra Nath v. Suradhani*, 14 C. W. N. 458 (1909). *Jitendra Kumar v. Nritya Gopal*, 18 C. W. N. 140 (1912). *Tripurari Pal v. Jagattarini*, L. R. 40 I. A. 37: s. c. I. L. R. 40 Cal. 274; 17 C. W. N. 145 (1912) and other cases discussed and distinguished. *Shib Lakhani v. Srimati Tarangini*, 8 C. L. J. 20 (1908). *Kandarpa Nath v. Jogendra Nath*, 12 C. L. J. 391 (1910). *Hara Kumari v. Mohini*, 12 C. W. N. 412 (1908), and *Radha Prasad Mullik v. Raneemani Dassi*, I. L. R. 35 Cal. 896: s. c. 12 C. W. N. 729 (P. C.) (1908), discussed and followed. *SURENDRA NATH CHATTERJEE v. SAROJBANDHU BHATTACHARJI* ... 893

CONTRACT—Usage, evidence of—Admissibility

—Adding to the terms of a written contract —Repugnancy—Whether such usage makes the contract insensible, inconsistent or unreasonable—Due date falling on a Sunday —Contract if may be performed on Monday following—European importer.] Evidence of well-known trade usage is admissible to add to the terms of a written contract when such usage does not make the written contract insensible, or inconsistent or unreasonable. In a contract, to which both parties were Indians, for the sale of piece-goods imported by a European firm, the due date fell on a Sunday: Held—That according to the well-known usage in the market the due date would be the Monday following. *Richardson v. Goddard*, [1859] 23 Howard 28, *Laichand v. Kersten*, I. L. R. 15 Bom. 338 (1890). *Juggomohan Ghose v. Manik Chandra* 7 M. I. A. 263 (1859). *Gibson v. Small*, [1853] 4 H. L. C. 353, 397. *Brown v. Byrne*, [1854] 3 El. & Bl. 703 715. *Ross v. Shaw*, [1917] 2 I. R. 367. *Cuthbert v. Cumming*, [1855] 11 Exch. 405 (408). *Produce Brokers Co. v. Olympia Oil and Cake Co.* [1916] 1 App. Cas. 314 and *Westcott v. Hahu*, [1918] 1 K. B. 495 and the other cases referred to. *KASIRAM PANTIA v. HURNUNDROY FULCHAND* ... 354

to buy goods, between London and Madras merchants—Stipulation for arbitration in London—Award made in London—Suit on award—Defence that arbitrator had given no opportunity to Defendant to be heard, if may be taken in the suit—English Arbitration Act, 1889—Supreme Court Rules, Or. 64, r. 14—Irregularity not going to the root and not apparent on the face of award.] In a contract to purchase sheepskin of a specified quality by a merchant carrying on business in London from a merchant carrying on business in Madras, it was stipulated that any differences not amicably settled was to be submitted to arbitration in London in the usual way and the award of such arbitration was to be binding on both buyer and seller. The buyer having sued the seller in the Madras High Court for enforcement of an award made by an arbitrator in London, the seller objected that the award was not binding on him as the arbitrator had proceeded to arbitrate without giving him an opportunity to be heard: Held—That as the arbitration clause provided for an

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arbitration which was to take place in London and in accordance with English law and procedure, any objection to the award on the ground of misconduct or irregularity had to be taken by motion to set aside or remit the award, under the English Arbitration Act of 1889, within the time limited by Or. 64, r. 14, of the Rules of the Supreme Court. No such objection having been taken, the award became fully binding on both parties to it, as if it had been incorporated in the contract. Any defence going to the root of the award, e.g., that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could have been pleaded in the suit, but a defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both parties had agreed to be bound. *Thorburn v. Barnes*, L. R. 2 C. P. 384 (1867) referred to. *L. OPPENHEIM AND CO. v. HAJEE MAHOMED HANEEF SAHIB* (P. C.) ... 642

CONTRACT ACT, INDIAN (1 of 1872), s. 27—

Rival businesses in plying ferry boats—Sale of good-will of one to the owner of the other—Agreement not to start similar business by vendor, if in restraint of trade.] The Respondent plied passenger ferry boats on a river. The Appellant started a similar business and gained an advantage over the Respondent by securing better landing places and negotiating facilities for collecting dues. In 1910, the Appellant purported to sell to the Respondent the good-will of his trade in plying the ferry boats and every description of interest and ownership which the Appellant had acquired in the several landing places as well as settlements obtained for the collection of tolls. By a separate document the Appellant undertook to close the business of plying the particular ferry boats and that if he ever carried on the business again he would return the whole amount of consideration. Held—That the transaction amounted to a sale of a real good-will within the meaning put on the expression in *Churton v. Douglas*, [1859] Joh. 474, *Trego v. Hunt*, [1896] A. C. 7 and *Inland Revenue Commissioners v. Muller*, [1901] A. C. 217, and as used in the same sense in sec. 27 of the Contract Act. *CHANDRA KANTA DAS v. PARASULLAH MULJICK* (P. C.) ... 345 (1X of 1872), ss.

56, 9 and 20—A contract for "sale of certain goods on arrival," if enforceable when goods shipped from Germany were captured after the outbreak of war by a belligerent but after proceedings in a Prize Court arrived in a different ship two years after—Such arrival if comes within the meaning of "arrival" contemplated by the contracting parties—Doctrine of frustration, applicability of.] Defendant contracted to supply Plaintiffs with five cases of white shawl cloth. The contract was made on 21st January 1914, and it was headed "contract shipment and arrival." The goods were to be shipped in July and August 1914. The Defendant had previously ordered 50 cases of white shawl cloth from sellers in London. In part fulfilment of the Defendant's order 20 cases were shipped in

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July 1914 by his sellers in a German ship SS. "Spitzfels," Hamburg to Calcutta. The German ship was captured by the British in the Mediterranean shortly after the outbreak of the war and was condemned as prize. Under Government orders the cargo was transhipped at Alexandria into a different ship, which arrived in Calcutta in June 1916, delivery to the consignees being made conditional upon payment of extra charges in the nature of transshipping and forwarding expenses. There was a provision in the contract that in case of loss of the ship the contract should stand cancelled. There was a further provision in the contract that if the goods did not arrive within the specified time, the sellers should notify their buyers, and the latter should declare whether they are prepared to grant an extension of time, otherwise the contract should be considered as cancelled. The Defendant did not inform the Plaintiff of the arrival of the cases in June 1916 and he similarly ignored his other buyers of 1914, and sold them to other dealers at a profit to himself, the market having risen. The Plaintiff in July 1917 in consequence of information which he had received, tendered the contract price to the Defendant and brought the present suit for non-delivery of the goods. Held—That having regard to the capture of the ship and the transshipment, the Plaintiff was not entitled to the delivery of the goods on their arrival in June 1916 in the same manner as if there had been no interruption. Per Sanderson, C. J.—The arrival of goods in June 1916, after the events which happened, was not such an arrival as was contemplated by the parties to the contract. The purpose of the contract and the intention of the parties to the contract were altogether upset by the capture of the ship, by the prolonged delay and by the other circumstances which were the result thereof. Consequently the Defendant was not bound to deliver the goods to the Plaintiff when they eventually did arrive in June 1916. Per Richardson, J.—Regard being had to the events which happened, the contract had ceased to be operative when the goods arrived in June 1916. If the contract between the Defendant and his shippers became illegal owing to the outbreak of the war, it may be that the contract between the Plaintiff and the Defendant fell with it, but the question of illegality not having been raised, the conclusion that the events which happened dissolved the contract may be supported by recourse to the doctrine of frustration, according to which a subsequent event or contingency beyond the ken of the parties at the time of the transaction, for the occurrence of which neither of them is responsible and for which they have not provided, may operate to undermine and avoid the contract between them. *Horlock v. Beal*, [1918] 1 A. C. 486, *Tamplin Steamship Company v. Anglo Mexican Petroleum Products Co., Ltd.*, [1916] 2 A. C. 397, *Metropolitan Water Board v. Dick Kerr & Co.*, [1917] 2 K. B. 31; [1918] A. C. 119, *Bank Lime v. Capel*,

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[1919] A. C. 435 and Bally v. DeCrespigny, L. R. 4 Q. B. 180 (1889), referred to and followed. Treating the question as one of construction, regard must be had to the nature and circumstances of the particular transaction. The importance of delay in the regime of commerce is recognised. Metropolitan Water Board v. Dick Kerr & Co., [1918] 2 K. B. 81; [1918] A. C. 110, and Bensaude v. Thames and Mersey Insurance Co., [1897] A. C. 609, 611, referred to and approved. The delay and the probability of delay were amply sufficient for the conclusion that the contract in a business sense perished with or after the capture, long before the goods arrived in Calcutta and it could not be revived without a new contract. Semble:—The "loss" of a ship does not include capture. Horlock v. Beal, [1916] 1 A. C. 486, referred to. GOURI SANKAR AGARWALLA v. H. P. MOITRA 573

s. 69.] Arrangement by vendor with a third party to pay off incumbrances, if enforceable by purchaser, where no trust created. NATHU KHAN v. THAKUR BURTONATH (P. C.) 514

s. 162—Son's liability for jewellery deposited with father—

The son as an involuntary bailee, whether comes within the category of a depository—

Limitation Act (IX of 1908), Art. 49 or 145, which applies in a suit for recovery from son of jewellery deposited with his deceased father—Wrongful or unlawful possession of the son, if attracts operation of Art. 49—Statement in a Will, how far evidence.]

All actions for the recovery of a deposit of moveable property are, by the express words of Art. 145 comprised within it and no exception is made as regards deposits where demand and refusal make the continuance of possession unlawful. The fact of the possession by the depository after demand becoming wrongful does not make Art. 49 applicable. Ganginani v. Gathipati, I. L. R. 33 Mad. 56 (1909), followed. Bank of New South Wales v. O'Connor, L. R. 14 A. C. 273 (1889), distinguished. Notwithstanding the provisions of sec. 162 of the Indian Contract Act, (which is not an exhaustive Code) the relation of depositor and depository does not cease on the latter's death? The relation of the depositor and depository is that of a voluntary bailor and voluntary bailee and when the latter dies his successor becomes and remains an involuntary bailee so long as the article is not returned to the true owner. For the purpose of the Limitation Act, involuntary bailees can be described as depositories. Administrator-General of Bengal v. Kristo Kamini, I. L. R. 31 Cal. 519 (1904), Narmadabai v. Bhavani Shankar, I. L. R. 28 Bom. 430 (1902), Gobinda Prasad v. Patna Municipality, 6 C. L. J. 535 (1907), Ram Krishna v. Panaya, 9 Mad. L. J. 51 (1899), Gopalaswamy v. Subramaniam, I. L. R. 35 Mad. 636 (1911), Balkrishnaou v. Narayanawami, I. L. R. 37 Mad. 175 (1912) and Gangarai v. Nabin, 23 C. L. J. 145 (1915), referred to. The statement in a Will cannot be used as evidence for the purpose of showing that the facts therein mentioned are true, but it can be looked at for the purpose of finding out whether it is con-

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sistent with the assertions made from time to time by the testatrix in her life-time. PROMOTHO NATH MULLICK v. PRODYMNO KUMAR MULLICK ... 779

s. 201—Termination of agency—S. 209—After the principal's death, if agent is to be treated as a trustee—Indian Limitation Act (IX of 1908), Art. 89 or 120, applicability of, where an agent is sued for accounts after the principal's death.] C. acted as gomastha under J. until the latter's death in July 1912, and then he acted as agent under J.'s widow. The widow, more than three years after her husband's death, brought a suit against the agent for accounts from 1894 to 1915: Held—That Art. 89 of the Limitation Act applied to the case and the claim for accounts for the period up to the death of J. was barred by limitation as under sec. 201 of the Contract Act the agency was terminated on J.'s death and as the suit was brought more than three years after J.'s death. Madhu Sudan Sen v. Rakhal Chandra Das Basak, J. L. R. 43 Cal. 248: s. c. 19 C. W. N. 1070 (1915), and Nabin Chandra Barua v. Chandra Madhab Barua, I. L. R. 44 Cal. 1: s. c. 21 C. W. N. 97 (P. C.) (1916), followed. That as C. was not sued for any act done by him after the death of his late principal, which he might have done as a trustee, sec. 209 of the Contract Act or Art. 120 of the Limitation Act did not apply to the case. SM. SAROSHIBALA DAS v. CHUNILAL GHOSH ... 320

sec. 247, scope and meaning of. See Hindu law. SANYASI CHARAN MANDAL v. KRISHNADHAN BANERJI (P. C.) 954

s. 253, cl. (10)—Dissolution of partnership by death of a partner—Execution of a trust deed by a partner, the other partner affixing his signature as an attesting witness, if can be treated as a "contract to the contrary"—Representatives of deceased partner, if entitled to profits of the business continued by the surviving partner.] A partnership business was carried on by two persons, one of whom died in August 1915. On the day previous to his death he executed a trust deed for continuance of the business after his death and the other partner affixed his signature thereto only as an attesting witness, but after the execution of the deed said that he would not carry on the business unless his remuneration was fixed. The trustees too subsequently refused to carry on the business. The surviving partner continued the business alone: Held—That by the execution of the trust deed and the signature of the other partner as an attesting witness thereto, there was no concluded "contract to the contrary" within the meaning of sec. 253 of the Contract Act and the partnership was dissolved by the death of one of the partners in August 1915 by virtue of the operation of cl. (10) of the section. Held further—That as to the profits made out of the business by the surviving partner subsequently, the latter was bound to share them with the representatives of the deceased partner, after making all just allowances including fair remuneration for his management, in accordance with

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 the maxim *accessorium sequitur suum principale*. *Ahmed Musaji Salehji v. Hashim Ebrahim Saleji*, I. L. R. 42 Cal. 914 at p. 925: s. c. 19 C. W. N. 449 (P. C.) (1915), *Brown v. D. Taset*, Jacob 284 (1821) and *Yates v. Finn*, 13 Ch. D. 839 (1880), and other cases referred to and discussed. **MUHAMMED KAMEL v. HAJI HEDAYE-TULLA** ... 463
- CONTRIBUTION SUIT—Co-sharer's right to be reimbursed when money realised by creditor by coercive process—Limitation Act (IX of 1908), Arts. 61, 99, 120—Time from which limitation runs.** The Plaintiff and the Defendants were owners of five different jotes. In execution of one of the decrees obtained by the landlord in respect of the five jotes one of the jotes was put up to sale and purchased by the Plaintiff. The landlord took out the amount of his dues in respect of that jote out of the sale proceeds and in respect of the other jotes he attached the balance and ultimately withdrew it. The sale of the first jote was set aside, but the Plaintiff failed to obtain restitution of the sale proceeds. The Plaintiff thereupon sued the Defendants for contribution: **Held**—That the joint liability of the Plaintiff and the Defendants having been discharged by the money of the former there was no doubt that the Defendants obtained the benefit of the same. That although under sec. 173 of the Bengal Tenancy Act, the Plaintiff being one of the judgment-debtors could not purchase at the sale, the Plaintiff and the Defendant having bid for the jote and the Plaintiff's bid having been accepted the purchase by the Plaintiff was not void but only voidable. In any case after the sale was set aside the money deposited became the money of the Plaintiff alone and should be treated as having been lawfully paid, or appropriated in payment of the decree for rent. That so far as the right of contribution against co-sharers is concerned it does not matter whether the money is actually handed over by the party seeking contribution or is realised from him by coercive process by the creditor. In either case the right to contribution arises from the fact that one of the co-sharers has paid in excess of his share and the joint liability of all the co-sharers has been discharged. That the suit was not barred under Arts. 61 or 99 of the Limitation Act, having been brought within three years of the setting aside of the sale or under Art. 120, having been brought within six years of the date of payment. **GOPENATH MOONSHI v. CHANDRA-NATH MOONSHI** ... 340
- COURT FEES ACT (VII of 1870), Sch. II, Art. 17—Court-fee payable in suit by person whose claim in respect of property attached in execution of decree has been rejected for default.** Under Art. 17, Sch. II of the Court Fees Act, a court-fee of Rs. 10 is payable upon the plaint in a suit by a person, whose claim to properties attached in execution of a decree has been dismissed for default, to set aside the decision. An order dismissing a claim for default is an order within the meaning of Or. XXI, r. 63 of the Civil Pro-
- COURT FEES ACT—concl'd.**
 cedure Code, and, subject to the result of a regular suit, is conclusive. *Phul Kumari v. Ghanashyam*, I. L. R. 35 Cal. 202: s. c. 12 C. W. N. 169 (P. C.) (1907) and *Nagendra Lal v. Fani-Bhusan*, I. L. R. 45 Cal. 785: s. c. 23 C. W. N. 375 (1918), relied on. **SATINDRA NATH BANERJEE v. SHIVA PRASAD BHAKAT** ... 126
- CREDITOR AND DEBTOR—Right of creditor to appropriate towards interest in case of indefinite payment.** See under Debt. **RAI BAHADUR SETH NEMICHAND v. SETH RADHA KISHEN** ... 153
- CUSTOM—Family custom—Migration of family carrying a custom.** See under Hindu law. **RANA MAHATAB SINGH v. BADAN SINGH** ... 226
- , proof of, in derogation of Mahomedan law if permissible. See Mahomedan law. **MAHOMED IBRAHIM ROWTHER v. SHAIKH IBRAHIM ROWTHER** ... 793
- DATTAKA CHANDRIKA**, authority of, in Southern India and Bengal. See under Hindu law. **ARUMILI PERRAZU v. ARUMILI SUBBARAYADU** (P. C.) ...
- DEBT carrying interest—Payment without specific appropriation—Creditor's right to apply payment in discharge of interest first.** Where a debt is due which carries interest, and moneys are received without a definite appropriation on the one side or on the other, the rule which is well established in ordinary cases is that the money is first applied in payment of interest and then when that is satisfied in payment of the capital. *Parr's Banking Company v. Yates*, [1898] 3 Q. B. D. 460 at p. 466, referred to. **MEKA VENKATADRI APPA ROW BAHADUR ZEMINDAR GARU v. RAJA PARTHASARATHY APPA ROW BAHADUR ZEMINDAR GARU** (P. C.) ...
- , due with interest—Indefinite payment—Right of creditor to appropriate towards interest—Person when debtor makes specific appropriation—Entry in creditor's book as evidence of acceptance of debtor's appropriation.] A creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest. A debtor might in making a payment stipulate that it was to be applied only to principal. If he did so, the creditor need not accept the payment on these terms, but then he must give back the money or cheque by which the money was offered. *Meka Venkatadri Appa Row Bahadur Zemindar Garu v. Raja Parthasarathy Appa Row Bahadur Zemindar Garu*, 26 C. C. W. N. 33 (P. C.) (1921), referred to. Entries in the books of creditors may be taken as indicative of agreement to a proposed appropriation by the debtor. **RAI BAHADUR SETH NEMICHAND v. SETH RADHA KISHEN** (P. C.) ... 153
- DEBUTTER PROPERTY**, purchase of, by shebait at Court sale. See under Shebait. **RAJA PEARY MOHAN MUKHERJEE v. MONOHAR MUKHERJEE** (P. C.) ... 133
- EJECTMENT—Suit for recovery of possession**
 —Proof of title by Plaintiff and of exercise

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of acts of possession during currency thereof
Onus on Defendant to prove adverse possession for statutory period—Qualities which make possession adverse—Effect of acts of possession by owner upon the character of trespasser's possession which is claimed to be adverse.] Where the original title is unknown and both parties in a suit for ejectment give evidence of possession the Court will be justified in deciding in favour of one party or the other by a comparison of the evidence, judged in the light of probabilities. Such possession has to be interpreted according to the fairest view of what the property itself (in this case forest land) was capable of in the way of possession and what upon a broad view would be considered an adequate assertion of title by sufficient occupation. But where the Plaintiff has succeeded in proving a clear title the onus lies on the Defendant to prove adverse possession for the statutory period; and possession to be "adverse" must have all the qualities of adequacy, continuity and exclusiveness. **Radharoni Debi v. The Collector of Khulna, L. R. 27 I. A. 136, 140.** s. c. 4 C. W. N. 597 (1900) and **The Secretary of State for India in Council v. Chelikani Rama Rao, L. R. 43 I. A. 192; s. c. I. L. R. 39 Mad. 617; 20 C. W. N. 1311 (1916)**, referred to. When the holder of title proves that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even though they might have failed to constitute adverse possession as against another, may be quite sufficient to destroy that adequacy and interrupt that exclusiveness, and continuity which is demanded from any person challenging by possession, the title which he holds. **KRISHNAN alias KRISHNAN MOOTHAVAR v. PERINGATI KUNHARANKUTTY HAJI (P. C.)** ... 666

allegation of dispossession—
Onus of proof of possession within 12 years of suit. See under possession, suit for recovery of. **RAKHAL CH. GHOSH v. DURGA DAS SAMANTA** ... 724

EKRARNAMA, construction—Stipulation to pay a pension to manager on retirement from service—Clause in ekarnama that the principal's heirs should continue pension after principal's death whether a recommendation or a binding promise—Privy Council—Costs—Irrelevant document printed by successful Appellant.] B, after appointing S as manager of her estate, by ekarnama stipulated to provide B with a certain pensionary allowance in the event of his resigning the service. The ekarnama concluded with this clause: "The heirs and representatives of mine and the administrators of the Raj Rayasat Dumraon (of which she was in possession as life-tenant) should fully comply with the terms of this deed": Held—That these words were only a recommendation by the executant to the two parties respectively named to pay the pension and not a binding promise that they should pay it after her death. The successful Appellant was deprived of the cost of printing in the paper-book documents which were irrelevant for the disposal of the ap-

EKRARNAMA—conclid.
peal. **MAHARAJA KESHO PROSAD SINGH v. SIV SARAN LAL**

ELECTION, suit to set aside—Specific Relief Act (1 of 1877). s. 42, scope of—Legal character, what is.] The Plaintiff, who was unsuccessful as a candidate for election as a Municipal Commissioner, sued for a declaration that the election, being in contravention of the Plaintiff's right and franchise, right of election and right of being present at the polling place, was not according to law proper and valid and was ultra vires, and that the election of the Defendants was illegal, and he further prayed that they should be restrained by injunction from forming the Municipal Board: Held—That although the words "legal character" in sec. 42 of the Specific Relief Act have been held to be wide enough to include the right of franchise and also a right of being elected as a Municipal Commissioner, it was doubtful whether, regard being had to the form of the suit and the declarations asked for, the case came within the words of the section. That, assuming that the Court had inherent jurisdiction to entertain the suit, having regard to the circumstances of the case, there was no ground for setting aside the election. **CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF KOTRUNG v. BISSESWAR GHOSE ... 91**

Bengal Municipal Election Rules—R. 4, register of voters—R. 4, application for removal of name of a voter from the register—Rr. 6 and 10, application by the said voter for inclusion of his name in the register, if lies when his name was already in the register—R. 29, District Magistrate's power.] A certain name was entered in the Register of voters prepared under r. 4 of the Bengal Municipal Election Rules. Several applications were made to the Chairman of the Municipality under r. 7 for removal of his name, and the said voter too made an application under r. 6 for inclusion of his name in the Register. All these applications were disposed of by the Chairman on the same date. He allowed the applications under r. 7, and directed the name of the said voter to be removed from the register. The said voter thereupon applied to the District Magistrate under r. 10, who restored his name in the register. On appeal, it was contended that r. 10 was inapplicable because the name of the said voter was already on the register when he made the application under r. 6 for inclusion of his name therein: Held—That the Chairman could not have dealt with the application of the voter in question before he had decided the applications under sec. 7, and he had not rejected the application of the said voter as premature. In these circumstances, the application might well be regarded as having been presented on the day and after the applications under sec. 7 were disposed of, although it was on the record from before. In that view the Magistrate had power under r. 10 to make an order for the insertion of the name in the register. Besides, r. 29 gives a general power to the Magistrate to decide all disputes arising under the Rules, so the Magistrate had power to decide the point under r. 29. **SYAM**

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A statement in a Will which suggests an inference as to a fact in issue cannot be proved by or on behalf of the person who made it or his representative in interest. NALAM PATTABHIRAMA RAO v. MANDAVILLI NARAYANA (P. C.) ...	273
ss. 82, and 88,	
parcels evidence to explain an unambiguous word in a lease, admissibility of—Civil Procedure Code (Act V, of 1908), Or. 41, rr. 27 (1) (a), 28, 29, reversal of decree for improper exclusion of evidence and remand of suit by Appellate Court, legality of.] The right of fishery in a tank was let out for a term of 9 years by a lease which specified the period to be 1318 to 1324 San. The lessor having instituted a suit for ejectment on the ground of expiry of the period of the lease, the Defendant stated that the year in respect of jalkars begins from the commencement of the rains, i.e., from Ashar, and the term of yearly settlement subsists till then, so that the term of the aforesaid settlement did not expire before Ashar 1325. The Court of first instance held that the expression used in the contract was unambiguous and that oral evidence was not admissible to show that the expression San meant not the Bengali year which ends on the last day of Chaitra, but another period which ends in Ashar. Held—That it is well-settled that various words in written documents which prima facie present no ambiguity may be interpreted by extrinsic evidence of usage, and their peculiar meaning, when found in connection with the subject-matter of the transaction, fixed by parole testimony. Therefore evidence was admissible to show that the term San did not signify the Bengali year, but a different period specially applicable to jalkar tenancies. Grant v. Maddox, 15 M. & W. 737; 71 R. R. 315 (1848), Re: Andn [1875] 3 Dyer, 345n, Pl. 5, and R. v. Newstead, [1769] Burr. 669, and other cases referred to. Held further—That the circumstance that evidence had been improperly excluded by the trial Court did not justify a reversal of the decree and a remand of the suit. Under the provisions of Or. 41, rr. 27, 28 and 29, it was open to the Appellate Court either to take the evidence itself or to direct the primary Court to take the evidence and to send it to the Appellate Court for consideration. RAJA JOTE KUMAR MOOKERJEE v. JADUNATH BOSE ...	1022
EXECUTION OF DECREE—Limitation. See Limitation. HAZARILAL v. BAIDYANATH SAHA ...	292
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Two compromise rent-decrees both providing for satisfaction by sale of the tenure—Second decree, if may	

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be executed against tenant personally, when the tenure was sold in execution of the first decree—Sale, subject to directions in the second decree.] Two compromise rent decrees provided that the landlord should satisfy his claim for rent by sale of the tenure. Under the first decree the property was sold and purchased by the decree-holder and the decree-holder next applied for personal execution of the second decree: Held—That the executing Court cannot go behind the decree and must give effect, if possible, to both the decrees. The second decree having been passed before the sale of the property, the sale was subject to the directions contained in the second decree. The first decree for rent, being a special rent decree passed on a contract between the parties, was not an ordinary rent decree under the Bengal Tenancy Act under which all encumbrances would be avoided. The decree-holder therefore must proceed first of all against the property as the decree itself directed. RATAN LAL BISWAS v. NAFAR CHANDRA PAL CHOWDHURY ...	704
Objection on the ground of non-service of notice—Concurrent findings by two Courts in India—Non-interference by Judicial Committee—Adjudication of judgment-debtor as insolvent—Subsequent Proceedings in execution against sons and heirs only of judgment-debtor.] In execution of a decree passed in 1896 the decree-holder in December 1915 applied for the attachment of a certain property of the judgment-debtor and obtained the order of attachment on the 21st January 1916. In March 1916 the judgment-debtor applied to have the order of attachment set aside on the ground that no notice of execution had been served on him and the decree was barred by limitation. The decree-holder's contention was that the judgment had been revived by a writ of attachment issued on the 3rd February 1904 and within 12 years from that date, viz., on the 12th January 1916, the notice of execution taken out in December 1915 had been served. This application of the judgment-debtor was, in the first instance, dismissed but on appeal a remand was ordered on 23rd November 1916. On the same day the judgment-debtor was declared an insolvent by the Privy Council. The judgment-debtor died on 25th April 1918 and on 5th August 1918 the decree-holder took out a summons against the present Appellants, the sons and heirs of the judgment-debtor, to show cause why the original decree should not be executed against them and having thus revived against them brought the matter of the remand on for hearing. The decision of both the trial Judge and the High Court in appeal on the remand was that notice had been served on the judgment-debtor as alleged by him: Held—That, on the question of service of notice, there was nothing exceptional to cause their Lordships to interfere with two concurrent findings of fact. Held, further—That in the absence of information as to whether the order adjudicating an insolvent was afterwards annulled or came to a termination in	

- EXECUTION OF DECREE—**consolid.
 any way before or after the death of C, the appeal should be dismissed with the declaration that if the adjudication of the insolvency of C had not been annulled on the insolvency had not otherwise terminated on or before the date, when the order on remand was made in the High Court by the trial Judge, the said order would owing to the absence of the Receiver or other representative of the Insolvency Court be inoperative except in so far as it decided against any asserted interest of the sons and heirs of C. parties to the proceedings. **SRIPAT SINGH DUGAR v. RAI HARI-RAM GOENKA (P. C.)** ... 739
- FRAUD**—Rule that case of fraud must depend strictly on proof of fraud alleged, how far applicable to action brought by purdanashin lady. See **Purdanashin lady. SATISH CHANDRA GHOSE v. KALIDAS DASI** 177
- GIFT** by Hindû to wife whether limited or absolute—Principle of construction.] It is not accurate to say that under the Hindu law, in the case of a gift of immoveable property to a Hindu widow, she has no power to alienate unless such power has been expressly conferred, and it is possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including the power to alienate, without such express declaration—and the decisions of the Privy Council in **Surajmani v. Rabi Nath Ojha, L. R. 35 I. A. 17; a. c. I. L. R. 30 All. 84; 12 C. W. N. 231 (1907), and Bhaidas Shivdas v. Bai Gulab, L. R. 49 I. A. 1: s. c. 26 C. W. N. 129 (1921)**, do no more than affirm this proposition. **T. B. RAMACHANDRA RAO v. RAMACHANDRA RAO (P. C.)** 713
- GOOD-WILL** of business in plying ferry. See under Contract Act. **CHANDRA KANTA DAS v. PARASULLAH MULLICK** ... 345
- GUARDIAN**—Consent to appointment as such essential. See Civil Procedure Code. Or. XXXII, r. 3. **ANNADA PRASAD GHOSE v. UPENDRA NATH DEY SARKAR** ... 781
- GUARDIANS AND WARDS ACT (VIII of 1890), s. 31 (3) (a)**—Condition precedent distinguished from condition subsequent—Condition subsequent if vitiates a sale—Bona fides of sale of minor's property.] A condition precedent, if not complied with, vitiates a sale but not a condition subsequent. Where the District Judge acting under the Guardians and Wards Act empowers the guardian to sell a property of the minors for an alleged debt of theirs and further directs him to put in the bonds after these have been satisfied and so endorsed by the creditors, it does not follow that non-compliance with the latter direction vitiates the sale if actually carried out and the vendee has all along been in possession of the purchased property. Where the same property is held partly by adult co-sharers and partly by minors, the very fact that the minors' share was sold for a price little over that for which the shares of adult co-owners was sold goes to indicate the bona fides of the transaction relating to the shares of the minors. **DEAN KHAN v. DAVILLI NARAYANA (P. C.)** ... 379
- HANDWRITING**, proof of—Comparison of handwriting and evidentiary value thereof—Expert testimony of, value of. See under Will. **SREEMUTTY SARAJINI DASSI v. HARI DAS GHOSE** ... 113
- HIGH COURT, ORIGINAL SIDE**, Taxation Rules, Chap. 38, r. 32, jurisdiction, of Court or Judge to hear application and pass orders regarding payment of Counsel's fees as between Attorney and client, when no reference is made by the Taxing Officer under r. 32, applicability of, to fees to Counsel—Proviso to r. 32, if applies to and controls the jurisdiction and discretion of the Court or Judge—Proper time for making the application.] In a certain suit in the High Court, Original Side, the Judge allowed a change of Attorneys on behalf of the Defendant on condition that he should pay his former Attorney a specified sum, subject to readjustment after taxation. Upon taxation of the costs a question arose with regard to four fees of Counsel and the Taxing Officer said that he could not allow those fees without an order of Court as required by r. 32 of the taxation rules. Thereupon an application was made to the Judge by the said former Attorney for an order that in the taxing of his costs as between Attorney and client the Taxing Officer might do so irrespective of the taxation rules as regards payment of Counsel's fees. The learned Judge rejected the application on the ground that he had no jurisdiction to make the order asked for: Held—That the fact that the matter was not raised by means of a reference by the Taxing Officer does not deprive the Judge of his jurisdiction under r. 32. The Judge had jurisdiction to deal with the application and to decide the matter on its merits. The proviso in r. 32 requiring client's written authority or ratification for payment of the fees applies to the jurisdiction and discretion of the Taxing Officer only and does not control the jurisdiction and discretion of the Court or a Judge. The proviso applies to a case when the Court or a Judge has not ordered or does not order otherwise. Even assuming that r. 6 must be taken to refer to Counsel's fees, although such fees are not specifically mentioned therein, the rule is a direction to the Taxing Officer only and does not limit or control the jurisdiction of the Court or a Judge given by r. 32. It is open to the learned Judge to consider the question as to the proper time and procedure at and in which such an application should be made to him. **SAILLENDRA MOHAN DUTT v. DHABANI MOHAN ROY** ... 870
- HINDU JOINT FAMILY BUSINESS**—Admission of partner—Evidence—Evidence Act (I of 1872), ss. 17 and 21.] An arrangement was alleged to have been made with a Hindu joint family, part of whose property consisted of a joint family business, to take in as partner the person through whom the Plaintiff claimed to have a share in the family properties: Held—That no such arrangements had been proved. That a statement in a Will which suggests an inference as to a fact in issue cannot be proved by or on behalf of the person who made it or his representative in interest. **NALAM PATTABHIRAMA RAO v. MAN-DAVILLI NARAYANAMOORTHY** ... 373

HINDU JOINT FAMILY ESTATE—Losses in management—Agreement providing for surrender of share—Subsequent letter affirming agreement, not registered—Registration Act (XVI of 1908), ss. 17 (b) and 49—Mere attestation, if operates as estoppel—Indian Evidence Act (I of 1872), s. 115.] Where the manager of a Hindu joint family estate entered into an agreement with his co-sharers that on proof of losses in the management of the estate they should pay their share of such losses and in case the losses be not paid when demanded, their shares in the estate would pass to the former: Held—That the agreement by itself was sufficient to transfer the shares upon the event happening as contemplated, and that a subsequent letter to the manager admitting the loss and surrender was not an operative conveyance which required registration. Held also—That the fact that the manager had been an attesting witness to a conveyance by which his co-sharers subsequently purported to transfer the property did not estop him from denying their title. Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the documents. To operate as estoppel, the signature must be shown by independent evidence to have been meant to involve consent to the transaction. **PANDURANG KRISHANAJI v. MARKANDEYA TUKARAM** 201

HINDU JOINT FAMILY—Karta of joint Hindu family, nature and extent of his accountability.] In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the karta is liable for is as to the existing state of the property divisible, the parties have no right to look back and claim relief against part inequality of enjoyment of the members or other matters. But the karta is the accountable party, and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property now consists of, not what the karta says it is. **NIBARAN CHANDRA MUKERJI v. NIRUPAMA DEBI** ... 517

... acquisition of superior and inferior interests by, in the names of different individuals to indicate intention to prevent merger. See *Merger*. **DULHIN LACHHANABATI KUMRI v. BODHNATH TIWARI** ... 565

HINDU LAW, adoption proof of.] It is not necessary to produce direct evidence of the act of adoption; where it has taken place long since and where the adopted son has been treated as such by the members of the family and in public transactions, every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist. **JAGANNATH MARWARI v. SM. CHANDNI BEBI** 65

... customary law at variance with, if enforceable—Dhusars of Gurgaon, emigrating to the Central Provinces—Adoption of orphan, if valid.] It is beyond question that, according to the law of the Mitakshara,

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as recognised by the School of Benares, an orphan cannot be adopted. It is also beyond doubt that in some parts of Northern India, particularly in districts now in the Punjab or adjacent to the Punjab, the strict rules of the Mitakshara, as recognised by the School of Benares, have not been followed by some castes, tribes and families of Hindus, and that customs which are at variance with that law have for long been consistently followed and acted upon and that when such customs are established, they, and not the strict rules of the Mitakshara with which they are at variance, are to be applied. They are found principally amongst the agricultural classes, but they are also to be found among classes which are not agricultural. The Dhusars of Gurgaon are governed in matters of adoption not by the orthodox Hindu law but by customary law; and the adoption of orphans by Dhusars being consistent with that customary law is valid. **RAMKISHORE v. JAINARAYAN (P C.)** 891

Dayabhaga family with a minor coparcener—Loan by karta for new business started after father's death—Liability of minor—Adult brothers adjudicated insolvent and Receiver appointed of their shares—Partition between Receiver and minor and share of all properties including after-acquired given to minor—Suit against minor for money borrowed for new business—Receiver if necessary party—Indian Contract Act (IX of 1872), s. 247, scope and meaning of—Order directing accounts to ascertain Defendant's liability, appeal against—Order, if "final"—Civil Procedure Code (Act V of 1908), ss. 109, 97.] The Defendant a minor and his brothers were members of a Dayabhaga family. The ancestral businesses which their father had were carried on after the father's death by the eldest brother as karta assisted by the adult brothers and they started a new business for which they borrowed sums of money from the Plaintiffs in the two suits out of which the present appeals arose. Proceedings under the Insolvency Act were taken and the adult brothers were adjudicated insolvent and a Receiver was appointed to take possession of the adult brothers' proportionate share of all ancestral and after-acquired properties. A partition took place between the Receiver and the infant's guardian and the infant was given his proportionate share in all properties ancestral and after-acquired. The dividend received by the Plaintiffs in the insolvency, falling short of the amount due they sued to recover from the share of the Defendant, the minor, who disclaimed all interest in the new business: Held—That the suits to which the Receiver was not a party were misconceived. In the circumstances the Receiver was a necessary party to any proceeding for the purpose of realising assets liable for the firm's debts and the proceeds of any realisation would be applicable, not towards the exclusive discharge of any individual debt but for rateable distribution among the whole body of the firm's creditors. All the property of the firm vested in the Receiver on the making of the order

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of adjudication and if any part of it got improperly into the possession of the minor the right to recover it was in the Receiver. The distinction between an ancestral business and one started after the death of the ancestor as a source of partnership relations is patent. In the one case these relations result by operations of law from a succession on the death of an ancestor to an established business with its benefits and obligations. In the other they rest ultimately on contractual arrangement between the parties. Under sec. 247 of the Contract Act a minor may be admitted to the benefits of partnership but cannot be made personally liable for any obligations of the firm, but the share of such minor in the property of the firm is liable for the obligations of the firm. This share is no more than a right to participate in the property of the firm after its obligations have been satisfied. The High Court in reversing a decree dismissing the suits against the minor Defendant directed certain accounts against the Defendant, not because his liability was established but for the purpose of determining whether or not he was liable. On appeal to the Judicial Committee a preliminary objection that the order was not "final" and in consequence not appealable was overruled by the Judicial Committee. **SANYASI CHARAN MANDAL v. KRISHNADHAN BANERJI (P. C.)** ... 954

Debtor property—Order of succession of shebait as laid down in deed of endowment, if may be altered by donor.] It is clear law that the donor of a debutter property can make no change in the order of succession of shebait as laid down in the deed of endowment in the absence of a reservation to that effect in the deed. **GOURI KUMARI DAS v. INDEA KUMAR MUKHOPADHYA** ... 926

Family custom—Migration of family carrying custom of primogeniture—Custom if necessarily ceases with the cesser of office.] In a suit for partition of family properties, the principal Defendant claimed that succession in the family was governed by the rule of primogeniture, the properties being in consequence impartible and as such belonging exclusively to him as the holder of the gaddi and the title of Rada. It was not disputed that the family to which the parties belonged were Chohan Rajpoots who had migrated from their original homes into the Nimar District in the Central Provinces. Held—That the presumption was that they carried with them to their new homes the customs and institutions to which they were subject in the land of their birth. That the evidence showed that the custom of primogeniture which the family brought with them continued to govern the family under the Mahomedan, the Marhatta and the British rules up to the present time, and that the existence of the family as an entity through so many centuries was mainly owing to this custom, and the theory favoured in the Judicial Commissioner's Court that after the head of the family ceased to be the holder of a hereditary fiscal office, the junior members must

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naturally assert themselves as share-holders according to the ordinary Hindu law which in consequence would displace the custom was based on a priori reasoning of a speculative character. The mere cessation of services to which watan lands are attached which are by custom impartible does not ordinarily destroy that custom. **Ramrao v. Yeshvantaro, I. L. R. 10 Bom. 327 (1885)**, approved. **RANA MAHATAB SINGH v. BADAN SINGH (P. C.)** ... 268

Joint family—Karta, position of, if that of trustee in the strict sense—Accountability for money misapplied as karta—Interest payable thereon—Discretion of Courts in India, Privy Council if will interfere with—Adoption by Sudra—Partition among adopted son and after-born sons—Shares, if equal—Dattaka Chandrika, authority of, in Southern India and Bengal.] The trial Court directed the karta of a joint Hindu family to pay interest at 9 per cent. per annum on moneys misapplied by him, but the High Court on appeal reduced it to 6 per cent. per annum. Held, by the Judicial Committee, that it would require very special and unusual circumstances to induce it to vary such a decision which rested upon discretion even though in this matter the view of the High Court differed from that of the trying Court as to the way in which that discretion should be exercised. On the merits of the matter, too, the Judicial Committee agreed with the High Court. There are a number of fiduciary relationships in India to which the rules applicable to strict accounts between trustees and cestuis que trusts in England cannot in their entirety apply—the office of manager of a joint Hindu family affording one such instance. In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with. The rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family, an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption, although not supported by any ancient text of the Smritis or by the Mitakshara is not inconsistent, so far as Sudras are concerned, with the Smritis or the Mitakshara, and having been accepted and acted upon for at least more than a century in the Presidency of Madras until the law on the subject was disturbed in 1918 by the decision of the Madras High Court in **Karuturi Gopalam v. Karuturi Venkataraghavulu, I. L. R. 40 Mad. 632; s. c. 29 M. L. J. 710 (1915)**, should be affirmed as the law applicable in such cases in that Presidency. **Karuturi Gopalam v. Karuturi Venkataraghavulu, I. L. R. 40 Mad. 632; s. c. 29 M. L. J. 710 (1915)**, overruled. **Asita Mohan Ghosh Moulik v. Nirode Mohan Ghosh Moulik, 20 C. W. N. 901 (1916)**, approved. The Dattaka Chandrika has been for long and still is accepted in the Presidency of Madras as a treatise on adoption of the highest authority. It does not

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however follow from this, that comments and propositions contained in it, apparently novel, when the Dattaka Chandrika was first accepted in Southern India as an authority on the law of adoption, if not based upon ancient texts which can with some certainty be identified, have been accepted by the Hindus of Southern India as part of Hindu law. **ARUMILLI PERRAZU v. ARUMILLI SUBBA**. (P. C.)

Karta of joint family—Nature and extent of his liability. See **Hindu Joint Family**. **NIBARAN CHANDRA MUKERJI v. NIRUPAMA DEBI** ... 617

Maharatta School—Widow's power to adopt without husband's authority and without consent of kindred—Authority by husband—Particular boy named—Direction if operates as prohibition to adopt another boy on his death.] The rule laid down in **Rakhmabai v. Radhabai**, 5 Bom. H. C. R. A. C. J. 181 (1868), that in the Maharatta Country, a Hindu widow may, without the permission of her husband and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and bona fide performance of a religious duty and neither capriciously nor from a corrupt motive, is equally applicable whether her husband at the time of his death was joint or separate and whether his property was or was not vested in her as his heir at the time when she made the adoption. **Ramji v. Ghamau**, I. L. R. 6 Bom. 498 at p. 503 (1879) and **Dinkar Sitaram v. Ganesh Shivram**, I. L. R. 6 Bom. 505 (1879), overruled. Report of **Bayabai v. Bala Venkatish**, 7 Bom. H. C. R. App. I (1866), commented on. Where the most that could be said was that the husband directed his wife to adopt a particular boy, but said nothing as to what should be done if the boy named should be unavailable or should die after he was adopted, and the boy who was adopted after the husband's death in childhood and unmarried: Held—That there was no explicit or clearly expressed intention to prohibit the widow against adopting any boy other than the boy named, and a second adoption by the widow to her husband subsequently to his death was validly made. **YADAO v. NAMDEO** (P. C.) ... 393

Mitakshara—Joint family—Bond held in the name of a member—Separate private transactions by individual members—Presumption of jointness, if rebutted.] The presumption is that a bond held in the name of the managing member of a joint Mitakshara Hindu family is joint property and it is for those who assert the contrary to make good their case. Proof that some of the members of the joint family had some private transactions by no means proves that the particular bond in question was the private property of the member in whose name it was held. Held—That while the evidence on both sides was somewhat meagre the presumption in favour of joint ownership was not displaced. **BANDHU RAM v. CHINTAMAN** (P. C.) 406

Mitakshara joint family—Father giving up decree on behalf of self and minor son—Decree, found not binding

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on minor son, if bound father's undivided share—Power of father to dispose of joint property.] R, the managing member of a joint Hindu family, for himself and as guardian of his minor son G, after obtaining a decree for money against T, by compromise surrendered all his rights and those of G, the consideration mentioned being that T would not prosecute an appeal he had preferred against that decree. Two more sons were born to R subsequently to the compromise. G on attaining majority having sued to set aside the compromise, it was held that the compromise did not bind G: Held—That as the decree was a portion of the joint family property, R could deal with it only with the consent of G or as manager for a justifying necessity: and therefore the compromise failed as a whole and did not bind even the then existing share of R in the undivided property. That the compromise having been set aside T was entitled to proceed with his appeal. **T. R. VENKATA ROW v. T. V. TULJARAM ROW** (P. C.) ... 645

Mitakshara (Southern school)

—Succession, order of, amongst atma-bandhus—Division into ex parte paterna and ex parte materna, and preference of former to latter, if justifiable—Doctrine of of spiritual benefit, if determines preference—Propinquity alone, if ground of preference—The rule in Mitakshara, if open to question as spurious or as incomplete—Enumeration of heirs, illustrative—Viramitrodaya, authority of, in Southern India—Maternal uncle's place in the order of succession.] The passage in the Mitakshara, Chap. II, sec. 6, para. 1, laying down the order of succession amongst the bandhus has been accepted by a series of Commentators and by eminent Hindu Judges in the British Indian Courts, and any doubt at this stage as to its character or authority will lead only to perplexity and confusion. The enumeration of bandhus in the passage being intended, by way of illustration only, the rule is not open to objection on the ground of incompleteness. The question being whether according to the law of the Mitakshara as recognised in the Dravira Country, the maternal uncle or the son of the paternal aunt's son (both of whom are atma-bandhus) should succeed as the preferential heir: Held—That there is nothing in para. 598 of the *Sarasvati Vilasa* to justify the division of the atma-bandhus in two sub-classes, viz., ex parte paterna and ex parte materna or the preference of the former to the latter. That, in the absence of express authority varying the rule, the propositions enunciated in **Muttusami v. Muttukumarasami**, I. L. R. 18 Mad. 23 (1892): affirmed on (P. C.): I. L. R. 23 I. A. 83; s. c. I. L. R. 19 Mad. 405 (1896), furnish a safe guide, and the maternal uncle, who was undoubtedly nearer in degree and who offered oblations to the father and grandfather of the deceased, whilst the son of the paternal aunt's son offered none, was the preferential heir. The place assigned by Sarbadhikary and Mayne to the maternal uncle in their tables of succession questioned. Although the

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Smriti Chandrika in the Southern Presidency is regarded as the most authoritative commentary on Vijnaneswara's work, the Viramitrodaya holds, as in Western India, a high position. A. S. VIDACHELA MUDALIAR v. K. I. RANGANATHAN CHETTIAR (P. C.) ... 159

Mitakshara—Partition, clear expression of intention to separate, if effects—After notice expressing intention to separate, joint family if liable for marriage expenses of members—Father's right to give money to daughter.] Under the Hindu law, it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family. Under the law of the Mitakshara, an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which until then he had held in jointness. No obligation therefore lay on the joint family to provide for the expenses of the marriage of some of the Plaintiffs which took place after the latter had given to their co-parceners a notice clearly expressing such an intention but before a decree for partition was made in their suit in the Court of first instance. The father has undoubtedly the power under the Hindu law of making within reasonable limits gifts of moveable property to a daughter and in one case the Judicial Committee upheld the gift of a small share of immoveable property on the ground that it was not shown to be unreasonable. K. RAMALINGA ANNAVI v. NARAYANA ANNAVI (P. C.) 929

Southern India—Inheritance—Division amongst sons by putrabhag approvable as custom—Custom proved as prevailing amongst Chettis of certain villages, if open to objection as unreasonable, as a local custom—Chettis, if Sudras.] Though division of the inheritance amongst sons by putrabhag (i.e., according to the number of sons) is now the recognised rule of Hindu law, there are traces of division by putrabhag (i.e., according to wives). Therefore, though the prevailing law is putrabhag, putrabhag may be proved to exist as a territorial family or caste custom specially in Southern India, where it is possible that the matriarchal theories of the earlier inhabitants may have led to the prevalence of this custom and caused difficulties in the way of its being extirpated by the Brahmans when they introduced the law of the Smritis in Southern India. The Chettis are generally deemed to be Sudras. Held, on the evidence, that the custom of putrabhag proved in the case was one of the particular class of Chettis who happened to dwell in, and probably were at the moment the only dwellers in, an area of seven villages; and such a custom could not rightly be described as a local custom, which it would be unreasonable to impose upon all persons dwelling in the area. PALANIAPPA v. ALAYAN CHETTI (P. C.) ... 417

HINDU LAW. Temple property, permanent lease of, questioned after 100 years—presumption that alienation was lawfully made.] The disability of a shebait of a Hindu Deity to make a permanent grant of endowed property is not absolute. Although the shebait for the time being has no power to make a permanent alienation of such property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power. Chockalingham Pillai v. Mayandi Chettiar, I. L. R. 19 Mad. 485 (1896), followed. The above principle was applied in the present case of a permanent lease of temple property which was challenged after the lapse of 100 years, when it had become completely impossible to ascertain the circumstances which caused the grant to be made. The importance to parties to litigation in India of defining at the earliest moment and in the simplest terms the exact character and extent of the dispute which is going to be made the subject of litigation adverted to. BAWA MAGNIRAM SITARAM v. SHETHI KASTURBHAI MANIDHAI (P. C.) ... 473

Will—Construction—Bequest to widows by Mithila Hindu—Interest given whether absolute or limited—"Malik," "malkiyat," meaning and effect of—Danger of construing one Will by reference to another—Translation of vernacular documents, challenged in the High Court—Proper procedure.] The term "malik," when used in a Will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred. But the meaning of every word in an Indian Will must always depend upon the setting in which it is placed, the subject to which it related, and the locality of the testator from which it may receive its true shade of meaning. Where a Hindu governed by the Mithila School of Hindu law purported by his Will to confer on his wives "full power and all proprietary rights (malkiyat) over all his moveable and immoveable properties": Held—That the rights intended to be conferred included full rights of alienation. It is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will, which was adopted by a Court in another case. Proper procedure where the correctness of the official translation of a vernacular document is challenged in the High Court indicated. MUSAMMAT SASIMAN CHOWDHURAIN v. SHIB NARAYAN CHOWDHURY (P. C.) ... 425

Will—Construction—"Malik." If a term of art and imports full ownership—Trust, if valid, when subject-matter uncertain.] A Hindu testator gave the whole of his immoveable estate to his wife as

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"malik" and directed that she should leave the property to his two daughters in such manner as she might like: Held—That the word "malik" taken in conjunction with the context indicated a clear intention to pass an absolute estate, and that even assuming it were intended to create a trust, the subject-matter of such trust was too uncertain. The word "malik" is not a term of art, it does not necessarily define the quality of estate taken but the ownership of whatever that estate may be, but in the context of the present Will, it imported that the estate was absolute. If words are used in a Hindu's Will conferring absolute ownership upon the wife, the wife enjoys the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended. *Mussammat surajmani v. Rabi Nath Ojha*, L. R. 35 I. A. 171; s. c. I. L. R. 30 All. 84; 12 C. W. N. 231 (1907), referred to. *BHAIDAS SHIVDAS v. BAI GULAR* (P. C.) ... 129

Right of succession of young widowed daughter in a caste where widow remarriage is permitted—Necessity of proof of custom entitling the widowed daughter to succeed equally with a married daughter.] A Hindu was succeeded by his widow, and on her death, the contest for succession was between a childless widowed daughter aged 16 or 17 and a married daughter having a son. In the caste to which the parties belonged widow remarriage is permitted: Held—That though widow remarriage is a custom in the caste, that does not by itself predicate the further custom that the widowed daughter, because it is open to her to remarry, is entitled to succeed equally with the married daughter. There must be clear proof of custom entitling the widowed daughter to succeed equally with the married daughter. *BINO DINI HAZRANI v. SUSTHA HAZRANI* 29

Widow—Power to make permanent lease—Benefit of estate—Acquisition of tenant's rights—Accretion to husband's estate—Onus on Appellant to show error in judgment appealed from.] A permanent lease executed by a Hindu widow does not bind the reversioners unless legal necessity and benefit to the estate are proved. The mere fact that the rent and purchase price represent the fair market value does not of itself prove necessity. Tenant rights acquired by a Hindu widow are, in the absence of proof that they were acquired out of the accumulated savings of her income and were dealt with as her separate property, accretions to her husband's estate and as such cannot be sold by her so as to give a title as against the reversioners. *NARA KISHORE MONDAL v. UPENDRA KISHORE MANDAL* (P. C.) ... 322

HINDU WIDOW RE-MARRIAGE ACT (XV of 1856)—Son dying after mother's remarriage—Right of mother to inherit—Widow—[Apert from any provisions of the Hindu Re-Marriage Act, a Hindu mother may inherit from her son by a former marriage, the son having died after her re-

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HINDU WIDOW RE-MARRIAGE ACT—concl'd. marriage. *Akorah Sooth v. Boreanae*, 2 B. L. R. 199; 11 W. R. 82 (1868), referred to. *HAR KISHORE SEAL v. THAKUR DHAN BAISHNUH* ... 925

INCOME TAX ACT, INDIAN (VII of 1918), ss. 31, 33, 34—Assessment to super-tax as agent of principal non-resident in British India—Agent who is—Agent, if must be in receipt of income on behalf of principal.] The applicant Company was assessed to super-tax as agent for six share-holders in the Company all of whom were non-residents of British India in regard to the dividends payable to them by the Company: Held per Woodroffe and Greaves, JJ.—That secs. 31 and 34 of the Indian Income Tax Act are to be read together, the latter section merely defining who may be included as an agent under sec. 31. That being so the agent must be in receipt of income within the terms of sec. 31 and the Company was not in receipt of income on behalf of the share-holders within the meaning of sec. 31. That even if the two sections be read disjointly the Company was not in the circumstances of the case an agent within the terms of the Act. That in this view no question as to the propriety of assessment to super-tax as agent arose. Per B. B. Ghose, J., contra.—Under sec. 33, sub-sec. (1), the agent of any person residing out of British India whose income accrues or arises within British India need not be in receipt of the income on behalf of such person to be assessable to the tax in respect of such income; the mere fact of agency is sufficient. Sec. 34 was enacted for the purpose of assessing the income of such non-residents when they have not appointed agents residing in British India who might be assessed under sec. 33 (1). It is only necessary that the person on whom the Collector has served a notice under sec. 34 is a "person employed by or on behalf of a person residing out of British India or having any business connection with such person" and if that condition is satisfied the person on whom such notice has been served shall for the purposes of the Income Tax Act be deemed to be the agent of such person. That the Company was such an agent and was rightly assessed to super-tax as such. *THE IMPERIAL TOBACCO COMPANY OF INDIA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL* ... 745

INSOLVENCY—Receiver if necessary party to suit against minor coparcener whose adult brothers have been adjudicated insolvent in respect of money borrowed by elder brother as karta for new business started after father's death. See under Hindu law. *SANYASI CHARAN MANDAL v. KRISHNADHAN BANERJI* ... 954

Presidency Towns Insolvency Act (III of 1909), ss. 5, 6, 38, 101, s. 18, Sch. II—Appeal, time within which to be filed—Signing of the findings and of the report—Jurisdiction of the Registrar in insolvency—Validity of a mortgage, whether could be decided by the Registrar—Consent when infants are concerned, effect of.] Under sec. 101 of the Presidency Towns Insolvency Act, 1909, the period of limitation for an

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appeal from the order of the Registrar in insolvency is twenty days from the time when the report is signed by the Registrar and the matter is thereby completed and not from the time when the findings of the Registrar are signed or filed. The Registrar in Insolvency has no jurisdiction to deal with the question of validity or otherwise of a mortgage alleged to have been executed by the insolvent. *Re, LAL-BERARY SHAH* ... 631

Presidency Towns Insolvency Act (III of 1909), s. 36—Order under section, when can be properly made—Admission of proof of debt by Official Assignee a condition precedent. The words in sec. 36, "any creditor who has proved his debt" mean not merely a creditor who has lodged proof of his debt but a creditor whose proof has been admitted by the Official Assignee and unless this has been done no order can be made under the section. The mere fact that a creditor's name was included in the schedule filed by the insolvent and that so far his claim has not been challenged does not assist him if his debt has not been admitted by the Official Assignee so that he becomes a creditor who has proved his debt within the meaning of sec. 36 of the Act. *RE, ABDUL SAMAD* ... 744

Presidency Towns Insolvency Act (III of 1909), ss. 55 and 56—Application, to be made by the Official Assignee—Creditor, if may apply when the Official Assignee refuses to act. An application under secs. 55 and 56 of the Presidency Towns Insolvency Act, 1909, should be made by the Official Assignee in whom the property of the insolvent is vested. If the Official Assignee refuses to take action when asked, a creditor may make such an application with the leave of the Court. *RE, SURAJMULL MUNGLE-CHAND* ... 803

Presidency Towns Insolvency Act, (III of 1909), ss. 70, 82—Separate creditors—Misfeasance, neglect or omission—Distribution of assets—Notice of claim not disposed of—Personal liability of the Official Assignee—Method of ascertaining his liability—Costs. The Official Assignee distributed the assets of the insolvent after deducting commission, etc., to the two scheduled creditors, though he had notice of claim by three other creditors and their claims were neither admitted nor rejected. Held—That the Official Assignee was personally liable for the amount of which the three creditors had been deprived. A creditor who lodges his proof in the statutory form is entitled that it should be dealt with without doing anything more. *RE, ARCHIBALD GILCHRIST PEACE* ... 652

Provincial Insolvency Act (V of 1920), s. 4, sub-s. (1)—Decision of question of title, how far discretionary with Court—Sub-s. (3). Court if bound to take evidence or give reasons for refusing to decide questions of title or for holding that the insolvent has a saleable interest in any property and ordering its sale—Nature of materials upon which Court may come to such decision. A was adjudicated an in-

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solvent, and a Receiver was appointed. After various intermediate proceedings the insolvent's brother B. appeared in Court and laid claim to certain properties. The Judge put to him certain questions and elicited certain answers. The Receiver also submitted a report and a petition on the same date. The Judge after considering the report and the petitions submitted and after hearing pleaders refused to go into the question of title and decided that the insolvent had a saleable interest in the properties. He thereupon directed the Receiver to sell the insolvent's right, title and interest in the properties under the provisions of sub-sec. (3) of sec. 4 of the Provincial Insolvency Act. Held—That though the Court had power under sub-sec. (1) of sec. 4 to decide a question of title, it had full discretion to follow the course laid down in sub-sec. (3), i.e., to refuse to decide questions of title and to direct sale of insolvent's right, title and interest, whatever that might be. Where the Court has reason to believe that the debtor has a saleable interest in any property, it may without further enquiry sell such interest. The matters stated in the report of the Receiver and the answers given by the claimant when questioned by the Judge, were sufficient materials for his coming to the conclusion that the debtor had a saleable interest in the property. *JITENDRA NATH BHATTACHARJEE v. FATEH SINGH NAHOR* ... 822

INTEREST, right of creditor to appropriate to, in case of indefinite payment. See under Debt. *RAI BAHADUR SETH NEMICHAND v. SETH RADHA KISHEN* ... 153

discretion of Court as to. See Civil Procedure Code, sec. 34. *PANNA LAL v. NIHAL CHAND* ... 737

INTERLOCUTORY ORDER, leave to appeal to Privy Council against. See Civil Procedure Code, sec. 109. *SHIVA PRASAD SINGH v. RANI PRAYAG KUMARI DEBI* ... 819

JUDGMENT, within the meaning of cl. 15 of the Letters Patent. See Letters Patent. *GOUR MOHAN MULLICK v. NAYAN MANJURI DASSI* ... 243

JUNGLE OR WASTE LAND—Presumption of possession if Plaintiff proves title. See under possession, suit for recovery of. *RAKHAL CHANDRA GHOSH v. DURGADAS SAMANTA* ... 724

KABULIYAT, covenant in, for payment of selami at every transfer in respect of a tenure if enforceable after a sale in execution of a money decree. See under Tenure. *KUMAR MONMATHA NATH MITRA v. CHUNI LAL GHOSH* ... 173

KARNAM—Land attached to office of Karnam—Nature of tenure—Land appurtenant to office and impartible—Enfranchisement and inam grant, effect of—Law governing Palayams, not applicable. In Madras, the Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is member of a particular family. It follows that land appurtenant to the office so enjoyed should continue to go with that office and

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should accordingly be impetible. The enfranchisement of the Karnam lands in 1906, whereby the Inam was confirmed to V, "his representatives and assigns, to hold and dispose of as he or they might think proper," subject to the payment of quit rent, etc., and the reservation of minerals, did not enure for the benefit of the joint family of which V was a member but to him exclusively. Different considerations apply to the case of a Palayam; for when a Palayam was abolished, in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar in the same manner as if possessed by a zamindar, and the Full Court of Madras were in error in applying the law regarding Palayams by analogy to a Karnam case in *Gunnaiyan v. Kamakchi Ayyar*, I. L. R. 26 Mad. 339 (1902). The decision of the majority in *Venkata v. Rama*, I. L. R. 8 Mad. 249 (F. B.) (1884), approved. *Pingala Lakshmiipathi v. Bommireddi Palli Chalamayya*, I. L. R. 30 Mad. 434 (1907), overruled. **MUSTI VENKATA JAGAN-NADHA SARMA v. MUSTI VEERA-BHADRAYYA** (P. C.) ... 302

KAZI, District Judge as. MOHSINUDDIN AHMED v. KHABIRUDDIN AHMED ... 246

LAKHERAJ lands in the zemindari of Venkata-giri—Government, if may assess revenue thereon—Inam rules, if apply to them—Permanent settlement of revenue, if could be concluded apart from Reg. XXV of 1802 (Mad.)—Ss. 3 and 4—Reg. XXXI of 1802 (Mad.), scope of.] Sec. 4 of Reg. XXV of 1802 (Mad.), by which Government in concluding permanent settlement of revenue with the zamindars of the Madras Presidency reserved to itself the power of imposing additional revenue upon lakheraj lands, had no application to the Venkata-giri zemindari, inasmuch as the sunnud-i-milkaut istimrar granted by the Government to the zemindar in respect of it made no such reservation and must, in view of the provisions of sec. 3 of the Regulation and the necessity which arose of making separate arrangements with powerful zemindars, have been granted independently of the provisions of the Regulation. Reg. XXXI of 1802 (Mad.) refers entirely to procedure appointed for the investigation of title to hold lands exempted from payment of revenue. **THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAJA-GOPALA KRISHNA YACHENDRA BAHADUR** (P. C.) ... 800

LAND ACQUISITION ACT (1 of 1894), s. 11—Apportionment of compensation by Collector—S. 18 and proviso to s. 31, cl. (2), maintainability of a separate suit by a person dissatisfied with the appointment but who did not ask for reference to "Court." Some lands were acquired for a Railway and the Collector, after serving notice under sec. 9 of the Land Acquisition Act on the zamindar and the putnidar, apportioned the compensation half and half between them. Neither party applied for any reference to Court under sec. 18 of the Act, and the putnidar withdrew the amount awarded to him. The zamindar thereupon brought a suit for recovery of

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the amount withdrawn by the putnidar on the ground that under the putni kabuliyyat, the putnidar was not entitled to any portion of the compensation money; Held—That the zamindar having been served with notice under sec. 9 of the Act was bound to apply for a reference under sec. 18 when he was dissatisfied with the award, and he cannot maintain a suit in the ordinary Civil Court to re-open the question. The Act creates a special jurisdiction and provides a special remedy. And ordinarily when jurisdiction has been conferred upon a special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive and the ordinary jurisdiction of the Civil Court is ousted. *Bhandi Singh v. Kamagnin Roy*, 10 C. W. N. 991 (1905), *Stevens v. Jeacocke*, 11 Q. B. 731 (1848), *West v. Downman*, I. R. 14 Ch. Div. 111 (1880) and *Rama Chandra v. The Secretary of State for India in Council*, I. L. R. 12 Mad. 105 (1888), followed. Under the third proviso to sec. 31, cl. (2), a person who was a party to the apportionment proceedings cannot re-open the question by a regular suit. The proviso must be given a limited application, and it applies only to cases where the person was under a disability or was not served with notice of the proceedings before the Collector. *Raja Nilmani Singh Deo Bahadur v. Ram Bandhu Rai*, I. L. R. 7 Cal. 388 (1881), discussed and followed. *Punnabati Dai v. Raja Pudmanand Singh*, 7 C. W. N. 538 (1903), discussed and dissented from. *Hurmurt Jan Bibi v. Padma Lochan*, I. L. R. 12 Cal. 33 (1885), referred to. **SAIBESH CHANDRA SARKAR v. SIR BEJOY CHAND MAHATAP BAHADUR** ... 586

s. 54—"Award," if includes decision on disputed question as to disposition of compensation money.] The "award" as constituted by the Land Acquisition Act is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment amongst persons whose interest are not in dispute. A dispute between interested people as to the extent of their interest forms no part of the "award." The determination of such a dispute in the High Court was a decree and appealable as such to the Privy Council. *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*, I. R. 39 I. A. 197; s. c. 16 C. W. N. 961 (1912), *Sreemati Trinayani Dassi v. Krishna Lal De*, 17 C. W. N. 935n (1910) and *Balaram Bharamaratar Ray v. Sham Sunder Narendra*, I. L. R. 23 Cal. 526 (1890), commented on. **T. B. RAMA-CHANDRA RAO v. A. N. S. RAMA-CHANDRA RAO** (P. C.) ... 713

LANDLORD AND TENANT—Renewal, covenant of—Dossara bundbust, meaning of.] Where a kabuliyyat stated that after the expiry of the term of the tenancy the tenant would take a *दोसरा बन्डबस्त* (dossara bundbust) and on his failure to take the same the landlord would be competent to grant settlement thereof to any other tenant: Held—That the covenant was one for renewal on the same terms as the previ-

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ous tenancy. *Lani Mia v. Mohammed Easin Mia*, 20 C. W. N. 948 (1915) and Secretary of State for India v. *Forbes*, 18 C. L. J. 217 (1912), referred to. *GURU PROSANNA BHATTACHERJEE v. MADHUSUDAN CHAUDHURY* ... 901

LEASE, UNREGISTERED, admissibility of. See under Registration Act. *SANJIB CHANDRA SANYAL v. SANTOSH KUMAR LAHIRI* ... 329

of land under a compromise decree—Lessee, if entitled to suspension of entire rent when he does not get possession of a portion of the leasehold, known to both parties to be in the possession of a stranger—Liability for proportionate rent—Lessor's bona fides and mala fides, effect of. *A.* purchased a jote at a sale for arrears of rent, but found the major portion of it in the possession of *B.* and the rest in the possession of *C.* He thereupon brought a suit against *B.* for declaration of his title to, and khas possession of, the land in *B.*'s possession. The suit was compromised and under the compromise *B.* took a lease of the entire jote, but did not obtain possession of the portion which was in *C.*'s possession. *A.* subsequently brought a suit against *B.* for arrears of rent of the entire jote: Held—That where the lessor has evicted the lessee from a part of the land demised the entire rent is suspended. *Sarada Prosad v. Monmotha Nath*, 19 C. W. N. 870 at p. 871 (1914), referred to. In the present case there is no question of eviction by the lessor or by any one claiming under him or by his procurement. *Hurriah Chandra v. Mohini Mehan*, 9 W. R. 582 (1868), *Bullan v. Lalit Jha*, 3 B. L. R. App. 119 (1869), *Naraina Swami v. Yerramallu*, 1 L. R. 33 Mad. 499 (1910) and *Annada v. Mathura Nath*, 13 C. W. N. 702 (1909), distinguished. The present case is not an ordinary case of settlement, where the lessor has to deliver possession of the land demised to the lessee. The lessee was already in possession (though wrongful) of the major portion and took settlement of the entire jote with full knowledge that a portion of it was in the wrongful possession of a third party. These indicate an intention that the liability of the lessee to pay rent in respect of the portion in his possession already did not depend upon the delivery of possession of the other portion which was in another's possession. The lessor never put any obstruction in the way of the lessee recovering possession and there is no question of mala fides on the part of the lessor. Therefore the lessee cannot claim suspension of the entire rent, and he is liable to pay proportionate rent in respect of the portion of the jote in his possession. *Manindra Chandra v. Narendra Nath*, 23 C. W. N. 585 (1919), *Stokes v. Cooper*, 3 Camp. Rep. 513n (1814), *Smith v. Raleigh*, 3 Camp. Rep. 513 (1814), *Reeve v. Bird*, 1 Cr. M. & R. 31 at p. 36 (1834) and *Neale v. Mackenzie*, 1 Meeson & Welsby 747 (1838), referred to. *NARENDRO CHANDRA LAHIRI v. MANINDRO CHANDRA NANDY* ... 826

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Covenant in permanent lease prohibiting transfer without lessor's permission, validity of. See head-note under Bengal Tenancy Act, sec. 179. *SWARNA KUMAR GHOSE v. PRAHLAD CHANDRA SARKHEL* ... 874

LEGAL PRACTITIONERS ACT* (XVIII of

1879), s. 28—Pleader's suit for fees upon oral agreement, if maintainable. Where a suit by a Pleader for fees against his client is based on an agreement he cannot succeed unless the agreement is both in writing signed by the party to be charged and filed as provided in sec. 23 of the Legal Practitioners Act. Consequently no suit upon an oral agreement can succeed under the section. *Ishan Ch. Kar v. Ram Charan Pal*, 20 C. L. J. 445 (1914), *Shib Kishore Ghosh v. Manik Chandra Nath*, 21 C. L. J. 618 (1915), *Raghunath Saran Singh v. Sri Ram*, 1 L. R. 23 All. 764 (1906), and *Sarat Chandra Ray Chowdhury v. Chandi Charan Mitra*, 7 C. W. N. 900 (1904), referred to. *DEACHARAM LAHIRI v. SUDEBI DAS* ... 789

LETTERS PATENT, cl. 15—Judgment—Suit on behalf of a lunatic—Benefit of the lunatic—Application to take the plaint off the file—Dismissal of the application—Right to apply at the hearing—Final decision. In a suit instituted on behalf of a lunatic one of the Defendants applied for taking the plaint off the file on the grounds, amongst other, that the suit was not for the benefit of the lunatic and was an abuse of the process of the Court. The Court dismissed the application on the ground that on the materials before the Court at that stage, the Court was not prepared to hold that these grounds were substantiated. The Defendant appealed: Held—That the order dismissing the application was not a "judgment" within the meaning of cl. 15 of the Letters Patent, inasmuch as the said order did not finally decide any right between the parties, it being open to the Defendant to substantiate the grounds by further materials at the hearing of the suit. The Justices of the Peace for Calcutta v. The Oriental Gas Co., 8 B. L. R. 434 at p. 452 (1872) and *Rambhadrav v. Mongilall Dalimchand*, 23 C. W. N. 1017 (1919), referred to. *GOTIB. MOHAN MULLICK v. NOYAN MANJURI DAS* ... 242

LIMITATION—Execution, application for—

Objection on the ground that decree had been satisfied out of Court—Objection and application both dismissed for default—Subsequent application for execution, if in continuation of previous application. A decree-holder after applying for execution filed processes and process-fees as directed by the Court. Thereafter the judgment-debtor objected to the issue of execution on the allegation that the decree had been satisfied out of Court. On a subsequent date on which both the application for execution and the objection had been fixed for hearing, the latter case was dismissed for default, and the Court recorded the further order: "the decree-holder has no objection to his case being dismissed provided

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he gets his costs. The execution case is dismissed for default. The decree-holder will get his costs;” Held—That the order dismissing the execution case must be treated as equivalent to an order for striking off the case or removing it from the file for the convenience of the Court; and a subsequent application for execution made more than three years after the date of the first application was therefore to be regarded as one in continuation or revival of the previous application. **CHOWDHURY AJODHYA NATH PAHARY v. CHOWDHURY SRINATH CHANDRA PAHARY** ... 538

LIMITATION ACT (IX of 1908), s. 14, applicability of, when the parties in the two proceedings are not the same—Arts. 62 and 97, which applies, where an execution purchaser of a putni paid rent to the zemindar after the setting aside of the sale by the first Court and during the pendency of infructuous appeal—Existing consideration, meaning of.] Plaintiff purchased a putni at a sale held under Reg. VIII of 1819 in May 1908. In October 1910 the purchaser paid rent to the zemindar after the sale was set aside by the Court of first instance in May 1910, and during the pendency of an appeal by the zemindar, which was ultimately dismissed. There were certain proceedings for assessment of mesne profits between the purchaser and the original putnidar on the basis of the decree for cancellation of the sale. Thereafter the said purchaser in February 1916 sued for recovery of the money paid as rent to the zemindar: Held—That the suit was barred. In view of the provisions of sec. 14 of the Limitation Act, the Plaintiff was not entitled to a deduction of the time during which the mesne profits proceedings were going on as the zemindar was not a party therein, nor was there, since October 1910, any period of time when the right of the Plaintiff to sue was suspended by reason of events over which he had no control. **Prannath v. Rookea**, 7 M. I. A. 323 (1899), **Surnomoyee v. Soshee Mookhee**, 12 M. I. A. 244 (1898) and **Nrityamoni v. Lakhan Chandra**, I. L. R. 43 Cal. 680; s. c. 20 C. W. N. 552 (P. C.) (1916), referred to. That Art. 62 of the Limitation Act applied to the case. The fact that there was failure of consideration at the time the payment was made in October 1910 attracted the operation of the bar imposed by Art. 62. Art. 97 did not apply because at the time when the money was paid there was no subsisting consideration. **Hukum Chand Bold v. Pirthi Chand Kal Chowdhury**, 23 C. W. N. 721 (P. C.) (1912), **Raghunoni Audhikari v. Nilmoni Singh Deb**, I. L. R. 2 Cal. 393 (1877) and **Mahomed Wahib v. Mohamed Amir**, I. L. R. 32 Cal. 527 (1905), referred to. **JANAKI NATH SINHA ROY v. BIJOY CHAND MAHATAB BAHADUR** ... 271

s. 19, valid acknowledgment, what is—Endorsement on the back of a mortgage bond stating only that a certain sum on account of the principal was paid, if is a valid acknowledgment saving limitation.] In a suit upon a

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mortgage bond securing an advance of Rs. 5,700, the question was whether an endorsement made on the back of the mortgage bond by the mortgagor in the following terms: “Paid on account of the principal as per separate accounts Rs. 1,751 only” was a valid acknowledgment within sec. 19 of the Limitation Act. Held—That the expression “the principal” must be taken to refer to the principal mentioned in the bond on the back whereof the endorsement was made. The examination of the bond shows that the principal advanced being Rs. 5,700, a payment of Rs. 1,751 on account of that principal cannot be taken to wipe out the liability and there was thus an acknowledgment of the right of the mortgagee to recover whatever might be found to be due. Therefore, the endorsement constituted an acknowledgment within the meaning of sec. 19 and consequently saved limitation. **Shearman v. Fleming**, 5 B. L. R. 619 (1870) and **Madhavray v. Gulabhai**, I. L. R. 23 Bom. 177 (1898), distinguished. **Maniram Seth v. Seth Rup Chand**, I. L. R. 33 Cal. 1047; s. c. 10 C. W. N. 874 (P. C.) (1906), referred to. **PROSANNA KUMAR ROY v. NIRANJAN ROY** ... 213

sec. 19 if applies to cases under the Bengal Tenancy Act. **PARESH NATH PAL CHOWDHURY v. ISMAIL SARDAR** ... 486

s. 20—Uncertified payment of an instalment decree, if saves limitation—Civil Procedure Code (Act V of 1908), Or. 21. r. 2—Certification of payment, if can be made at any time.] After the passing of an instalment decree, some instalments were paid within three years of the date of the decree. The payments were not certified to the Court before the application for execution, but were certified by a petition presented after the application for execution was made and made a part of the said application. The said application for execution was made more than three years after the date of the decree, but within three years from the dates of the said payments: Held—That the payments, which were evidenced by letter written and signed by the judgment-debtor, having been made within three years of the decree and within three years of the present application for execution, and they having been certified by a petition which was made a part of the application for execution, the application for execution was not barred by limitation. **Lakhi v. Felamoni**, 20 C. L. J. 131 (1914), **Khatibunnissa v. Sanchia**, I. L. R. 43 Cal. 207; s. c. 20 C. W. N. 272 (1915), and several other cases referred to. **MADAN MOHAN BANIKYA v. HARULAL KUNDU** ... 531

s. 22—Addition of Plaintiffs after period of limitation, if a sufficient ground for throwing out the suit as barred without any finding as to whether the added Plaintiffs were necessary parties.] A finding that some of the Plaintiffs were made parties after the period of limitation is not sufficient to hold the suit barred. There may be circumstances in which addition of parties subsequently

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brought on the record may not be essential and may be merely for the protection of the Defendant and therefore there should be a finding as to whether the added parties are necessary parties to the suit and if not whether the suit can proceed without them. **SITAL PROSHAD PODDAR v. KAIFUT SHEIKH** ... 488

Art. IIA, applicability of, to order dismissing case for default. See Civil Procedure Code, Or. 21, rr. 98, 99, 101, 103. **SM. NIRODE BARANI DAS v. MANINDRO NARAYAN CHANDRA** ... 853

Arts. 39, 120. See under Civil Procedure Code, Or. VI, r. 17. **GYANENDRA NATH CHAKRAVORTI v. PABESH NATH PAL** ... 73

Art. 89 or 120—Applicability of where an agent is sued for accounts after the principal's death. See head-note under Contract Act. **SM. SAROSHIBALA DAS v. CHUNI LAL GHOSH** ... 320

Arts. 91, 95 and 120, s. 18—Suit for setting aside or cancelling a written instrument on the ground of fraud and declaration of title—Deed if need be set aside when instrument void ab initio. Plaintiff prayed inter alia (1) for a declaration that a deed of gift was void and inoperative in that the donor signed the deed believing, owing to the fraud and misrepresentation of the donee, that it was only a power of attorney, and (2) for a declaration of title in certain Government Promissory Notes, the subject of the deed of gift. The deed was signed on the 12th July 1906 and the donor came to know of the fraud on the 23rd January 1915, and the suit was instituted on the 22nd December 1919: Held—That the three years' limitation provided by Arts. 95 and 91 of the Limitation Act did apply to the suit, inasmuch as the principle laid down in *Foster v. Mackinnon*, L. R. 4 C. P. 704 at p. 711 (1869), that the alleged deed is no deed was applicable so that the deed being void ab initio did not require to be set aside or cancelled. Held further, with reference to the relief sought for in cl. (2) of the prayer, that Art. 120 of the Act would apply and that sec. 18 would prevent the period of limitation from running until the fraud became known. *Rani Janki Kunwar v. Raja Ajit Singh*, L. R. 14 I. A. 148 (1887) and *Malkarjan v. Narhari*, L. R. 27 I. A. 216: s. c. I. L. R. 28 Bom. 597; 5 C. W. N. 10 (1900), distinguished. **SARAT CHANDRA GUPTA v. KANAI LAL CHAKRAVARTI** 479

Arts. 89, 115, 116—Applicability of. See Suit for accounts. **PRAM RAM MOONERJEE v. MOHARAJ KUMAR JAGADISH NATH BOY** ... 61

Art. 91, applicability of when Plaintiffs seek possession on declaration that Defendant's document of title wholly void—Time from which limitation runs when deed voidable. See full head-note under Parnaship lady. **NIBARAN CHANDRA MUKERJI v. NIRUPAMA DEBI** ... 517

Sch. I, Art. 100—Money received by partner after dissolution of

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partnership—Suit by other partner for recovery of share therein, if maintainable after suit for general accounts barred—Position where an item falls in after accounts squared off—Fresh cause of action. It is contrary to the policy of the Legislature to allow a partner, whose right to sue for a general partnership accounts has been barred by limitation, to sue for his share of specific payments received from debtors by one partner subsequently to the dissolution of the partnership, permitting the latter by way of set off to claim what may be found due to him upon taking the partnership accounts. If a partnership has been dissolved and the accounts have been wound up and each partner has paid what he has to contribute to the debts of the partnership and received his share of the profits, the mutual rights and obligations having been thus all discharged, and then it turns out afterwards that there was some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or for any other cause, which item afterwards becomes of value and falls in, it ought to be divided between the partners in proportion to their shares in the original partnership. If on the other hand no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy, then it is also too late to claim a share in an item as part of the partnership assets. *Knox v. Gye*, L. R. 5 H. L. 656 (1872), considered. Obiter dictum to the contrary in *Dayal v. Khatav*, 12 Bom. H. C. R. 97 (1875) and decisions in *Merwanji v. Rustomji*, I. L. R. 6 Bom. 628 (1882), *Sokkanadha v. Sokkanadha*, I. L. R. 28 Mad. 344 (1904) and *Thiruvengada v. Sadagopa*, I. L. R. 34 Mad. 112 (1910), overruled. **K. GOPALA CHETTY v. T. G. VIJAYARAGHAVAGHARIAR (P. C.)** ... 277

Sch. I, Arts. 109, 62, 120—Suit on mortgage—Profits received by transferee pendent lite—Suit by purchaser at mortgage sale to recover same—Profits if "wrongfully received." The words "wrongfully received" in Art. 109 of the Limitation Act, include receipts of profits that cannot be legally substantiated. It was held in a suit between the purchaser at a mortgage sale and the holder of a usufructuary mortgage granted by the mortgagor after the passing of the mortgage decree that the usufructuary mortgage was void as against the purchaser owing to the application of the doctrine of his pendens. The purchaser having sued the usufructuary mortgagee to recover rents realised by the latter from certain tenants of the property before the Plaintiff obtained possession under his purchase: Held—That Art. 109 of the Limitation Act applied to the case. **NAGENDRO NATH PAL v. SARAT KAMINI DAS** ...

Art. 120, applicability of, Art. 120 of the second schedule to the

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Indian Limitation Act, if applicable to a suit for declaration of title to immovable property which must consequently be brought within six years from the date when the right to sue accrues. **JOY NARAYAN SEN UKIL v. SRIKANTHA ROY** ... 206

... sec. 23, Arts. 120 and 144—Applicability of to suit for declaration of public right of way. See Right of way. **HARISH CHANDRA SAHA v. PRAN NATH CHAKRABARTY** ... 587

... sec. 23, Arts. 120, 142—period of limitation applicable to a suit for declaration of title to property after attachment under sec. 146, Criminal Procedure Code. See head note under Specific Relief Act. **PANNA LAL v. PANCHU RUIDAS** ... 432

... Arts. 134, 144, sec. 10—Permanent lease by Mohant of Mutt without necessity—Lessee if acquires title by adverse possession after twelve years. See Mohant of Mutt. **SRI VIDYA VARUTHI THIRTHA SWAMIGAL v. BALUSAMI AYYAR (P. C.)** ... 537

... Art. 137, applicability of, where tenure purchased under rent law and not right and interest of judgment-debtor only.] See under Bengal Tenancy Act, sec. 187. **JNANENDRO MOHAN DUTT v. UMESH CHANDRA GUHA** ... 985

... Art. 138—"Date when sale becomes absolute," significance of—Arts. 137, 138 and 144, which applies when an execution purchaser obtains symbolical possession, but is kept out of actual possession—S. 16, it applies to a suit for possession by such an execution purchaser.] A tenure was purchased at an execution sale, which was confirmed in August 1902. Symbolical possession was delivered to the purchaser in January 1904. An application for setting aside the sale was made in June 1905 and was rejected in April 1906. Being kept out of actual possession the purchaser brought a suit for possession in July 1914 and added some Defendants in March 1916, i.e., more than 12 years from the date on which the sale became absolute, as well as from the date when symbolical possession was delivered to the execution purchaser: Held—That the sale became absolute on the confirmation of the sale in August 1902 and not in April 1906, when the application for setting aside the sale was dismissed. The confirmation of a sale cannot be kept in abeyance (when no proceedings are taken to set aside the sale before the confirmation) in order to enable the judgment-debtor to take such proceedings afterwards. So if Art. 138 of the Limitation Act applied, the suit would be barred, even deducting the time during which the application for setting aside the sale was pending. Art. 137 did not apply as the judgment-debtor was in possession at the date of the sale. Art. 138 too was not the proper article applicable to the case. The purchaser obtained symbolical possession, which was as effective as actual possession against the judgment-debtor, and if the latter continued in possession, it was

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adverse against the purchaser from the very day on which he got symbolical possession. The purchaser therefore had a fresh cause of action for instituting the suit for possession against the judgment-debtor. In such a case Art. 138 does not apply but Art. 144 applies. **Gopal v. Krishna Rao, I. L. R. 25 Bom. 275 at p. 289 (1900)**, referred to. Where Art. 144 applies, no deduction of time under sec. 16 of the Limitation Act or under the general principles of equity is allowable, and the suit was therefore barred. **Lakhan Chandra Sen v. Madhusudan Sen, I. L. R. 35 Cal. 209, 217; s. c. 12 C. W. N. 326 (1907)**, **Hemendra Mohan Khasnabis v. Dharani Nath Chandra Roy, 25 C. W. N. 376 (1920)** and **Mussamat Ramee Surnomoyee v. Shoshi Mukhi Burmania, 12 M. I. A. 244, 254 (1868)**, distinguished. **BROJENDRO KUMAR ROY CHOWDHURY v. ASHUTOSH ROY** 364

... Art. 139—Lease of endowment for term by Mohant—No rent paid for over 12 years after the expiry of lease—Successor of Mohant, if may sue to recover possession.] The mohant of a math granted a lease of land belonging to the math for a term which expired in 1880. It was found that no rent was ever paid since the expiration of the lease, more than 12 years after which the succeeding mohant sued to recover the land from the successors of the lessee: Held—That the High Court was right in holding that the suit was barred under Art. 139 of Sch. II of the Limitation Act of 1877. **MOHUNT BHAGWAN RAMANUJ DAS v. RAM-KRISHNA BOSE (P. C.)** ... 722

... Art. 142, applicability of, in a suit for recovery of possession of land on allegation of dispossession. See under possession, suit recovery of. **RAKHAL CHANDRA GHOSE v. DURGADAS SAMANTA** ... 724

... Art. 144, sec. 23—Applicability of in suit for declaration of public right of way. See under Right of way. **HARISH CHANDRA SAHA v. PRAN NATH CHAKRAVARTI** ... 587

... Arts. 148 and 105, applicability of. See under mortgage. **PRA-SUNNA KUMAR MONDAL v. SINAMBAR MONDAL** ... 123

... Arts. 174 and 181—Period of limitation for certifying payment of money payable under a decree—Such certification if can be made in the application for execution—Civil Procedure Code (Act V of 1908), Or. 21, r. 2—Certification of payment out of Court to decree-holder.] In a mortgage suit the preliminary decree was made in May 1912 and the final decree in January 1916. In August 1916, the decree-holder applied for execution and sought to escape from the bar of limitation by reference to a payment alleged to have been made by the judgment-debtor in October 1917. The lower Courts dismissed the application for execution, as the alleged payment had not been certified or recorded under Or. 21, r. 2 of the C. P. Code. Held—That Art. 174 of the Limitation Act is applicable only to a case under sub-

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r. (2) of r. 2 of Or. 21, i.e., where the judgment-debtor moves the Court for recording a payment as certified. The only article applicable in the case of a decree-holder certifying a payment to Court is Art. 181. The Code does not prescribe that such application must be distinct from an application for execution of the decree and there is obviously no objection to a combined application embodying a two-fold prayer, namely, first that the alleged payment be recorded, and secondly, that the decree be executed for the balance of the judgment-debtor. Therefore, if the application for execution is made within three years from date of the said payment, it is not barred by limitation. *Lakhi Narain v. Falamoni*, 20 C. L. J. 131 (1914) and *Khatibannessa Bibi v. Santhialal Nahutu*, I. L. R. 43 Cal. 207; s. c. 20 C. W. N. 273 (1915), and other cases referred to and followed. The decree-holder is not bound by the rule of limitation applicable to the judgment-debtor. *Shaikh Elahi Bukhsh v. Nawab Ali*, [1919] Pat. 260; 4 P. L. J. 159 (1919) and *Masilamani Mudaliar v. Sethu Swami Ayyar*, I. L. R. 41 Mad. 251 (1918), and other cases referred to. *Bireswar Mookerjee v. Ambica Charan Bhattacharjee*, I. L. R. 45 Cal. 690 (1917) and *Bahubalabhai Roy v. Jogesh Chandra Banerjee*, 23 C. W. N. 320 (1918), disapproved and distinguished. *BAHY MD. SAHA v. AIJANMAI* ... 529

Art. 179—Payment of decree more than three years after, if covered by deed of indemnity. See head-note under Mortgage. *SACHINDRA NATH ROY v. MAHARAJ BAHADUR SINGH* 838

sec. 206—Suit for declaration of right of way. See Right of way. *GOPAL CHANDRA SEN v. BANKIM BEHARI ROY* ... 121

LIS PENDENS—Purchase of mortgaged property during pendency of execution proceedings—Misdescription of property if prevents application of doctrine. See under Specific Relief Act. *BEPIN KRISHNA ROY v. PRIYA BRATA BOSE* ... 36

MADRAS ESTATES ACT (I of 1908)—Object of the statute—Rights conferred by the statute on occupying cultivators of raiyati lands, if can be claimed by middlemen who sub-let to occupying and cultivating tenants—Lease of Lanka lands for term—Passing of this Act before expiration of lease—Lessee who sub-let lands to cultivating tenants if can claim permanent occupancy rights and compel landlord to grant patta—*Izadars* and farmers of rents if identical, and if may acquire occupancy right. The Appellants obtained from the Respondents a lease of certain Lanka lands for a period of three years at an annual rent. The lease contained various stipulations from which it was clear that the parties contemplated the cultivation of the land and the raising of crops upon it by raiyats and there was no clause forbidding sub-letting. It was further stipulated that at the conclusion of the term the lands were to be dealt with according to the pleasure of the estate authorities without obtaining any release from the lessees. After obtaining the lease

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the Appellants did not cultivate the lands themselves but sub-leased them to cultivating tenants. On the termination of the lease the Appellants were served with a notice to quit. The Appellants, contending that inasmuch as they were cultivating the lands as raiyats when the Madras Estates Act of 1908 came into operation the contract of tenancy was entirely superseded by that statute, instituted a suit against the Respondents for determination of a fair and equitable rent for the holding leased to them and for a decree directing the Respondents to grant to them a patta in proper terms: Held—That the object of the Madras Estates Act, 1908 was to improve the condition and confer new rights and privileges especially upon the occupying cultivators of raiyati lands and it would be quite opposed to its policy to confer on middlemen who sub-let to occupying and cultivating tenants rights and privileges at all resembling those conferred on occupying cultivators and indeed would result in depriving the latter class of the benefits intended to be conferred upon them. The words "*izadar*" and farmer of rent" in sub-sec. 1, sec. 6, are not synonymous. They denote two classes of persons. If *izadars* and farmers of rent are raiyats at all, they are, as appears from sec. 46, non-occupying raiyats and cannot be converted into raiyats with a permanent right of occupancy. *SURISETTI BUTCHAYYA v. SRI RAJAH PARTHASARATHY APPA ROW BAHADUR ZAMINDAR GARU (P. C.)* ... 785

MAHOMEDAN LAW—Acknowledgment as son, what is necessary to its validity—Valid acknowledgment, operates as declaration of legitimacy and not as legitimation—Presumption of fact, rebuttable by proof of impossibility of marriage or no marriage—Concurrent findings of fact. In Mohammedan law, the acknowledgment by one person of another as his legitimate son is of no avail, in the face of a finding that there was no marriage. In Mohammedan law, such an acknowledgment is a declaration of legitimacy and not a legitimation—a declaration which, though it cannot be withdrawn, may be contradicted. By the Mohammedan law, a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of zina; that is, illicit connection, and cannot be legitimate. The term "wife" necessarily connotes marriage, but, as marriage may be constituted without any ceremonial, the existence of marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. One of the ways of direct proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledgor meant to accept the other not only as his son but as his legitimate son. It must not be impossible upon the face of it, i.e., it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father

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of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not *juris et de jure*, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is, that a claimant-son who has in his favour a good acknowledgment of legitimacy is in this position; the marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact. *Muhammad Allahdad Khan v. Muhammad Ismail Khan*, I. C. R. 10 All. 289 (1898) and *Sadik Husain Khan v. Hashim Ali Khan*, L. R. 43 I. A. 212; a. c. 51 C. W. N. 130 (1916) followed. Where the majority of the Judges in the Appellate Court affirmed the Trial Court's finding that the marriage was disproved, the finding was a concurrent finding which bound the Board. To constitute such a finding, the fact or facts found must be such as are necessary for the foundation of the proposition of law to be subsequently applied to them. *SYED HABIBAR RAHMAN CHOWDHURY v. SYED ALTAUF ALI CHOWDHURY* (P. C.) ... 81

... law of pre-emption if affected by the Transfer of Property Act. See Pre-emption. *SITARAM BHAURAO DESHMUKH v. SYED JIAUL HASAN KHAN SYED SIRAJUL HASAN KHAN* ... 221

... mother as "de facto" guardian if can execute agreement to refer to arbitration on behalf of her minor children. See head-note under Civil Procedure Code. *MOHSINUD-DIN AHMED v. KHABIRUDDIN AHMED* 246

... Divorce by writing—Pregnancy followed by miscarriage—Divorce in khula form—Date on which period of iddat commences—Circumstances by which iddat may be terminated earlier. A Mahomedan husband executed and registered a deed of divorce in favour of the wife and a few days later saw her, pronounced the legal formulas, made over the document to her and went away. Subsequently she went through ceremonies of marriage with two persons one after the other, the marriage with the Plaintiff taking place last. In a suit for restitution of conjugal rights by the Plaintiff on the allegation that the first marriage after the divorce took place within the period of iddat and as such was void, the defence set up was that the period of iddat commenced on the date of the execution of the document and expired before the first marriage after the divorce

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took place, that the lady was pregnant at the time of the divorce and miscarried and this had the effect of terminating the period of iddat and that the divorce was in khula form: Held—That the divorce took effect from the date of the writing and not from the date of its receipt by the wife unless there were words in the instrument showing a different intention. That the case must be sent back for re-investigation as to the validity of the first marriage after the divorce on production of the Talaknama so as to enable the Court to consider whether there was anything in the document preventing its taking effect from the date of its execution and after allowing the parties to adduce relevant evidence regarding the divorce so as to enable the Court to consider the other points raised in the defence. *MOHAN MOLLA v. BARU BIBI* ... 261

Wakf—Musalman Wakf Validating Act (VI of 1913)—Provision for support and maintenance of family how far validates wakf—If wakf property be mortgaged at the time of dedication whether the wakf valid—Whether delivery of possession essential—Settlor in death illness—Wakf affects what share of the property—Death illness, conditions of—Question when one of fact only and when of law and fact.] In a wakf although provision is made for the maintenance and support of the family, children and descendants of the settlor, if the ultimate benefit is reserved for the poor and for other purposes recognized by the Mahomedan law as religious, pious or charitable purposes of a permanent character, then, tested in the light of the provisions of the Musalman Wakf Validating Act, no valid objection can be taken to the legality of such a wakf. The circumstance that the property dedicated was under a mortgage at the time of creation of the endowment and that provision was made in the wakf for the discharge thereof does not render the endowment invalid under the Mahomedan Law. *Shahzadi Hajra Begum v. Khaja Hossain Ali Khan*, 12 W. R. 498; 4 B. L. R. 86 (A. C.) (1869), referred to. According to the Calcutta High Court, a valid wakf is created by declaration of endowment by the owner, and delivery of possession is not essential. Where the settlor had appointed himself as the first mutwali no formal delivery of possession from himself was a prerequisite to the validity of the wakf and even if transmutation of possession was necessary no formal delivery was essential. *Abdul v. Bai Juna Bai*, 14 Bom. L. R. 295 (1911), referred to. A Muslim who is in Marz-ul-maut or death-illness cannot make a valid disposition of more than one-third of his property after payment of funeral expenses and debts, and if he purports to make a wakf in such illness, unless his heirs assent, the wakf will affect only one-third of his estate and will be invalid in respect of the excess notwithstanding that possession of the entire property dedicated has been delivered to the person nominated mutwali. In order to establish the existence of death-illness there must be at least three

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conditions with regard to the illness which has caused death: (a) proximate danger of death so that there is a preponderance of apprehension of death, (b) there must be some degree of subjective apprehension of death in the mind of the sick person and (c) there must be some external indicia such as inability to attend to ordinary avocations. *Fatima Bibi v. Ahmad Baksh*, L. R. 35 I. A. 67; s. c. I. L. R. 35 Cal. 271; 12 C. W. N. 214 (1907), referred to. Whether or not a particular illness constitutes *Marz-ul-maut* is primarily a question of fact, but may sometimes be a mixed question of law and fact, for instance, where the question arises whether the facts found as to the physical condition of the deceased at the date of the execution of the deed constitute the essential elements of *Marz-ul-maut* as formulated by Mahomedan jurists. *BIBI JINJIRA KHATUN v. MOHAMMAD FAKIRULLA MIA* 749

Proof of custom in derogation of, if permissible—Standard of proof—Onus—Lubbai Mahomedans of Coimbatore—Custom excluding females from succession. The parties to the litigation were Lubbai Mahomedans of the Sunni sect residing in the District of Coimbatore in the Madras Presidency, the question was whether succession to the estate of a deceased member of the sect was governed by Mahomedan Law or by a rule of descent excluding females: Held—That in view of sec. 16 of the Madras Civil Courts Act, III of 1873, prima facie all questions of succession amongst the parties who were Mahomedans were to be decided according to Mahomedan Law, but it is now well established that in India a custom at variance even with the rules of Mahomedan Law, governing the succession in a particular community of Mahomedans may be proved. The onus of proof is on the party alleging the custom. The custom should be ancient and invariable and established to be so by clear and unambiguous evidence. *Ramalakshmi Ammal v. Sivananantha Perumal Sethurayar*, 14 M. I. A. 570 (1872) and *Abdul Hussein Khan v. Bibi Sona Dero*, L. R. 45 I. A. 10; s. c. I. L. R. 45 Cal. 450; 22 C. W. N. 353 (1917), referred to. Held—That the evidence in this case fell far short of the standard of proof requisite to establish the custom alleged. Apart from Madras Act III of 1873, the standard of proof found sufficient in *Fanindra Deb Raikat v. Rajeswar Das*, L. R. 12 I. A. 72 at p. 81; s. c. I. L. R. 11 Cal. 463 (1884), could not be accepted as a guide in this case, upon the assumption that many of the Lubbais being recent converts from Hinduism retained the mode of the devolution of property according to Hindu usage even after their conversion. *Abraham v. Abraham*, 9 M. I. A. 195 (1865), referred to. **MAHOMED IBRAHIM ROWTHER v. SHAIKH IBRAHIM ROWTHER (P. C.)** 798

"MALIK" if a term of art and imports full ownership. See under *Will. BHIDAS SHIVDAS v. BAI GULAB* 129

MERGER, doctrine of, if applied in *mofussil* before Transfer of Property Act—Merger, a question of intention—Acquisition of superior and inferior interests by joint

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Hindu family in the names of different individuals, to indicate intention to prevent merger.] *Quere*—Whether prior to the Transfer of Property Act there was a law of merger applicable in the *mofussil*. *Hirendra Nath Dutt v. Hari Mohan Ghosh*, 18 C. W. N. 860 (1914), referred to. Merger is not a thing which occurs *ipso jure* upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. The question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain. *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. D. 631 and *Ingle v. Jenkins*, [1900] 2 Ch. D. 369, referred to. The fact that acquisitions of the superior and inferior interests on behalf of a joint Hindu family have been made in the names of different members thereof may point to an intention to keep the two interests from merging. **DULHIN LACHHANBATI KUMRI v. BODHNATH TIWARI (P. C.)** 585

MOHANT OF MUTT—Permanent lease by Mohant of Mutt without necessity—Lessee if acquires title by adverse possession after twelve years—Shebait or mutwalli, if "trustee"—Legal powers of Mohant and sajjadanashin—Application of rules of English law by analogy in such cases condemned—Indian Limitation Act (IX of 1908), Arts. 134, 144, s. 10. Neither under the Hindu law nor in the Mahomedan system is any property "conveyed" to a shebait or a mutwalli, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interest regulated by custom and usage. The shebait or the mutwalli is not a "trustee" as understood in the English system though if any specific property is specifically entrusted to such a person for specific purposes, he might be regarded as trustee with regard to that property. Where the head of a Mutt gave a permanent lease of property which had been granted for the general purposes of the Mutt and no necessity for the alienation was established: Held—That Art. 134 of the Limitation Act which is controlled by sec. 10 of the Act did not apply to the case as the property in question was not property specifically "conveyed" to the Mutathipathe "in trust." Also, that the rent reserved in the lease was not "valuable consideration" within the meaning of the article. Held, further—That as, according to the well-settled law of India, a Mohant is incompetent to create any interest in respect of Mutt property to endure beyond his life, the possession of the lessee did not become adverse within the meaning of Art. 144 of the Limitation Act until he died, and the acceptance of rent by his successor being properly referable only to a new tenancy created by himself, which it was within his power to continue during his life, the possession of the lessees did not become adverse again until his death. The legal position of Mohants, shebait, sajjadana-

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shrine and mutwallis discussed. Ordinarily speaking the sajjadanashin has a larger right in the surplus income than a mutwalli, for so long as he does not spend it in wicked living, or in objects wholly alien to his office he, like the Mohant of a Hindu Mutt, has full power of disposition over it. **SRI VIDYA VARUTHI THIETHA SWAMIGAL v. BALUSAMI AYYAR** (P. C.) 537

MOHUNT, lease of endowed property by—No rent paid for over 12 years after expiry of lease—Successor of Mohunt, if may sue to recover possession. See Limitation Act. **MOHUNT BHUGWAN RAMANUJ DAS v. RAMKRISHNA BOSE** ... 723

MORTGAGE—Personal decree when allowable. A personal decree for the recovery of the money is only allowable if the suit is brought within six years of the date of the bond or from the date of any payment within the meaning of sec. 20 of the Limitation Act. **SRISTIDHAR GHOSE v. RAKHYAKALI DASI** ... 264

personal decree if can be made at the Appellate stage.] A personal decree can be made against the mortgagor at the Appellate stage. **Jauna Bahu v. Parmeshwar Narayan Mahata**, I. L. R. 47 Cal. 370; s. c. 23 C. W. N. 49 (P. C.) (1918), followed. **ASKARAN BALD v. GOBORDHAN KOBRA** 318

MORTGAGES, successive—Suit by first mortgagee without impleading puisne mortgagees—Purchaser at mortgage sale, may set up first mortgage as shield in puisne mortgagee's suit—Puisne mortgagee's right to be placed in the same position in which he would be if he had been impleaded.] Under r. 5 of Or. XXXIV of the Civil Procedure Code (which has repealed sec. 89 of the Transfer of Property Act) an owner of a property who is in the right of a first mortgagee and of the original mortgagor, as acquired at a sale under the first mortgage, is entitled, at the suit of a subsequent mortgagee who (not having been made a party in the first mortgagee's suit) is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield. **Het Ram v. Shadi Lal**, I. L. R. 45 I. A. 180; s. c. 22 C. W. N. 1033 (1918), **Matru Mai v. Durga Kunwar**, I. L. R. 47 I. A. 71. (1919) and **Vanmikalinga Mudali v. Chidambara Chetty** I. L. R. 29 Mad. 37 (1905), referred to. But in such a case, the puisne mortgagee (Plaintiff) also is entitled to be put in the position which he would have occupied had he been made a party to the first mortgagee's suit. After two mortgages had been effected by the owner of certain properties, the first mortgagee sued on his mortgage and purchased the property without impleading the second mortgagee. Later on his successor in interest executed another mortgage in favour of the Plaintiff. Subsequently the second mortgagee sued on his mortgage without impleading the Plaintiff, and in that suit the then owners recovered from the second mortgagee the amount of the first mortgage (which they set up as a shield), but as they failed to redeem the second mortgagee the property was sold and purchased by the latter. In Plain-

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tiff's suit to enforce Plaintiff's mortgage against the property in the hands of the second mortgagee: Held—That the amount of the first mortgage had been wrongly taken away by the owners, the same being then subject to the mortgage of the Plaintiff, and that therefore in this suit unless the Defendant paid to the Plaintiff that amount with interest Plaintiff was entitled to get a decree for the sale of so much of the estate as would realise that sum, and that the Plaintiff should get a decree for sale of the rest of the estate on condition that the Plaintiff paid to the Defendants the amount or the decree passed on the second mortgage. **MUSAMMAT SUKHI v. MUNSHI GHULAM SAFFAR KHAN** (P. C.) ... 279

MORTGAGE BOND, if properly attested by scribe who signs for and on behalf of mortgagor. See Transfer of Property Act, sec. 59. **SRISTIDHAR GHOSE v. RAKHYAKALI DASI** ... 264

rectification of, after passing of decree—Purchase of mortgaged property during pendency of execution proceeding. See under Specific Relief Act. **BEPIN KRISHNA ROY v. PRIYA BRATA BOSE** ... 36

MORTGAGE SUIT—Mortgagor's estate taken over by Court of Wards after preliminary decree—Decree absolute for sale passed against Court of Wards representing the mortgagor—Release of estate thereafter—Release not shown to have had retrospective operation—Refusal of Government to produce correspondence leading to release—Decree absolute if bound mortgagor.] A preliminary decree was made in a suit for sale of mortgaged properties on 15th June 1915. On 21st July 1915, the Court of Wards declared the mortgagor a disqualified proprietor and assumed superintendence of his estate under United Provinces Act, IV of 1912. On 21st February 1916, a decree absolute for sale was passed against the Court of Wards representing the mortgagor on the application of the mortgagees. On 12th September 1917, the estate of the mortgagor was released from the superintendence of the Court of Wards under an order of the Local Government which was made under the direction of the Central Government for reasons of State. The correspondence which passed between the two Governments upon the matter was not produced and its production could not be compelled by Court: Held—That prima facie, the Local Government acted within its powers in putting the Court of Wards in charge of the mortgagor's estate and it could not be presumed until the contrary was shown that the order of release operated retrospectively. That the Court in India was therefore right in holding that the decree absolute bound the mortgagor. **NARINDRA BAHADUR SINGH v. THE OUDH COMMERCIAL BANK LD.** (P. C.) ... 825

usufructuary suit for redemption of—Suit for redemption of an usufructuary mortgage and for recovery of surplus profits from the mortgagee—Limitation Act (IX of 1908), Arts. 148 and 149, applicability of—Civil Procedure Code (Act V of 1908),

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Or. 34, rr. (7) and (9), scope and effect of.] A mortgagor brought a suit for redemption of an usufructuary mortgage, and alleged that if accounts were taken a large sum would be found due from the mortgagee. The mortgagee contended that the claim for recovery of the surplus profits received by him was barred under Art. 120 of the Limitation Act: Held—That having regard to the provisions of Or. XXXIV, rr. (7) and (9) of the Civil Procedure Code, the claim for recovery of the surplus profits received by the mortgagee is a relief which is a part of the suit for redemption itself, for which the limitation is provided by Art. 148 of the Limitation Act. Therefore the claim for recovery of the surplus collections was not barred by limitation. Baboolal Dass v. Jammal Ally, 9 W. R. 187 (1868), discussed. Art. 105 of the Limitation Act applies to cases where the mortgagor has not to bring a suit for redemption but has to sue only for recovery of the surplus collections. Ram v. Bhup Singh, I. L. R. 30 All. 225 (1908), Vinayak Shivrav v. Dattatraya Gopal, I. L. R. 32 Bom. 661 (1902) and Venkatesh v. Pandurang, 1 Bom. L. R. 858 (1899), referred to. PRASUNNA MONDAL v. NILAMBAR MONDAL ... 123

Equity of redemption, sale of—Purchaser retaining portion of purchase money to pay off mortgage, if personally liable for the mortgage debt.] A purchaser of mortgaged property who retains a portion of the purchase-money in order to enable him to pay off the mortgage does not thereby become personally liable to discharge the mortgage debt. NANKU PRASAD v. KAMTA PRASAD (P. C.) ... 771

equitable—Sub-mortgage by deposit by mortgagee of mortgage deed—Discharge of mortgage by mortgagor—Indemnity, deed of, by mortgagee to mortgagor—Preliminary decree on sub-mortgage, appealed to Privy Council—Appeal dismissed for non-prosecution—Application for order absolute when barred—Limitation Act (XV of 1877), Sch. II, Art. 179—Payment of decree more than three years after, if covered by deed of indemnity.] The mortgagee of certain properties after having created an equitable sub-mortgage by depositing the mortgage deeds with a firm S. K. C. accepted payment of his mortgage dues and by a deed, dated 23rd April 1894, released the mortgaged properties from all claims under the mortgage and covenanted to indemnify the mortgagor from all losses, damages, actions, claims, etc., in respect of the mortgage deeds or any money owing or due thereunder or otherwise howsoever or for any act done by him the mortgagee in respect of the mortgage deeds. The firm of S. K. C. recovered a preliminary mortgage decree *inter alia* against the mortgagor on their sub-mortgage on 26th August 1905, against which the mortgagor appealed to the Privy Council. But before the appeal was ready for hearing the mortgagor on 2nd February 1910 made payments to an assignee of the decree, who having acknowledged satisfaction the appeal to the Privy Council was not further prosecuted

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and the appeal was dismissed for want of prosecution on 16th April 1910. The mortgagor on 9th September 1912 sued the mortgagee to recover the amount paid to the assignee of the decree on the basis of the deed of indemnity. Held—That the decree of 26th August 1905 became unenforceable under Art. 179 of Sch. II of the Limitation Act of 1877 by proceedings commenced after 26th August 1908, and time did not run either from the date when the appeal to the Privy Council was dismissed for default or from the expiry of the six months given for redemption in the decree of 26th August 1905, but from 26th August 1905 the date of the decree. Abdul Majid v. Jawahir Lal, I. L. R. 36 All. 350, s. o. 18 C. W. N. 963 (P. C.) (1914) and Batuk Nath v. Munni Dei, L. R. 41 I. A. 104, s. o. I. L. R. 36 All. 298; 18 C. W. N. 740 (1914), referred to. That the payment of the decree on 2nd February 1910 was voluntary in the sense that the mortgagor could not have been compelled by any proceeding founded upon the decree to make the payment. That in view of the wide terms of the deed of indemnity, the fact that the payment was voluntary did not preclude the mortgagor from demanding payment from the mortgagee of the amount which they paid to the decree-holder in order to rid the property of the incumbrance which had been created by the mortgagee depositing the title deeds with the firm of S. K. C. SACHINDRA NATH ROY v. MAHARAJ BAHADUR SINGH (P. C.) ... 838

MOURASI MOKURARI lease creating a heritable and transferable tenancy at a fixed rate of rent—Agreement by successors-in-interest to pay an enhanced rate of rent, if destroys the character of the original tenancy or creates a new tenancy—Novation of contract.] Where a mourasi mokurari lease created a transferable, permanent and heritable tenancy at a rate of rent fixed in perpetuity, and the successors-in-interest of the tenant by an agreement consented to pay rent at an enhanced rate and a decree for rent was obtained by consent on this basis: Held—That the circumstance that one of the terms of the lease was altered by agreement of parties, namely, that the rent originally fixed was increased, did not destroy the tenancy. It cannot be said that there was a supersession of the original tenancy or that there was a novation of contract. The consent decree for rent at an enhanced rate did not give the tenancy a fresh start in all respects, nor did the alteration of rent necessarily destroy the transferable character of the tenancy. Semble:—Though the enhancement was made by consent of the parties, the enhancement should be deemed to have been made subject to the original agreement that the rent was not enhanceable. Ramanuj Roy v. The Midnapur Zemindary Co., 16 C. W. N. 725 (1912), referred to. Samapado Roy v. The Midnapur Zemindary Co., 16 C. L. J. 522 (1912), distinguished. PRIONATH GHOSH v. SURENDRA NATH DAS ... 857

NOABAD LANDS, settlement of—Right of Government in respect of such lands.]

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Semle:—Government stands in the same position as an ordinary zemindar in respect of Noabad lands which it has a right to settle with whomsoever it likes. **NAZIR AHAMAD CHOUDHURY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL** ... 913

NOTICE to purchaser by title papers, nature and effect of—**Notice, necessity of, when knowledge proved. See under Specific Relief Act.** **BEPIN KRISHNA ROY v. PRIYA BRATA BOSE** ... 36

ORDER IN COUNCIL, construction of—Interest, from what date payable—Mesne profits—Compensation for improvements—Excessive time taken by litigation in India, commented upon.] An order in Council directed that on payment by the Appellant of certain sums of money, due in respect of mortgages, and interest thereon at 6 per cent., the Appellant should recover possession of the property together with mesne profits. **Held:**—That interest should run concurrently with the mesne profits, that being the construction which the Board had placed upon the order upon an application for review. **Held, also:**—That part of the mesne profits having been due to permanent improvements made by the disseisor, a deduction of 10 per cent. was properly allowed by the High Court in respect thereof. **Held, further:**—That the increased rents that could be properly attributable to the improvements could be properly set off against the mesne profits even though they were not actually executed by the persons in possession of the date of the decree, but by persons from whom they had purchased the property. **RAJA RAI BHAGWAT DAYAL SINGH v. RAM RATAN SAHU (P. C.)** ... 257

PALAYAM of 'Kannivadi, whether inalienable—Palayams, originally held on military tenure, which was abolished—Palayams continued as zamindars—Rights of Palayams with whom tenure not permanently settled—Abolition of Police duties of zamindars—Effect, to make palayam alienable.] Where lands in British India are held on military service tenure, there is good reason for holding that no one of the successive tenants could deal with the land so as to deprive the next holder of the source from which his duties might be discharged. **Naraguntty Luchmadavamah Vengama Nalldoo, 9 M. I. A. 66 (1861), followed.** **Held:**—That it may be accepted as a fact that the palayam of Kannivadi was originally held on military tenure and subject to the payment of a tribute to the paramount power, but that the tenure of military service under which the palayam had been held was abolished and determined by the proclamation of the 1st December 1801 issued by the Governor of Madras in Council. That the palayam was not permanently settled under Reg. XXV of 1802 before 1895 (when it was mortgaged by the holder for the time being), but that did not take away from the former owner any rights he then had—the only difference between a palayam or zamindari which is permanently settled and one

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that is not, being that in the former the Government is precluded for ever from raising the revenue and in the latter the Government may or may not have that power. That the conditions in certain sanads granted to the Palayams of Kannivadi by which the Palayam was bound to protect the inhabitants by preventing, as far as might be in the power of the Palayam, robberies, depredations, etc., in their properties, to deliver up persons guilty of murder and not to give shelter to deserters and to apprehend and deliver them to the Collector, were similar to the duties which all landholders and zamindars in British India have to perform. But that even if it were possible to infer from these sanads that the Palayam of Kannivadi was then held on a tenure of rendering police duties to the State, the police duties of zamindars in that part of the country were abolished in 1816 by the Government of Madras. **Held, therefore,** that the Palayam of Kannivadi was not inalienable in 1805. **MALAYANDI APPAYASAMI NAICKER v. THE MIDNAPUR ZEMINDARY CO., I.D. (P. C.)** ... 106

PLEADINGS. Court not to entertain a question not raised in—Reason of the rule explained—**Test.** Neither party to a litigation can be allowed to set up at the hearing an entirely new and inconsistent case. **Eshan Chunder v. Shama Churn, 11 M. I. A. 7 (1866)** and **North-Western Salt Coy., Ltd. v. Electrotype Alkali Coy., Ltd., [1914] A. C. 461,** referred to. The reason for the rule is that the Plaintiff might have received no notice that the point would be raised by the Defendant and would presumably be not prepared with the necessary evidence, and conversely, the Defendant might be seriously embarrassed if the Plaintiff were permitted to spring a surprise upon him in the shape of a new case. The test to be applied is whether the party aggrieved has really been taken by surprise. So, where the Plaintiffs sought to eject the Defendant on the ground that he was a trespasser and the Defendant answered that he was a tenant at money rent, but the Court determined the nature of the alleged tenancy and came to a conclusion which was not the case of either party: **Held:**—That the substantial question in controversy between the parties being whether the Defendant was a trespasser or a tenant, the finding that the Defendant was a tenant was a complete answer to the claim for ejectment, and the determination of the nature of the tenancy did not prejudice the Plaintiffs in respect of their claim for ejectment. The question of the nature of the tenancy was, however, left open. **GONDLI BIBI v. JOYNAL ABDIN** ... 294

POSSESSION. suit for recovery of—Allegation of dispossession—The onus of proving possession within twelve years of suit, on Plaintiff—Onus of proving adverse possession for 12 years, if lies on Defendant when Plaintiff's title is proved—Cases where the presumption about possession following title arises—Disputed, waste or jungle land, law as to, if different.] Plaintiff sued for recovery of possession of a certain land

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on declaration of his title thereto. The Plaintiff and the Defendant were putridars under two separate Touzis, both the Touzis being situate in the same village. The Plaintiff claimed the land as appertaining to his Touzi while the Defendant claimed it as part of his Touzi. The lower Appellate Court found title with the Plaintiff but that he had failed to prove possession within 12 years of suit and accordingly held that the suit was barred by limitation: Held—That the case was governed by Art. 142 of the Limitation Act. Where the Plaintiff while in possession has been dispossessed and is out of possession at the date of the suit, the onus is upon him to prove that he was in possession and was dispossessed within 12 years of the suit. *Moharaja Koowar Nitrasur Singh v. Nund Lal Singh*, 8 M. I. A. 199 (1860), *Rajah Saheb Perhlad Sein v. Moharaja Rajendra Kishore*, 12 M. I. A. 292, 337 (1869), *Beer Chunder Jodrai v. The Deputy Collector of Bhooloah*, 13 W. R. P. C. 23 (1870) and other cases discussed and followed. *Karan Singh v. Pakar Ali Khan*, L. R. 9 I. A. 99: s. c. I. L. R. 5 All. 1 (1882), *Radha Gobinda Roy v. Inglis*, 7 C. L. R. 364 (1890), and other cases distinguished. In cases under Art. 142 of the Limitation Act, although the Plaintiff's title is proved, the onus is not upon the Defendant to show that the Plaintiff lost his title by adverse possession on the part of the Defendant. Possession is not necessarily the same thing as actual user. The nature of the possession to be proved by the Plaintiff, and the evidence of its continuance must depend upon the character and condition of the land in dispute. Where the land is incapable of actual enjoyment, as in the case of diluvion by rivers, if the Plaintiff shows his possession down to the time of diluvion, his possession is presumed to continue so long as the lands continue to be submerged. In cases where the land is not incapable of enjoyment, but may produce some profit though trifling in amount and only of occasional occurrence, as is so often the case with jungle land, all that can be required is that the Plaintiff should show such acts of ownership as are natural under the existing condition of the land and in such cases when he has done this his possession is presumed to continue so long as the state of the land remains unchanged unless he is shown to have been dispossessed. In waste as well as jungle lands possession may be exercised by grazing cattle, putting up boundary marks or fences and the like. The cases of diluviated lands or jungle or waste lands are thus no exception to the general rule that a Plaintiff who is dispossessed and brings a suit for recovery of possession must show that he was in possession within 12 years of the suit. *Monomohan Roy v. Mathura Mohan Roy*, I. L. R. 7 Cal. 225 (1881), *Raj Kumar Roy v. Gobind Chandra Roy*, L. R. 19 I. A. 140: s. c. I. L. R. 19 Cal. 660 (1892), *Mahomed Ali v. Khaja Abdul*, I. L. R. 9 Cal. 744, 750 (F. B.) (1883), and other cases referred to and discussed. In the case of jungle or waste lands if the Plaintiff proves his title, there

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is a presumption of possession in his favour where having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the Plaintiff asserts that he exercised acts of ownership and adduces evidence in support thereof, which is disbelieved by the Court, he cannot turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption, and is inconsistent with it. The presumption that possession follows title can be raised where the evidence is equally strong on both sides, and cannot be called in aid to give weight to evidence unworthy of credit. *Runjeet Ram Pandey v. Gobordhan Ram Pandey*, 20 W. R. 25 (P. C.) (1873), *Dharam Singh v. Har Prosad*, I. L. R. 12 Cal. 38 (1885), and several other cases discussed and followed. *RAKHAL CHANDRA GHOSH v. DURGADAS SAMANTA* ... 724

PRE-EMPTION—That the general law of pre-emption being what the parties contemplated as applying to the case, it was not open to the vendors to impose conditions other than those prescribed by that law for the exercise of the option of pre-emption. That the vendors and the vendees having regarded the sale as complete at the date of the agreement, that was the date with reference to which the requisite religious or other formalities had to be performed. *Jadu Lal Sahu v. Janki Koer*, I. L. R. 35 Cal. 575 (1908), referred to. The Transfer of Property Act was not intended to alter directly or indirectly the Mahomedan law of pre-emption as it previously existed. *Begam v. Mohammad Yakub*, I. L. R. 16 All. 344 (F. B.) (1894), approved. *SITARAM BHARAO DESHMUKH v. SYED JIAUL HASAN KHAN SYED SIRAJUL HASAN KHAN* (P. C.) ... 221

PRIVY COUNCIL—Practice—Appeal pending before the Privy Council—Compromise, in which persons under disability are concerned, application for approval of, should be moved before the High Court in India in the first instance. In all cases where it is desired to bind persons under disability by a compromise which is proposed to be entered into in an appeal pending before the Judicial Committee, it is of the utmost importance that there should be a clear expression of opinion by the proper Court in India that such compromise is a beneficial one for these persons. Such a question is essentially and necessarily the proper subject for consideration of the Courts in India, who are in a position to institute the inquiries, to ask the questions and to obtain the information which must always be required before sanctioning proceedings on behalf of persons who are unable to assent for themselves. And though the Judicial Committee may in rare cases, in their desire to avoid the multiplication or prolongation of proceedings, entertain in the first instance an application to sanction a compromise in which persons under disability are interested, this is not the regular and usual course. *GOBINDA*

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PRIVY COUNCIL—concltd.		PURDANASHIN LADY—contd.	
CHANDRA PAL v. KAILASH CHANDRA PAL (P. C.)	165	ted atmosphere and that from the clear language of an independent mind free from taint of interest the party acting should know precisely the nature and consequences of the transaction. The fairness of the bargain is the crucial test, and the Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate, and to have possessed a capacity to judge for herself. That in the present case the Defendant in whose favour the document was executed stood towards the Plaintiff in a relation of personal confidence and the document was executed under circumstances which according to the rules applicable to the execution of documents by purdanashin ladies rendered it liable to be cancelled. Every variance between pleading and proof is not fatal. The Court must carefully consider whether the objection is one of form or of substance. <i>Per</i> Buckland, J.—The rule that a case of fraud can succeed only on proof of the fraud specified in the plaint may be applicable in cases between man and man but where a purdanashin lady is involved other and equally well known rules have to be applied and conformity with them has to be established. That a purdanashin lady must have independent legal advice is not necessary as an inflexible rule. But, excluding such rare cases where the experience and attainments of the lady or the circumstances of the case render such advice superfluous, a purdanashin lady must have advice, the adviser should have no adverse interest and should be such a person as is capable of explaining to her fully her rights in general and in particular under the document which she intends to sign, if necessary contrasting them with her rights should the intended document not be executed by her; if the circumstances are such that unless he has a knowledge of law he is not competent to advise her, then and in that case independent legal advice is essential. SATISH CHANDRA GHOSH v. KALIDAS DASI	177
comment on delay in litigation in India. <i>RAJA RAI BHAGWAT DAYAL SINGH v. RAM RATAN SAHU</i>	257	deed by—Duty of disclosure of donee to donor of character of transaction—Failure operates to nullify transaction, apart from fraud.] The parties to a contract may stand in such a relation as (apart from fraud or of conduct partaking of the quality of fraud), may give rise to an obligation on the part of one towards the other, failure to fulfil which will be a ground for rescission of the contract and for the consequent remedies. <i>Nocton v. Ashburton</i> , [1914] A. C. 932, referred to. The donee from a purdanashin lady stands towards her in such a relation that it is his duty to see that she fully understands the transaction. The release in question in this case was set aside as the duty of disclosure resting upon the donee had not been discharged. <i>KAMAWATI v. KUNWAR DIGBIJAI SINGH (P. C.)</i>	490
PRIVY COUNCIL APPEAL—Bench to which application for direction regarding the preparation of paper-books is to be made.] All applications for directions with respect to the preparation of paper-books in Privy Council appeals should be made to the Bench taking Privy Council business, and not to the Bench which passed the judgment or order appealed against. <i>SHIVA PRASAD SINGH v. RANI PRAYAG KUMARI DEBI</i>	840	document executed by	
PURDANASHIN lady, suit for cancellation of document executed by—Rules by which Court should be guided to determine validity of document—Rule that case of fraud must depend strictly on proof of fraud alleged, how far applicable to action brought by purdanashin lady.] The Plaintiff, a purdanashin lady, sought to have a deed of partition executed by her in favour of her husband's brother immediately after her husband's death cancelled: Held—That it is well settled that the Court when called upon to deal with a deed executed by a purdanashin lady must satisfy itself upon the evidence first that the deed was actually executed by her or by some person duly authorised by her with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly, that she had independent and disinterested advice in the matter. In cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence, the Court will act with great caution and will presume confidence put and influence exerted and in cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length, the Court will require the confidence and influence to be proved intrinsically. In the former class of cases, the principle formulated in sec. 111 of the Indian Evidence Act applies, viz., that where there is a question as to the good faith of a transaction between parties one of whom stands to the other in a position of active confidence the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. It is an elementary principle that whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, over-reaching, undue influence or unconscionable advantage. Independent and competent advice which it is necessary that a purdanashin lady should have does not mean independent and competent approval; it simply means that the advice shall be removed entirely from the suspec-		—Principles which should guide Court—fn-	

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dependent and competent advice, meaning of—Necessity of greater caution in cases where persons benighted holds fiduciary position—Misrepresentation or fraud, proof of, not essential—Joint family—Severance, if effected by deed of settlement by widow entrusting reversioner with management for a term—Limitation Act (IX of 1908), Art. 91, applicability of, when Plaintiffs seek possession on declaration that Defendants' document of title wholly void—Time from which limitation runs when deed voidable.} On the death of a member of a Hindu joint family a deed of settlement was executed by the guardian of the widow who was at the time a minor, the effect of which was to place the properties of the minor inherited by her from her husband in charge of her husband's brother who was the reversioner on certain terms. After the widow had attained majority a deed of settlement for the life of the widow was executed by her in favour of the sons of her husband's brother who was now dead. The widow brought a suit for partition of the joint family properties and for other incidental reliefs on declaration that the last deed of settlement was void and inoperative. Held—That it is well settled that the Court when called upon to deal with a deed executed by a purdanasihin lady must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly, that she had independent and disinterested advice in the matter. In the class of cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character, the Court will act with great caution and will presume confidence put and influence exerted, and in cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length the Court will require the confidence and influence to be proved intrinsically. The substance of the matter is that the fairness of the bargain is the crucial test. In dealing with these cases, the Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself. These, however, are only general principles and there is grave risk of failure of justice, if they are moulded into inelastic formulas or crystallised into inflexible rules and treated as of universal application, regardless of the special fact and surrounding circumstances of the concrete case which requires adjudication. Independent and competent advice does not mean independent and competent approval but signifies at any rate advice removed entirely from the suspected atmosphere and conveyed in the clear language of an independent mind, free from taint

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of interests, to the party acting, regarding the precise nature and consequence of the transaction. In cases of this class, there need not necessarily be misrepresentation by one party to the other to invalidate the deed: if there is any concealment of material fact, any failure to disclose material information or any just suspicion of artifice, the Court will interfere and pronounce the transaction void and restore the parties as far as possible to their original rights. Held—That as the family was joint and there was a nucleus of joint property the burden was on the party setting up a case of separate estate to establish his allegation. That the first deed of settlement was in essence a deed of management and did not cause a severance of the family, the title to the half-share inherited by the Plaintiff from her husband never having vested in her brother-in-law. Held, upon the evidence—That the disputed deed of settlement was understood by the lady to be a deed for five years whereas in reality it was a deed operative for her life; that she had no independent advice; that the extent of the income and the value of all the joint properties, moveable and immoveable, were not disclosed to her, and that the effect of the deed on her rights was never brought home to her. That the deed actually executed by the lady having been fundamentally different from the deed she intended to execute and thought she executed was void and inoperative and that being so no question of limitation arose. Art. 91 of the schedule to the Indian Limitation Act has no application to a case of this description where a suit is brought for possession and partition upon declaration that an instrument under which the Defendant claims is void. That, on the supposition that the deed needed being cancelled, the Defendants had failed to prove that the Plaintiff acquired full information of the true state of facts at a time too remote to allow her to maintain the suit. NIBARAN CHANDRA MUKERJEE v. NIRUPAMA DEBI ... 517

PUTNI REGULATION (VIII of 1819, Bengal), sec. 3—Stipulation in a mourasi mukurari kabuliyat for the delivery of ghee and goat, annually, if enforceable—Second clause of the section whether abrogates all previous restrictions on abwabs as embodied in Regulation V of 1812, sec. 3.] In a mourasi mukurari kabuliyat executed in 1877 there was a stipulation at the end that the tenant should deliver annually one seer of ghee and one goat to the landlord putaidar. Held—That in view of the clause imposing the delivery of the goat and the ghee standing completely isolated from the terms relating to the rent proper and its mode of payment, the goat and ghee were not part of the rent, and as such were not recoverable, being in the nature of an abwab and hence an illegal imposition. Krishna Chandra Sen v. Sushila Sundari ... I. L. R. 26 Cal. 611 (1899), Aparna Charan Ghose v. Karam Ali, 10 C. W. N. 527; s. c. 4 C. L. J. 527 (1906). Tilakdhari Sing v. Chulan Mahton, I. L. R.

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17 Cal. 131 (P. C.) (1889), **Radha Prasad Sing v. Bal Kowar Koeri**, I. L. R. 17 Cal. 721 at p. 740 (1890) and **Ebbs v. Boulnois**, L. R. 10 Ch. App. 479 (1875) referred to and discussed. Sec. 3 of the Punji Regulation did not restrict the application of the general law against abwabs as embodied in sec. 3 of Reg. V of 1812. **Asanullah Khan v. Tirthabasi**, I. L. R. 22 Cal. 688 (1895) and **Bijoy Singh v. Krishna Behary**, 21 C. W. N. 959 (1917), referred to and discussed. **RAM TARAN TEWARY v. SM. KUMEDA DASSEE** ... 634

RECEIVER, rent decree obtained by, after conditional order of discharge made by Court, but not carried out and before the decree embodying order of discharge was signed by the Judge—Receiver, if bound to disclose to Court order of discharge in such circumstances—Devolution of interest pending suit—No application for substitution—Decree passed in favour of original party, it bad. In a rent suit instituted by the receiver of an estate as such a decree was obtained after an order discharging the receiver on certain conditions had been made by the Court. It appeared, however, that on the date the rent decree was made, the order of discharge had not been in fact carried out nor was the decree embodying the said order signed by the Judge who passed it. The receiver was in possession as before and he was subsequently continued as such by the order of the Appellate Court: **Held**—That it was not established that the receiver was in fact and law discharged on the date of the rent decree nor was it proved that there was fraud such as would entitle the Plaintiff to maintain a suit to have the decree set aside. That it was not shown that there was in fact and in law such a discharge as it was incumbent upon the receiver to disclose before the Court. That, assuming that the receiver was discharged before the decree was passed, there was only a devolution pending the suit, and the decree made in favour of the receiver would not on that account be a bad decree but would enure for the benefit of the party on whom the interest devolved, such party not having applied for the carriage of the proceedings. **BEFIN BEHARI BOSE v. MR. K. S. BONNERJEE** 361

Teshildar appointed by—Maintainability of suit by the owner of the estate against teshildar for accounts—Receiver, if a representative of the owner of the estate—Fiduciary relationship, necessity to establish. The owners of an estate brought a suit for account against a Teshildar of their estate who had been appointed by a Receiver who had been in charge of the estate under an order of Court but had since been discharged. **Held**—That a suit was not maintainable. Such a suit can be sustained only on proof of fiduciary relation between the parties. But the Receiver is not a representative of the owner; he is an officer of the Court. Hence an officer appointed by the Receiver does not stand in the same position as an officer appointed by the owner. **Jatindra Narayan Acharya v. Rajendra Kishore Das**, 8 C. L. J. 114 (1908), followed. Although a Receiver has been

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discharged, it is still open to the party entitled to surcharge him in his accounts and obtain relief against him; and a suit may be maintained against the Receiver if it is established that he has monies belonging to the estate still in his hands, notwithstanding his discharge. **Re Edwards**, L. R. 31 Ir. 242 and **Osmond Beeby v. Khitish Chandra Acharya Chowdhury**, I. L. R. 41 Cal. 771: s. c. 18 C. W. N. 631 (1914) referred to. **HARIHAR MOOKERJEE v. JAHARUDDIN MANDAL** ... 992

REGISTRATION ACT, INDIAN (111 of 1877), ss. 3, 34—Deed of gift in favour of a married minor girl presented for registration by latter's father without authority from executant—Registration if valid—Deeds void. Two deeds of gift executed by K in favour of his niece A who was a minor and married to his adopted son were presented for registration by A's father and registered: **Held**—That upon A's marriage her father ceased to be her natural guardian and never having been appointed her legal guardian was not her assignee or representative within the meaning of sec. 3 of the Registration Act, 1877. Nor was he, within the meaning of sec. 34 of the Act, the representative assign or agent duly authorised on behalf of K. The registration of the deeds was therefore illegal, invalid and void, with the consequence that the deeds themselves were void and unenforceable. **AMBA v. SHRINIVASA KAMATHI (P. C.)** ... 369

s. 17 (1)—**Document whether Will or an authority to adopt—Registration compulsory if latter.** The operative part of a document which the writer called a "Will" stated that having, owing to severe illness, had serious misgivings and not having been blessed with an heir apparent, the writer had consented to his wife adopting a son at her pleasure and conducting the management of the estate in the best manner: **Held**—That the document was not a Will but only a power to adopt and as such ought to have been registered as being an authority to adopt a son, not conferred by a Will within the meaning of sec. 17 (1) of the Registration Act of 1877. **SRI SRI JAGANNATHA GAJAPATI ANANGA BHEEMA DEO KESARI MAHARAJUNGARU v. SRI KUNJA BEHARI DEO** ... 374

(XV of 1877), ss. 17, 49—Unregistered deed of gift of property of value exceeding Rs. 100 executed before passing of the Transfer of Property Act, effect of. An unregistered deed of gift affecting property of value exceeding Rs. 100 executed before the passing of the Transfer of Property Act could not under sec. 49 of the Registration Act affect any immovable property comprised therein or be received in evidence of any transaction affecting such property, though it would be admissible in evidence for a collateral purpose, and might also, if accompanied by delivery of possession, have been validated under the Hindu law which was then in force. **JAGANNATH MARWARI v. SM. CHANDNI BIBI** ... 65

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REGISTRATION ACT (XVI of 1908), secs. 17 (b) and 49—Hindu joint family estate—Losses in management—Agreement providing for surrender of share—Subsequent letter affirming agreement not registered. <i>See</i> Headnote under Hindu joint family estate. PANDURANG KRISHANAJI v. MARKANDEYA TUKARAM (P. C.) ...	201	REGISTRATION ACT—concl'd.	
ss. 2, 3, 17, 49—Admissibility of an unregistered lease—Lease and agreement to lease—Agreement followed by possession, effect of—Doctrine of part performance, if applicable—Statute of Frauds—Transfer of Property Act (IV of 1882), s. 107—Suit for specific performance—Estoppel against a statute, if available.] An agreement to lease intended to operate as a present demise is a lease within the meaning of cl. (d) of sec. 17 of the Registration Act, 1908, and as such is inadmissible in evidence in a suit for specific performance of its terms, under sec. 49 of the Act if it is not registered even though the tenant is in possession under the said agreement. Cases of part performance under sec. 4 of the Statute of Frauds have no application to those arising under sec. 49 of the Registration Act, 1908, as the positions under the two Acts are quite different. The Plaintiff who was in possession of certain premises under a previous tenancy expiring in December 1916, on the expiry of the said tenancy entered into negotiations for a further tenancy with the landlords, the Mondol Defendants, the terms of which were reduced into writing. This document, dated 15th January 1917, which was unregistered, purported to be in form a memorandum of agreement but was intended to operate as a present demise of the said premises to the Plaintiff for five years from 1st January 1917 and was held to be a lease within the meaning of cl. (d) of sec. 17 of the Registration Act, 1908. In May 1919 the Mondol Defendants sold the said premises to the Lahiri Defendants who had full notice of the unregistered instrument of 15th January 1917 and of its terms. On the 29th May 1919, the Plaintiff was given notice by the Lahiri Defendants to quit by the 30th June 1919 on the allegation that he was a monthly tenant. The Plaintiff brought a suit for the specific performance of the said agreement in terms of the unregistered document. Held —That the document, dated 15th January 1917, was not admissible in evidence in a suit for specific performance, under sec. 49 of the Registration Act, as it was not registered. Held, also —That as there was no other evidence before the Court of the terms of the said agreement, there could not be a decree for specific performance. Per Rankin, J. —“If I admit the document at all it seems to me that I would be receiving it as evidence of a transaction affecting the property. If upon its true construction it is meant to take effect as a present demise I cannot treat it as something else or as evidence of a transaction different from this in nature and so avoid the statute. My opinion is that against the prohibition of the statute no estoppel avails and that there is nothing in <i>Walsh v. Lonsdale</i> , 21 Ch. D. 9 (1882), or the cases under the Statute of		Frauds to cover the Plaintiff in this case.” Rani Hemanta Kumari Debi v. Midnapur Zemindary Co., Ltd. I. L. R. 47 Cal. 485; s. c. 24 C. W. N. 177 (P. C.) (1919) and Port Canning and Land Improvement Co., Ltd. v. Sm. Katyani Debi , I. L. R. 47 Cal. 290; s. c. 24 C. W. N. 869 (P. C.) (1919), relied on. Walsh v. Lonsdale , 21 Ch. D. 9 (1882), Bibi Jawaher Kumari v. Chatterput Singh , 2 C. L. J. 313 (1905), Maddison v. Alderson L. R. 8 A. C. 467 (1883), Kedarnath v. Poorasundari , 11 C. L. J. 548 (1909), Sm. Baranashi Dassi v. Papat Velji , 25 C. W. N. 220, 229 (1919), Shyam Kishore v. Umesh Chandra , 24 C. W. N. 463; s. c. 31 C. L. J. 75 (1919), Muhammad Musa v. Aghor Kumar , I. L. R. 42 I. A. 1; s. c. I. L. R. 42 Cal. 801; 19 C. W. N. 250 (1914), Sarat Chandra v. Shyam Chand , I. L. R. 39 Cal. 603; s. c. 16 C. L. J. 71 (1912) and Puchha Lal v. Kunja Behari , 18 C. W. N. 445; s. c. 19 C. L. J. 213 (1913), referred to. SANJIB CHANDRA SANYAL v. SANTOSH KUMAR LAHIRI ...	320
		RENT , suit for “abatement on the ground of eviction from a portion of the land by a person not having a title paramount—“Eviction by title paramount,” meaning of—Physical dispossession, if necessary to amount to eviction—Suit by stranger against tenant, and attornment by latter to former in respect of a portion of the tenure under Court's decree—Onus to prove eviction by title paramount, if on landlord.] An execution purchaser of some decretal lands obtained delivery of khas possession of the lands through Court and let out a portion thereof to B. Subsequently the Government settled with a third party some lands including a portion of the lands let out by the said execution purchaser. The Government lessee on the strength of the settlement sued B alone for recovery of the said lands and got a decree which provided that being a bona fide tenant B should not be ejected but should pay rent to the Government lessee in respect of the lands of which he was in possession. Subsequently the aforesaid execution purchaser brought a suit for rent against B, who claimed proportionate abatement of rent in respect of the said portion. Held —That in order to be entitled to proportionate abatement of rent, forcible expulsion is not necessary, nor is it necessary that the tenant should actually go out of possession, and if, upon a claim being made by a person with a title paramount, he consents by an attornment to such person to change the title under which he holds, or enters into a new arrangement for holding under him, this will be equivalent to an eviction and a fresh taking. But an eviction, whether actual or constructive, must be by a party with a title paramount. The Government lessee had no doubt obtained a decree against B, but that was not sufficient to show that he had a title superior to that of the execution purchaser. Nor was the onus to prove that the Government lessee had no title shifted on the execution purchaser in consequence of such a decree. Rani Dassi v. Asutosh Roy Choudhury , 15 C. L. J. 310 (1910) and Noorijan Sardar v. Bimola Sundari Gupta ,	

- RENT—concl'd.**
 18 C. W. N. 552 (1912), distinguished. "Eviction by title paramount" means eviction by a title superior to the titles both of lessor and lessee, against which neither is enabled to make a defence. *Neale v. Mackenzie*, 1 Meeson and Welsby 747 at p. 759 (1836). *Syed Mukhtar Ahmad v. Rani Sundar Koer*, 17 C. W. N. 960 (1913) and *Rung Lal Singh v. Lalla Roodur Pershad*, 17 W. R. 386 (1872), referred to. *BANKA BEHARI GHOSH v. MADAN MOHAN ROY* ... 143
- , if includes, interest. See *Bengal Tenancy Act*. *RAM LAL DAS v. BANDIRAM MUKHOPADHYA* ... 511
- RENT ACT.** See *Calcutta Rent Act*.
- RENT CONTROLLER.** order of, if may be revised by the High Court—Rent Controller, if may fix standard rent during currency of lease—President of Improvement Trust Tribunal, power of, to revise Rent Controller's order which did not fix standard rent—Act III, B. C., of 1920, secs. 15 (1), 18—Government of India Act of 1915, sec. 107. The Rent Controller's Court is a Court of Civil Jurisdiction. The High Court has the power of revising the Rent Controller's orders under its general powers of superintendence under sec. 107 of the Government of India Act. There is nothing to prevent the Rent Controller from fixing the standard rent during the currency of a lease. The President of the Improvement Trust Tribunal had no jurisdiction to revise the Rent Controller's order when the latter did not fix a standard rent. *H. D. CHATTERJEE v. L. B. TRIBEDI* ... 78
- RES JUDICATA—Civil Procedure Code (Act V of 1908), sec. 11—Res judicata—Sec. 92.** suit by public, if barred by the decision in a previous suit between a Manager appointed under the Religious Endowments Act and some claimants as Mohants. A Manager was appointed under sec. 5 of the Religious Endowments Act of 1863 in respect of a temple, and thereupon a person claiming to be a Mohant or Dundee of the temple instituted a suit for establishment of his title. There were three Defendants in the suit, viz., the said Manager, his successor in office and another rival claimant to the office of Dundee. The suit was decreed. During the pendency of the suit the public brought the present suit under sec. 92 of the Civil Procedure Code, but the District Judge dismissed the suit on the ground that the trial of the question raised in the present suit was barred by the result of the decision in the previous suit which was pending at the date of the institution of the present suit. Held—That the decree in the earlier suit though operative against the Manager appointed under sec. 5 of the Religious Endowments Act as also against the rival claimants, could not possibly operate to defeat a suit by members of the public instituted under sec. 92, C. P. C. Sec. 92 contemplates the administration of a trust created for public purposes. Such administration may include the removal of an existing trustee, the appointment of a new trustee or both. In such a suit it may be held that the endowment was not of such a nature as to attract the operation of the provisions of the Religious Endowments Act, 1863, and that the appointment of the Manager under sec. 5 of the Act was without jurisdiction and so forth. *SAHAYRAM CHAKRABARTY v. KHA-GENDRANANDA ASRAM* ... 504
- , general principle of, not limited by Civil Procedure Code (Act V of 1908), sec. 11. Under a deed of settlement executed by one R, one half of certain properties was given to his adopted son and the remaining half was given to his two wives who were to take the same half and half. One of these properties having been acquired by Government a question arose in a proceeding under sec. 32 of Act I of 1894 between the adopted son and one of the wives, as to whether the latter was absolutely entitled to her share of the compensation money or whether the same was to be invested she having no right to alienate her interest in the property under the deed of settlement. The High Court, when the matter came up before it, held that by the deed of settlement the wife was intended to have a widow's estate only in the property devised. Subsequently the wife having bequeathed her properties to Respondent by Will, the representatives of the adopted son instituted a suit against the claimants under the Will alleging that she had a limited estate under the deed of settlement and had no power to dispose of the properties by Will. Held—That it was not open to the Courts in this suit to review the decision of the High Court, in the proceeding under sec. 32 of Act I of 1894, that the lady had only a limited estate in the property without power of alienation. It is not competent for the Court, in the case of the same question arising between the parties, to review a previous decision no longer open to appeal given by another Court having jurisdiction to try the second case. This principle is of general application and is not limited by the specific words of sec. 11 of the Civil Procedure Code; so that the fact that the decision in question was not obtained in a "former suit" did not make any difference. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute, and the Defendants in the suit could not be heard to say that in view of the comparatively small value of the property involved in the proceeding under sec. 32 of Act I of 1894 it was not thought worth the while to appeal from the decision of the High Court in that proceeding. *T. R. RAMACHANDRA RAO v. A. N. S. RAMCHANDRA RAO (P. C.)* ... 713
- , private arbitration award filed and judgment pronounced and decree following, if can be re-opened in subsequent suit to set aside the award and decree. See *C. P. C., Sch. II, cls. 20, 21*. *GURU CHARAN SIKKAR v. UMA CHARAN SIKKAR* ... 940

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REVENUE SALE LAW—Act XI of 1859, sects. 2 and 3—Bengal Act (VII of 1868)—Tenures in Dibi Panchannogram—Board's Notification regarding time for sale, effect of—Sale for arrears of revenue when premature and ultra vires—Date of payment of revenue.] The effect of the Notification of the Board of Revenue, dated the 6th October 1871 is that no holding can be sold till after the 28th June next after the first day of the month following the month in which the revenue or rent should have been paid. The date on which the revenue is payable depends primarily not on general or administrative considerations such as the course of business in the Collectorate or the mode in which the accounts are kept but on the contract between the parties. Where a tenure was held under a <i>kaluliya</i> , dated the 10th November 1863, containing a stipulation to pay rent year by year in Dibi Panchannogram to which by virtue of Bengal Act VII of 1868, Act XI of 1859 was applicable, and the tenure was sold for arrears of revenue of 1914 and 1915 on the 17th May 1915, it was held that the sale was premature and ultra vires and conferred no title on the purchaser as the current demand for 1914-1915 was not payable till the 10th November 1914, so that the tenure could not be sold before the 28th June 1915. <i>Haji Bukshi Elahi v. Durlav Chandra Kar</i> , I. L. R. 39 Cal. 981; s. c. 10 C. W. N. 842 (P. C.) (1912), followed. MANMOTHO NATH MULLICK v. MAHAMED SOLEMAN ...	140	RIGHT OF WAY—concl'd. [1893] A. C. 162 and <i>Crossley v. Lightowler</i> , L. R. 2 Ch. App. 478 (1867), referred to. GOPAL CHANDRA SEN v. BAN-KIM BEHARI ROY ...	121
RIGHT OF WAY—Suit for declaration of—Necessity of proving that enjoyment of the right ended within two years before suit—Affirmative proof of "actual user," if necessary—Distinction between "enjoyment" of a right of easement and "actual exercise" of the right.] Plaintiff brought a suit for declaration of a right of way and for removal of an obstruction thereto. The right was enjoyed for more than 20 years peaceably and openly, without interruption, as an easement, and as of right. There was no discontinuance of the "enjoyment" by reason of the obstruction by the Defendant, till within a few days previous to the institution of the suit, and there was no suggestion that the Plaintiff voluntarily abandoned or discontinued the exercise of the right at any time before such date. Held—That it was not necessary for the Plaintiff to prove affirmatively "actual user" of the way down to a date within two years before the suit, <i>Sham Churn v. Tariney Churn</i> , I. L. R. 1 Cal. 422 (1876), <i>Koylash v. Sonatun</i> , I. L. R. 7 Cal. 132 (1881), <i>Vinayak v. Martand</i> , 6 Bom. L. R. 287 (1904) and <i>Ghulam v. Gulsher</i> , [1886] P. R. 38, referred to. A person may without violence to language, be said to be in "enjoyment" of a right of way during a period of time, though he does not actually "use" the way every moment. Cessation of user is not always inconsistent with continuance of enjoyment of a right, or in other words, cessation of user is not an invariable indication of abeyance of enjoyment of a right. <i>Janhavi v. Bindu</i> , I. L. R. 26 Cal. 593; s. c. 3 C. W. N. 610 (1899), <i>Carr v. Foster</i> , [1842] 3 Q. B. 581, <i>James v. Stevenson</i> ,		... public, suit for declaration of, if can succeed without proof of special damage—Advocate-General's permission under s. 92, Civil Procedure Code, if necessary, where permission of Court is taken under Or. 1, r. 8—Limitation Act (IX of 1908), sec. 23, Arts. 120 and 144, applicability of, in such suit.] Plaintiff sued for a declaration that a village path was a public way and sought relief for himself and his fellow villagers. The permission of the Court was taken under Or. 1, r. 8, of the Civil Procedure Code. The suit was decreed and the decree confirmed on appeal. The Appellate Court found that the Plaintiff suffered special damage, and the finding was challenged in second appeal. Held—That the question of whether the Plaintiff suffered special damage or not did not arise, because a suit for a declaration that a pathway is a village pathway can succeed without proof of special damages. <i>Harihar Das v. Chandra Kumar Guha</i> , 23 C. W. N. 91 (1918), followed. The suit was one to which Or. 1, r. 8, Civil Procedure Code was appropriate and the Court's permission having been obtained under that rule, recourse to the Advocate-General was not necessary. Art. 144, and not 120 of the Limitation Act, applied to the suit. And in either case the Plaintiff could have recourse to sec. 23 of the Limitation Act. HARISH CHANDRA SAHA v. PRAN NATH CHAKRABARTY ...	587
		SAJJADANASHIN, legal powers of. Vide <i>SRI VIDYA VARUTHI THIRTHA SWAMIGAL v. BALUSAMI AYYAR</i> ...	537
		SALE—Condition subsequent and not precedent if vitiates sale—Bona fides of sale of minor's property. See head-note under <i>Guardians and Wards Act</i> . DYAM KHAN v. SARAT CHANDRA DE ...	218
		SCRIBE of mortgage bond if can attest document. See <i>Transfer of Property Act</i> , sec. 59. SRISTIDHAR GHOSE v. RAKHYAKALI DASI ...	264
		SHEBAIT, purchasing debutter property at Court sale in the benami of his son for adequate price, if can keep his purchase—Fiduciary relationship, purchase by person standing in, valid if full disclosure made to cestuiqui trust—Secret purchase in another's name invalid.] The grounds for removing a shebait from his office may not be identical with those upon which a trustee would be removed in England. The close intermingling of duties and personal interest which together make up the office of shebait may well prevent the closeness of the analogy, but as part of the office, it is indisputable that there are duties which must be performed, that the estate does need to be safeguarded and kept in proper custody, and if it be found that a man in the exercise of his duties has put himself in a position in which the Court thinks that the obligation of his office can no longer be faithfully discharged, that is sufficient ground for his removal. A	

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trustee who is not a trustee for sale may acquire from beneficiaries who are sui juris an estate in which they are interested, but he can only do this if has made the fullest disclosure to them of all the relevant and material facts with-in his knowledge affecting or that might affect the value and condition of the estate, and the parties are at arms length, the cestuiqui trust knowing that he is dealing with the trustee. Otherwise the purchase is bad and it is bad because any person who occupies a fiduciary relationship may be able by virtue of his position to acquire information with regard to the trust estate which he is not permitted to use for his own benefit. This rule is of general application to dealings by persons with an estate in regard to which they stand in a fiduciary relationship and therefore governs purchases of debuttar estate by a shebait. The rule laid down in *Lewis v. Hillman*, 3 H. L. C. 607 (1852), that even if an attorney or agent can show that he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase can stand, applied to the purchase in this case by a shebait at a Court sale in the benami of his son, and it was declared invalid in spite of the fact that the price fetched was abundant. *PEARY MOHAN MUKHERJI v. MONOHOR MUKHERJI P. C.* ... 133

or mutwalli if trustee. See *Mohand v. Mutt. SRI VIDYA VARUTHI THIRTHA SWAMIGAL v. BALUSAMI AYYAR (P. C.)* ... 537

right of an idol to impose restrictions on the powers of subsequent shebait—Acceptance of benefits conferred by a gift by the shebait—Effect of such acceptance on the restrictions imposed by the gift. A Hindu governed by the Dayabhaga School established certain family deities, but imposed no condition as to their location. His son acquired a piece of land and erected thereon a separate Thakurbari for one of the deities. By a declaration of trust he declared that he, his heirs, executors, representatives and administrators should for ever hold the land to and for the use of the deity, that the Thakur should be located and worshipped in the premises and that the Thakur should not on any account be removed therefrom unless and until a similar or better Thakurbari was built. The grandsons of the founder separated and the palas of worship were divided. One of the said grandsons, not having got any part of the family house, removed elsewhere and built himself a separate residence, where he wanted to remove and worship the Thakur during his turn of worship, but was prevented by his co-sharers on the strength of the above declaration. Held—That the founder of the idols having imposed no condition as to their location, it was not open to any subsequent shebait to impose restrictions which would fetter those who subsequently as heirs of the founder became shebait. The said grandson is therefore entitled to remove the Thakur from the Thakurbari to his

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own house during his turn of worship. *Gossami Sri Gridharji v. Romanialji Gossami*, L. R. 16 I. A. 137; s. c. I. L. R. 17 Cal. 3 (1889), distinguished. *Idem*:—Whether it is open to the shebait to take for the Thakur the benefit of the Thakurbari without conforming to the restrictions imposed by the deed of trust. *PROMOTHA NATH MULLICK v. PRADYUMNA KUMAR MULLICK* ... 909

SHERIFF'S POUNDAGE, when payable—

Whether it is payable when claim is paid up upon compromise after an attachment before judgment—High Court Rules, G. XXXVI, r. 77—28, Elizi Ch. 4—“Levy,” meaning of.] A filed a suit against B for about 8½ lacs and subsequently applied for attachment before judgment of certain moneys belonging to B lying with the Bank of Bengal and got an order for interim attachment which was effected by the Sheriff. Thereafter a settlement was arrived at and the order nisi was discharged and the interim attachment was by consent withdrawn, each party paying his own costs. The present suit was filed by the Sheriff of Calcutta claiming Rs. 21,900 as poundage due to him as Sheriff of Calcutta by reason of the interim attachment before judgment under the High Court Rules, Ch. XXXVI, r. 77: Held—That the Sheriff was not entitled to any poundage under the said rule. A claim to poundage by a Sheriff must be under the express terms of a Statute, Rule or Order. He has no common law right to reward for executing a writ. *Woodgate v. Knatchbull*, 2 T. R. 148 (1787) and *Graham v. Grill*, 2 M. & S. 294, 297, (1874), referred to. R. 77 of Ch. XXXVI of the High Court Rules is directed to proceedings in which the Sheriff is employed about the levying of a sum of money in execution. The alternative part applies to such a proceeding in an event, viz., where the process is interrupted before completion but in a manner which produces the same or similar result. The rule has no application where there is an attachment before judgment but no execution. *A. D. PECKFORD v. RAI RAHADUR TANAKI NATH* ... 673

SPECIFIC RELIEF ACT (I of 1877), s. 31—

Suit for rectification of mortgage deed after issue of sale proclamation in execution of mortgage decree—Grounds on which rectification justifiable—Passing of decree if bar to rectification—Notice, necessity of, when knowledge proved—Notice to purchaser by title papers, nature and effect of—Purchase of mortgaged property during pendency of execution proceedings—Is pendens—Misdescription of property, if prevents its application. After the sale proclamation was issued in execution of a mortgage decree a suit was brought for the rectification of the mortgage bond so far as the description of the property mortgaged was concerned. The mortgaged property, it appeared, had been purchased by a third party during the pendency of the execution proceedings: Held—That in order to justify rectification of a contract or other instrument in writing there must be proof of a common intention different from the expressed intention and a com-

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mon mistaken supposition that the intention was rightly expressed in the instrument; it matters not by whom the actual oversight or error was made which caused the expression to be wrong. The conception of notice was introduced into law and the rules concerning it were established from considerations of policy and expediency based upon the common experience of mankind. Notice even when actual is not necessarily equivalent to knowledge, but the same effect must be attributed to it which would naturally flow from knowledge. Notice being thus a representative of, or substitute for, actual knowledge, whenever a party has obtained a full knowledge, although not in accordance with the rules which define the nature of notice and regulate the mode of its being given and received, there is no longer any need of invoking the legal conception of notice. Notice to a purchaser by his title papers in a transaction will not be notice to him in an independent subsequent transaction in which the instruments containing the recitals are not necessary to his title; but he is charged constructively with notice merely of that which affects the purchase of the property in the chain of title of which the paper forms a necessary link. Held, further—That the fact that a decree had already been made on the mortgage bond was no bar to the rectification of the bond itself. It may be held as a general rule that if there is a mutual mistake in a mortgage in the description, of property and the same mistake is reproduced in the decree, equity may go back to the original transaction and reform both the mortgage and the decree so as to make them conform to the intention of the parties concerned, but in a case where the decree has been executed and title has passed to a purchaser, fresh considerations may arise. The contesting Defendant having purchased the property during the pendency of the execution proceedings would be bound thereby, for in the case of a mortgage suit the *lis pendens* does not terminate till the security has been realised for the satisfaction of the judgment debt. The principle of the decision in *Lokenath v. Achitananda*, 15 C. L. J. 391 (1909), that misdescription of the property involved in a litigation is sufficient to render the doctrine of *lis pendens* inapplicable cannot be invoked by a person who has either knowledge or notice of the true state of things. **BEPIN KRISHNA ROY v. PRYA BRATA BOSE**

sec. 42, scope of—
Legal character what is. See under Election. **CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF KOTRUNG v. BISSESWAR GHOSE**

s. 42, declaratory suit without seeking consequential relief, maintainability of—Plaintiff if bound to sue for all the reliefs—Adverse possession against co-owners of joint property—Cause of action, accrual of, for a declaratory suit.—Limitation Act (IX of 1908), Art. 120, applicability of.] A declaratory suit was brought for determination of Plaintiff's share in certain joint ancestral lands, on

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the allegation that he was in joint possession of the share claimed by him, but he did not seek any consequential relief. The Defendants pleaded that the title of the Plaintiff was extinguished by adverse possession on the part of the predecessor of one of the Defendants. The suit was, however, dismissed under the provisions of sec. 42 of the Specific Relief Act, inasmuch as the Plaintiff had omitted to claim further relief. Held—That the possession by one co-owner is not presumed to be adverse to the others but is ordinarily held to be for the benefit of all. The possession of one joint tenant is the possession of all and there can be no dis-possession by one joint tenant, in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy. **Balaram v. Syamacharan**, 24 C. W. N. 1057 (1920). **Lokenath v. Chakraswar**, 20 C. W. N. 51 (1914). and **Narendra v. Jogendra**, 20 C. W. N. 1258 (1916). followed. **Corea v. Appuhamy**, [1912] App. Cas. 230. **Muttu Nayagan v. Brito**, [1918] App. Cas. 895. **Hardit v. Gurmukh**, 28 C. L. J. 437 (P. C.) (1918). and **Varad Pillai v. Jeevarathnammal**, L. R. 46 I. A. 285; s. c. I. L. R. 43 Mad. 244; 24 C. W. N. 346 (1919). referred to. Art. 120 of the Second Schedule to the Indian Limitation Act is applicable to a suit for declaration of title to immoveable property, which must consequently be brought within six years from the date when the right to sue accrues. **Mahabarat v. Abdul**, 1 C. L. J. 73 (1904). **Shyamanand Das v. Raj Narain Das**, 4 C. L. J. 568 (1906). and **Kali v. Bhagaban**, 1 Ihd. Cas. 810, and other cases referred to. Denials of title, which are not accompanied or followed by overt acts, are not calculated to cast a cloud upon the title of a person, and do not accordingly give rise to a cause of action. Held, further—That in sec. 42 of the Specific Relief Act, the expression used by the legislature is, not "other relief" but "further relief." A suit for a declaratory decree ought not to be dismissed on the ground that it is barred by the proviso to sec. 42 of the Specific Relief Act unless it is quite clear that the Plaintiff ought to seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. The proviso to sec. 42 forbids a suit for a pure declaration without further relief, but it does not compel a Plaintiff to sue for all the reliefs which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. Where the Plaintiff is in joint possession of immoveable property, whether such possession be actual possession of his share of the whole or actual possession of a part coupled with a constructive possession of the remainder, he is entitled to maintain a suit for declaratory relief with a view to remove a cloud on his title created by the act of the Defendant dis-putting his share; in a suit so framed decla-

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ration of title is all that the Plaintiff needs and he is consequently not called upon to ask for consequential relief by way of partition. *Aisa Siddika v. Bidhu Sekhar*, 17 C. L. J. 30 (1912). *Sivaramalingam v. Sabharathna*, 30 Mad. L. J. 624 (1918). *Kunj Bihari v. Keshva Lal*, 1. L. R. 28 Bom. 567; s. c. 6 Bom. L. R. 475 (1904). and *Asman Singh v. Tulsi Singh*, [1917] Pat. 131; 2 P. L. J. 221 (1917), and other cases referred to. **JOY NARAYAN SEN v. SRIKANTHA ROY** ... 206

... sec. 42—Suit for declaration of title to property after it was attached under sec. 146, Criminal Procedure Code (Act V of 1898)—Effect of Magistrate's attachment on the question of possession—Limitation Act (IX of 1908), sec. 23 and Arts. 120 and 142, period of limitation applicable to the case.] Plaintiff was dispossessed from some lands by the Defendant in April 1904 and in June 1904 the lands were attached under sec. 146, Criminal Procedure Code owing to disputes between the parties. Plaintiff brought the present suit for recovery of possession in May 1916. The lower Courts held that Plaintiff had title but that the suit was barred by limitation: Held—That the suit though framed as a suit for possession cannot be treated as such, because the possession was not with the Defendant, but with the Magistrate who was not and could not be a party to the suit. The article therefore applicable to the suit was Art. 120 of the Limitation Act and not Art. 142. *Goswami Ranchor Lalji v. Sri Girdharji*, 1. L. R. 20 All. 120 (1897). *Raja of Venkatagiri v. Isakpalli*, 1. L. R. 26 Mad. 110 (1902) and *Brojendra Kishore Roy v. Sarojini Roy*, 20 C. W. N. 481 (1915), referred to. The position of the Magistrate was that of a stake-holder and during the continuance of the attachment the property was in legal custody which must be held to be for the benefit of the true owner, i.e., the Plaintiff. And the possession of the Magistrate being in law the possession of the true owner the Defendant's possession was determined upon the Magistrate's taking possession under the attachment, in other words, the Plaintiff must be taken to have been restored to possession constructively on the date of the attachment. He therefore got a fresh starting point for purposes of limitation, and the case can be treated as one of continuing wrong within the meaning of sec. 23 of the Limitation Act. The suit was therefore not barred by limitation. *Khagendra Narain v. Matangini*, 1. L. R. 27 Cal. 814 (1890). *Boni Prasad v. Shahzada Ojha*, 1. L. R. 32 Cal. 856 (1905). *Rao Karan v. Raja Bakar Ali*, 1. L. R. 9 I. A. 99; s. c. 1. L. R. 5 All. 1 (1882). *Ramsamy v. Muthusamy*, 1. L. R. 30 Mad. 12 (1906). *Trustees, Executors and Agency Company v. Short*, 1. L. R. 13 A. C. 793 (1888). *Secretary of State v. Krishnamoni*, 1. L. R. 29 Cal. 518; s. c. 6 C. W. N. 617 (1902), referred to. *Deo Narain v. Webb*, 1. L. R. 28 Cal. 86; s. c. 5 C. W. N. 160 (1900), commented on. **PANNALAL v. PANCHURUIDAS** ... 432

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STAMP ACT, INDIAN (II of 1899), r. 2, sub-s. 5, cl. (6)—Attestation, what is—A document written by person other than executant, if "attested" by the writer, who did not sign as attesting witness.] The attestation referred to in sec. 2, sub-sec. (5), cl. (6) of the Indian Stamp Act means attestation on the face of the instrument. Reference under Stamp Act, 1. L. R. 17 All. 211 (F. B.) (1895) and *Jagannath Khan v. Bajrangi Das Agarwalla*, 1. L. R. 43 Cal. 61 (1920), referred to. **BIDHU RANJAN MAJUMDAR v. MANGAN SARKAR ... 585**

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STRAITS SETTLEMENTS ORDINANCE No. 6 of 1896, sec. 10—"Specific purpose," meaning of.] A "specific purpose" within the meaning of sec. 10 of the (Limitation) Ordinance No. 6 of 1896 of the Straits Settlements (which in terms corresponds to sec. 10 of the Indian Limitation Act), must be a purpose that is either actually or specifically defined in the terms of the Will or settlement, or a purpose which, from the specified terms, can be certainly affirmed. The statement in *Balwant Rao v. Puran Mal*, 1. L. R. 6 All. 1 (P. C.) (1888), that the purpose of following the property in the hands of the trustees referred to at the end of the section must be the purpose of restoring it to the trust which is specified in the earlier part of the section, provides a sound and critical test by which to consider whether or not any particular trust is within the provisions of the section. **KHAW SIM TEK v. CITUAH HOOI GNHO NIOH ... 495.**

SUCCESSION—Indian Succession Act (X of 1865), sec. 331—Probate and Administration Act (V of 1881), sec. 2—The Special Marriage Act (III of 1872), secs. 2, 10, 16, 17—Brahmo—A Hindu by becoming a Brahmo whether necessarily ceases to be a Hindu—A declaration under Act III of 1872, whether amounts to an abjuration of Hinduism for all purposes—Different sections of the Brahmo Community—Practice.] A Hindu by becoming a Brahmo does not necessarily cease to be a Hindu. Something further than the mere becoming a Brahmo is necessary for a man to cut himself off from Hinduism. A declaration under the Special Marriage Act, 1872, cannot be taken as an abjuration for all purposes of Hinduism but is merely a statement for the purposes of the Act itself. **IN THE GOODS OF JNANENDRA NATH ROY, DECEASED ... 799**

SUCCESSION CERTIFICATE ACT (VII of 1889)—Necessity of a certificate in case of a son belonging to a Mitakshara family.] In the case of a family governed by the Mitakshara law a son can maintain a suit for debts owing to his late father without a succession certificate under Act VII of 1889. **SITAL PROSHAD PODDAR v. KAI-FUT SHEIKH ... 488**

SUCCESSION ACT, INDIAN (X of 1865), secs. 2, 331—Person dying a Christian, succession to, if governed by Hindu law when he lived like a Hindu.] Succession to the estate of a person who died a Christian is governed by the Indian Succession Act, and cases such as *Abraham v. Abraham*, 9 M.

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I. A. 195 at p. 245; 1 W. R. P. C. 1 (1863), and Radhika Patta Maha Devi Garu v. Nilamani Patta Maha Devi Garu, 14 W. R. P. C. 33 (1870), which preceded the Act, cannot be relied on to modify or interpret it. **MUSAMMAT KAWAWATI v. KUNWAR DIGBIJAI SINGH** ... 490

SUIT, bare right of, if assignable. See Transfer of Property Act. **JEWAN RAM v. RATAN CHAND KISSEN CHAND** ... 285

— for accounts against a rent collector—Limitation Act (IX of 1908), Arts. 89, 115 and 116, applicability of—Omission to render accounts, when amounts to a refusal.]

• A rent-collector, employed under a registered agreement, was called upon to render accounts up to 12th April on or before the 13th May 1914. No accounts were rendered as demanded, and on 11th October 1915 the said rent-collector was dismissed and ordered to render accounts up to date. Subsequently a suit for accounts was instituted on the 27th August 1918: **Held**—That Arts. 115 and 116 of the Limitation Act did not apply to the case. In order to make them applicable it must be shown that the suit was not specifically provided for in the schedule. Art. 89 applied to the case, as the term "moveable property" includes money, and consequently excludes the operation of Arts. 115 and 116. That there having been a demand for accounts, non-compliance with the demand amounted to a refusal and the suit in so far as it claimed accounts up to 12th April 1914 must be deemed barred by Limitation as it was instituted after the lapse of three years from the date of refusal, i.e., 13th May 1914. **Madhusudan v. Rakhal**, I. L. R. 43 Cal. 248; s. c. 19 C. W. N. 1070; 22 C. L. J. 552 (1915), **Nabin v. Chandra**, I. L. R. 44 Cal. 1; s. c. 21 C. W. N. 97 (P. C.) (1916), and **Bhabatarini v. Sheik Bahadur**, 30 C. L. J. 90 (1919), and other cases referred to. That the agency having been terminated by the dismissal on the 11th October 1915, and the suit having been brought within three years from that date, the Plaintiff was entitled to accounts from the Defendant other than the accounts demanded in April 1914. The suit was thus in time for the accounts from 13th April 1914 to 11th October 1915. **Agappa v. Chidambaram**, 31 Mad. L. J. 688 (1916) and **Muthia v. Alagappa**, I. L. R. 41 Mad. 1 (1917), and other cases referred to. **PRAM RAM MOOKERJEE v. MOHARAJ KUMAR JAGADISH NATH ROY** ... 461

TENANCY—Suit in ejectment—Homestead within Municipal limits forming part of non-transferable occupancy holding sold to a pleader for residential and professional purposes—Recognition by landlord on receipt of salami, rent previously paid being quadrupled—Settlement whether fresh or in continuation of the old tenancy—Transfer of Property Act (IV of 1882) or Bengal Tenancy Act (VIII of 1885), which applicable.] Where a raiyat occupying his homestead within the residential suburb of the Naraingunj Municipality as part of his non-transferable occupancy holding first sold the rest of the holding to a certain

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person, and next sold his homestead to the Defendant a pleader who purchased it for the purpose of residence and for carrying on his profession as a pleader in the local Civil Courts, was recognized by the Plaintiff, landlords, on payment of salami and was granted rent receipts in the forms prescribed in the Bengal Tenancy Act as for a karsha holding, while the rent previously paid was now quadrupled: **Held**, in a suit brought by the Plaintiffs for ejectment of the Defendant after service of six months' notice to quit terminating with the end of a year of the tenancy—That the Defendant's contention that his tenancy was in continuation of the old tenancy of the outgoing raiyat was not maintainable, that the tenancy originated in a fresh settlement with the Plaintiffs and that in view of the purpose for which the new tenancy was created it was governed by the provisions of the Transfer of Property Act. **Rakhal Das Addy v. Dinomoyi Deb**, I. L. R. 16 Cal. 652 (1889), **Raniganj Coal Association v. Jadoo Nath Ghosh**, I. L. R. 19 Cal. 489 (1892), and **Umrao Bibi v. Mahomed Rojabi**, I. L. R. 27 Cal. 205; s. c. 4 C. W. N. 73 (1899), referred to. **HARENDRA KUMAR ROY CHOWDHURY v. HARA KISHORE PAL** 389

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TENURE—Covenant in a kabulyiat for payment of salami at every transfer in respect of a tenure, if enforceable after a sale in execution of a money decree—Involuntary sale and voluntary sale, difference in cases of.] A kabulyiat stipulated that at every transfer a certain salami should be paid. The tenure in respect of which this kabulyiat was given was sold in execution of a money decree. The landlord subsequently sued for recovery of the stipulated salami: **Held**—That the covenant did not cover an involuntary sale. A condition in a lease restraining transfer is not applicable to a case of involuntary transfer unless there are words in the covenant which clearly make it applicable to such a transfer. The transfer in execution of money decree can not be treated as on the same footing as a voluntary sale. **Dwarika Nath Roy Chowdhury v. Mathura Nath Roy Chowdhury**, 21 C. W. N. 117 (1916), distinguished. **Dayamayi v. Ananda Mohan Ray Chowdhury**, I. L. R. 42 Cal. 172; s. c. 18 C. W. N. 971 (F. B.) (1914), followed. **KUMAR MONMATHIA NATH MITRA v. CHUNI LAL GHOSH** ... 173

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3, 6 (e)—Bare right to sue, assignment of—Claim for unascertained damages—Comparison between the English and Indian law.] The Defendants entered into a con-

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tract with one B undertaking to take delivery of certain goods in accordance with the contract and on their failure to do so the matter was referred to arbitrators who gave an award to the effect that the Defendants were to pay for and take delivery of the goods B, therefore, resold the goods which fetched a lower amount than that contracted for. He then brought a suit against the Defendants for the balance and then assigned to the Plaintiff all his claim in and the right to proceed with the suit and all advantages and benefits of all proceedings thereof: **Held**—That the suit was not maintainable inasmuch as the claim was for unascertained damages for breach of contract and the assignment was an assignment of a mere right to sue. *Glegg v. Bromley*, [1912] 3 K. B. 474 at p. 490, referred to. That there were no materials justifying the application of sec. 107 of the Contract Act and the resale was not justified by the award so that the claim was one for unascertained damages. That on a true construction of the terms of the assignment the subject-matter of the assignment was not property with an incidental right to sue but a mere right to sue for unascertained damages for alleged breach of contract within the meaning of sec. 6 (e) of the Transfer of Property Act. Per Richardson, J.—That in England there is no statutory rule that a bare right of action cannot be assigned. There is a statutory provision making choses in action assignable which is subject to a limitation placed upon it by the Courts that the assignment must not offend the law of maintenance. In India there is an imperative statutory rule prohibiting the transfer of a mere right to sue. But in spite of this difference the results may be in many respects similar. The Indian Legislature when it enacted sec. 6 (e) of the Transfer of Property Act, no doubt had in mind the expressions used in the English cases; and on the question of construction which arises in India the language of Parker, J., in *Glegg v. Bromley*, [1912] 3 K. B. 474 at p. 490 is at least a valuable guide. That even assuming that the goods were properly resold and that the claim asserted in the plaint and transferred to the present Plaintiff is a claim to an ascertained sum it would still be for consideration whether this claim is in the particular circumstances a mere right to sue or property with an incidental remedy for its recovery within the meaning of Parker, J., in *Glegg's case*, [1912] 3 K. B. 474 at p. 490. **JEWAN RAM v. RATAN CHAND KISEN** ... 285

sec. 41—Rights of a mortgagee purchaser in execution of a decree upon a mortgage by a widow in whose benami her husband had purchased the property—Rights of a purchaser in execution of a money decree against the husband—Such purchaser if estopped from disputing the rights of a mortgagee purchaser—Bona fide transferee for value without notice, actual or constructive.] A Hindu husband purchased some lands in the name of his wife, who

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after his death mortgaged them, and the mortgagee purchased them at a sale held in execution of the decree obtained upon the mortgage. In the meantime the lands had been sold in execution of a money decree against the husband and taken possession of by the decree-holder purchaser. The mortgagee purchaser thereupon sued for a declaration that the lands belonged to the wife and for possession. The *kabuliyats*, *toujis*, counter-foil rent receipts stood in the name of the wife and the mortgagee had taken the mortgage in good faith after making proper inquiry: **Held**—That so far as there were occasions for doing so, the husband held out his wife as the real owner, and therefore the purchaser in execution of the money decree against the husband, being the successor-in-interest of the said husband, was estopped from disputing the title of the wife and should not be allowed to defeat the rights of the mortgagee who is a transferee in good faith from the ostensible owner without notice, actual or constructive, of the husband's title. The mortgagee was not bound to enquire into the financial position of the husband at the time when the purchase was made in the name of the wife. *Luchman Chunder Gossain v. Kali Charan Singh*, 19 W. R. 292 (1873), and *Sarat Chunder Dey v. Gopal Chunder Laha*, 1. L. R. 20 Cal. 296 (P. C.) (1892), followed. **ANNODA MOHAN ROY CHOWDHURY v. NILPHAMARI LOAN OFFICE LD.** ... 436

55 (1) (g), sub-sec. (2)—Sale free from incumbrances of property subject to mortgage charges—Incumbrances discharged by purchaser—Right of purchaser to be indemnified—Payment of incumbrances by purchaser, if voluntary—Indian Contract Act (IX of 1872), sec. 69—Arrangement by vendor with a third party to pay off incumbrances, if enforceable by purchaser, when no trust created.] Where a deed of sale of properties which in fact were subject to mortgage charges contained an express declaration that the property was sold free from incumbrances, the vendor was, under sec. 51 (1) (g), sub-sec. (2) of the Transfer of Property Act, liable to the purchaser for moneys paid by the purchaser either for redemption of the mortgages existing on the property purchased at the date of the purchase, or for purchase of the properties on sales under such mortgages or to prevent such sales. **Semble**:—It is difficult to accept the view that purchasers of a property are not compelled to pay off mortgagees who have obtained decrees for sale, even though a sale is not immediately threatened. Where after the sale the vendor sold another item of property to a third person, and it was agreed between them that the latter should discharge the incumbrances on the property which the vendor had sold to the first purchaser free from incumbrances: **Held**—That a suit by the first purchaser, against the second purchaser for recovery of the amount of the incumbrances was

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indicated above. Sub-sec. (2) of sec. 133 does not however appear to favour any reference of parties to Civil Court. *Per Richardson and Newbould, JJ.*—The Magistrate may, if he does not think the claim well-founded though he considers it made in good faith, allow the Defendant a reasonable time to assert the claim by a civil suit. *Per Ghose, J.*—The Magistrate is entitled to continue the proceedings where the objector shows nothing more than a mere belief in the claim of right put forward. He is not entitled to direct the objector to go to the Civil Court because in his opinion the claim of right cannot be ultimately maintained. *Per Sanderson, C. J. and Touzon and Ghose, JJ.*—The case of *Belat Ali v. Abdur Rahim*, 8 C. W. N. 143 (1903), was on the facts of that case rightly decided, *RAM SAGAR MONDAL v. ALEK NASYAR* (F. B.) ... 442

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—Jurisdiction of Magistrate to prohibit holding of hat on one's own land and on day other than day on which old hat was held—*Ex-parte* order, propriety of passing—Speedy disposal of objection to order necessary.] The Petitioners started a new hat on their own property within a certain locality where existed an old hat belonging to the Opposite Party, but on a day different from that on which the old hat was held. The Magistrate acting on a police report made an order prohibiting "any person from going to, buy or sell in the said place." The Petitioners shifted their hat to another place and the Magistrate again made a similar order: *Held*—That every person is ordinarily, entitled to exercise all rights of ownership on his own property and the holding of a hat on one's property is not in itself a wrongful act. The Criminal Court assumes jurisdiction to interfere with the lawful exercise of a person's right to ownership when such exercise in its ulterior consequences and being directed primarily, against the lawful exercise of another person's right of ownership is likely to cause a breach of the peace. That inasmuch as the Petitioners claimed exclusive possession of the land on which they wanted to hold the hat and intended to hold it on a day other than the day on which the hat of the Opposite Party assembled the Magistrate had no jurisdiction to make an order in the form in which it was made prohibiting the Petitioners from holding their hat on any day of the week and on every place within a large area. That it is not proper for a Magistrate to pass an *ex-parte* order under sec. 144, Criminal Procedure Code and when its propriety or legality is challenged to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matters ought to be disposed of quickly in order to avoid unnecessarily encroaching on the civil rights and liberty of the subject. *BANWARI LAL RAM v. PRONAB KRISHNA MAJUMDAR* ... 663

s. 144,
if empowers a Magistrate to stop

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prayers in a mosque to avoid a breach of the peace—Magistrate's jurisdiction to interfere with a mutwali's administration of wakf property—Proper course for Magistrate, when there is likelihood of breach of peace.] A certain mutwali of a mosque appointed as *pesh iman*, or the leader of prayers, a certain person, with whom the congregation got dissatisfied. The people therefore refused to read their prayers with him and the matter went so far as to necessitate police interference. Ultimately proceedings under sec. 144, Criminal Procedure Code, were drawn up and the Magistrate passed orders forbidding people of either party to read prayers in the said mosque: *Held*—That the order was a misconceived one. Unless the mutwali was displaced in due course of law, no one had a right to interfere with the management of the trust property. If the effect of the order of the Magistrate was that no Mahomedan would be allowed to say his prayer in the mosque, the order was not justified under sec. 144, Criminal Procedure Code. Such an order is not proper and justified by the law. The proper course for the Magistrate is to find out which party is wrong, and if he finds one party interfering unnecessarily with the exercise of the legal powers of the other party, he ought to bind down that party restraining them from committing any act which may lead to a breach of the peace. *Haji Md. Ismail v. Munshi Barkat Ali* ... 901

ss. 145,
146—Evidence of possession on both sides equally unreliable—Order under sec. 145, based on presumption of possession arising from title, if valid—Such presumption when applicable—Interference by High Court—Magistrate directed to act under sec. 146.] Where in a proceeding under sec. 145, Criminal Procedure Code, a Magistrate found that the evidence of possession on both sides was equally unreliable, but declared the second party to be in possession relying on the presumption as to possession arising from the title he found in that party: *Held*—That the order of the Magistrate under sec. 145 was bad, and he was directed to act under sec. 146, Criminal Procedure Code. Where a Magistrate finds the evidence on both sides, which in itself is reliable, equally balanced, and he is unable to conclude from such evidence which party is in possession then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he finds in that side. But this principle does not apply in a case like the present one where the Magistrate finds that the evidence of possession on both sides is equally unreliable. *AKSHOY KUMAR BHATTACHARJA v. BROJESWAR GHATTAK* ... 1000

s. 181,
sub-s. (2)—Penal Code (Act XLV of 1860), s. 408—Criminal breach of trust, in respect of monies received at Singapore for which the accused was liable to account in

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Calcutta—Court in Calcutta, if has jurisdiction to take cognizance of the complaint—Jurisdiction.] Where a firm carrying on business in Calcutta employed A as agent at Singapore, and prosecuted him in Calcutta for criminal breach of trust in respect of monies received at Singapore for which he was to render accounts in Calcutta: Held—That the Court in Calcutta had jurisdiction to take cognizance of the complaint. *Colville v. Kristo Kishore*, I. L. R. 26 Cal. 746; s. c. 3 C. W. N. 598 (1899), followed. *Simhachalam v. Emperor*, I. L. R. 44 Cal. 912; s. c. 21 C. W. N. 573 (1916), distinguished. *ABDUL LATIF YUSUFF v. ABU MAHOMED KASSIM* ... 175

sec.
195, cl. 6—Application in revision if lies to the High Court when sanction has been refused both by the first and the Appellate Court—"Any sanction given or refused under the section," meaning of—Government of India Act of 1915, sec. 107—Civil Procedure Code (Act V of 1908), sec. 115.] The words "any sanction given or refused under the section" in sub-sec. (6) to sec. 195 of the Criminal Procedure Code mean sanction given or refused in the first instance; that being so, one appeal or revision only is contemplated by the sub-section. *Habibar Rahman v. Khoda Bux*, 11 C. W. N. 195; s. c. 5 C. L. J. 219 (1906), and *Girija Sankar Roy v. Benode Sheik*, 5 C. L. J. 222 (1906), not followed. Re: *Ram Prasad Malla*, I. L. R. 37 Cal. 13 (1909), and *Hamiujuddi Mondal v. Damodar Ghose*, 10 C. W. N. 1026 (1906), approved. Two Courts having refused sanction upon the evidence. Held—That there was no case for interference under sec. 107 of the Government of India Act or under sec. 115 of the Civil Procedure Code. Per Canning, J.—Quære, whether these sections apply to the matter at all. *SARAT CHANDRA MONDAL v. RAM-SASHI ROY* ... 1016

196—Sanction of Local Government—Officer of Government over whose signature sanction should issue—Defective sanction and illegality of proceedings based thereon—Cognizance—Jurisdiction of Magistrate making report to Government for sanction to take cognizance.] The sanction of the Local Government required by sec. 196, Criminal Procedure Code, must be conveyed in an order signed by the Chief Secretary. Any such order signed by the Deputy Secretary for the Chief Secretary is not in form and the proceedings based thereon are liable to be quashed. A Magistrate making a report to the Local Government for obtaining the sanction is not incompetent to take cognizance of the case on the ground that he has taken a part in the initiation of the proceedings. *MD. OZTULLAH v. BENI MADHAB CHOWDHURY* ... 675

196A—Sanction of Government if necessary for prosecution under sec. 120B/420, I. P. C., where the allegations of the prosecu-

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tion support a case under sec. 120B/468, I. P. C.—Sec. 109, necessity of sanction for prosecution for abetment to commit non-cognizable offences in pursuance of a criminal conspiracy—Evidence Act (I of 1872), secs. 159 and 160, refreshing memory from entries in a register kept by a clerk but which the witness daily checked and signed.] During the war a large number of men having been required for marine work as serangs, tindals, laskars, etc., in Mesopotamia, a department called the Inland Water Transport (I. W. T.) Department, was created to carry on recruitment, and Chittagong was made a recruiting centre for "marine ratings," for service in Mesopotamia. In selecting recruits for "higher ratings" certificates of fitness were required and the men selected were paid one month's pay in advance and diet allowance. There were various brokers for the supply of recruits. The brokers subsequently formed a combination based on a system of rateable distribution of profits. Enquiries revealed the existence of a widespread conspiracy to secure appointments by deceiving the recruiting officer and his staff with forged certificates. Eventually ten persons were put on their trial on a charge of criminal conspiracy against them all and on separate charges of other offences against each of them individually. One of the accused was acquitted. Eight of the accused were convicted on the general charge of conspiracy under sec. 120B/420, I. P. C. and one of the accused was acquitted on this charge. Besides all the said nine accused were convicted on one or more of the charges framed against them individually. The recruiting officer while giving his evidence, refreshed his memory from certain entries in a register written by the clerk but daily checked and signed by himself: Held—That although the allegations of the prosecution support a case of conspiracy to forge documents, for prosecution of which sanction under sec. 196A, Cr. P. C. is required, there is no reason why, because the accused might have been charged with an offence for the prosecution of which the sanction of the Government is required, they should not be charged with and tried for offences in respect of which no sanction is required, e.g., conspiracy to cheat and cause delivery of property (sec. 120B/420, I. P. C.). That sec. 196A, Cr. P. C., only renders sanction necessary when the prosecution is for criminal conspiracy punishable under sec. 120B, I. P. C. It does not alter the former law that a prosecution for abetment by way of conspiracy punishable under sec. 109, I. P. C., requires no sanction. Therefore the individual charges of abetment to commit the non-cognizable offences in this case did not require sanction. That under the provisions of secs. 159 and 160 of the Evidence Act, the recruiting officer, while giving his evidence, was entitled to refresh his memory from the entries in the register written by his clerk and which he himself signed daily. *ABDUL SALIM v. KING-EMPEROR* ... 680

ss. 237, 227—Charge under s. 587, I. P. C., of house-

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breaking by night with the object of committing theft, conviction under s. 456, for house-breaking by night with the object of carrying on intrigue with the complainant's wife—Propriety of conviction, without amendment of charge—Indian Penal Code (Act XLV of 1860), ss. 456, 457.] The accused was tried on a charge under sec. 457 of the Penal Code of breaking open at night the door of the complainant's house with the object of committing theft and was convicted under sec. 456 for having committed the offence of house-breaking by night with the object of carrying on an intrigue with the complainant's wife: **Held**—That though it cannot be laid down as a general rule that in all cases a prosecution for house-trespass with the alleged object of theft must fail if that object is not proved, when a charge has been definitely framed in which theft is alleged as the object the accused cannot be convicted of house-trespass with some other object without an amendment of the original charge unless the Court is satisfied that he has not been in any way prejudiced in his defence by the omission to amend the charge. That in the circumstances of the case the conviction was liable to be set aside. **HAJARI SONAR v. KING-EMPEROR** ... 314

s. 239, legality of joint trial of several persons for various offences committed in pursuance of a criminal conspiracy—Acquittal on the conspiracy charge, effect of—Result of the trial, if can have any effect on the legality of the trial—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), sec. 120B, criminal conspiracy—Various offences committed in pursuance of such conspiracy, if to be treated as a single offence or separate offences.] **Held**—That the fact that an accused has been acquitted on the conspiracy charge, does not operate to show that the other offences with which he was charged were not part of the same transaction with the other offences charged at the trial and vitiate the trial. The legality of the joint trial depends on the accusation and not on the result of the trial. That the accused having been charged with criminal conspiracy under sec. 80B, the various acts of cheating referred to in the charges and the schedule annexed thereto are not to be treated as separate offences but as having been set out as acts done in pursuance of the conspiracy. It was open to the prosecution to prove such acts in order that from them the existence of the conspiracy might be inferred. It may not have been necessary to set out these details in the charge, but their addition did not make the charges bad for misjoinder. **Subrahmanya Ayyar v. King-Emperor**, L. R. 28 J. A. 257, 1 L. R. 25 Mad. 61; 5 C. W. N. 566 (1901), discussed and distinguished. That further the trial was not bad for the misjoinder of the charge of conspiracy with the other charges framed against the accused individually. Once a charge of conspiracy is framed, anything done in

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pursuance of the conspiracy can be tried at the trial for conspiracy for the offence of conspiracy and offences committed in pursuance thereof form one and the same transaction. **ABDUL SALIM v. KING-EMPEROR** ... 680

sec. 260—Summary procedure adopted in the middle of a trial, if legal—Such change of procedure causing prejudice to accused—Illegality of conviction—Trial before new Magistrate.] The Petitioners were summoned under secs. 186 and 206, I. P. C. After the examination in chief of the witnesses for the prosecution in the regular manner the Magistrate being of opinion that no offence under sec. 206 was made out changed the procedure to that applicable to summary trials and ultimately convicted the Petitioners under sec. 186, I. P. C.: **Held**—That the procedure adopted by the Magistrate was not authorised by law and caused prejudice to the accused and the conviction was therefore liable to be set aside. The case was sent back for retrial by a new Magistrate upon the Petitioner undertaking not to ask for the prosecution witnesses to be again examined in chief. **GOSTA BEHARY BOSH v. BASTAM DAS DEURA** ... 831

sec. 476—"In the course of" judicial proceeding, meaning of—Petition for return of documents filed before clerk of Court, if can be made the subject-matter of enquiry and order under the section.] After the disposal of two rent suits in the Court of the Munsif, the Petitioner, it was alleged, filed two petitions before the clerk in charge of rent suits in the Munsif's Court asking for the return of the documents filed by one B, whose interest had since been acquired by the Petitioner in the said rent suits. These petitions purported to bear the signature of the pleader of B who acted for him in the said rent suits, but it was alleged that this signature was forged. The Munsif after holding a preliminary enquiry made an order under sec. 476, Criminal Procedure Code, directing the prosecution of the Petitioner for offences under secs. 463, 471, I. P. C.: **Held**—That the petitions in question were not filed in the course of a judicial proceeding and the Munsif had no jurisdiction to make the order. The words "committed before it" in sec. 476, Criminal Procedure Code are qualified by the words "in the course of a judicial proceeding." **GIRIJANANDA KALI MITRA v. THE EMPEROR** ... 660

Sec. 526, if applies in the case of an application to the Sessions Judge for time and for keeping the case in his own file.] That an application to the Sessions Judge praying for time and for keeping the case in his own file instead of making it over to the Additional Sessions Judge, did not come within the purview of sec. 526, Criminal Procedure Code, and the trial was not vitiated by the Sessions Judge refusing time. **ABDUL SALIM v. KING-EMPEROR** ... 680

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CRIMINAL PROCEDURE CODE—concl.	JURY—contd.
sec. 494	NCER OF LEGAL AFFAIRS v. SHYAM
(a) —Order upon Public Prosecutor's application for withdrawal—Court must give its reasons in the order.} The order upon an application for withdrawal made by the Public Prosecutor under sec. 494 (a), Criminal Procedure Code, is passed by the Court in its judicial capacity and must contain its reasons so that the High Court may be in a position to say whether the Court's discretion has been properly exercised. Umesh Chunder Roy v. Satish Chundra Roy, 22 C. W. N. 69 (1917), referred to. JAGAT CHANDRA ROY v. KALIMUDDI SARDAR ... 880	SUNDAR BHUMIJ ... 528
EVIDENCE ACT, INDIAN (1 of 1872), s. 24—Confession—Prosecutor if a "person in authority"—Duty of prosecutor to prove absence of inducement in doubtful case.} The words "person in authority" in sec. 24 include the prosecutor. If in the circumstances of a case it appears to the Court that there is reason to suspect that the confession was obtained by inducement, the prosecution must show that the confession was freely made, otherwise it would not be admissible in evidence against the accused. ASHUTOSH DUTT v. THE KING-EMPEROR ... 54	Charge to, to be considered as a whole in deciding misdirection.} That the charge to the jury must be considered as a whole in deciding whether there has been misdirection on the facts. ABDUL SALIM v. KING-EMPEROR ... 686
s. 32—Dying declaration—Sings made, in answer to question, if a verbal statement within the meaning of the section.} Where shortly after the deceased had received the injury a Magistrate proceeded to record her dying declaration in the hospital and although she could not speak she in answer to questions put to her pointed out the accused as the assailant. Held—That the questions and answers taken together might properly be regarded as verbal statements made by a person as to the cause of her death within the meaning of sec. 32 of the Evidence Act and were therefore admissible in evidence. Queen-Empress v. Abdullah I. L. R. 7 All. 385 (1885). EMPEROR v. SADHU CHURN DASS ... 414	trial by—Misdirection in charging jury—Omission to explain that onus is on prosecution to prove charge—Omission to give proper direction on questions of fact.} When the Sessions Judge in his charge to the jury did not clearly explain that the onus of proof was on the prosecution and did not set out all the points for and omitted to give proper direction on the facts of the case; Held—This was misdirection which vitiated the verdict and rendered the conviction liable to be set aside. ABDUL GOHUR SIKKAR v. THE KING-EMPEROR ... 972
secs. 159 and 160—refreshing memory from entries in a register kept by a clerk but which the witness daily checked and signed. See head-note under Criminal Procedure Code, sec. 160A. ABDUL SALIM v. KING-EMPEROR ... 680	Misdirection on points of law and improper direction on facts.} The three accused were found guilty by the unanimous verdict of the jury, two under secs. 302/34, I. P. C. and one under secs. 302/149, I. P. C. and further all under secs. 304, 148, I. P. C. The Sessions Judge in charging the jury said—"Sec. 34 provides that where it is doubtful which of several persons has taken the chief part in any given crime committed in furtherance of the common intention of all of them each of such persons is severally liable as if he alone had done the deed." Held—That it is necessary for the Judge to read the very words of the section itself to the jury if he purports to give them what are the provisions of the section and then if necessary to explain what is the meaning of the section and the direction with regard to sec. 34 was not a proper direction. In charging the jury as to what constitutes murder the Sessions Judge said—"Murder is the intentional killing of another human being with malice aforethought." Held—That it is not the way in which Judge ought to charge the jury in this country. It is usual to refer to the sections which relate to culpable homicide and to direct the jury as to what is culpable homicide and in what circumstances culpable homicide amounts to murder. As to the charge under secs. 302/149, the Sessions Judge charged the jury as follows—"This charge is to some extent redundant and strictly applies only to one accused A, for the other accused are supposed to have been the actual murderers. By sec. 149, A becomes a constructive murderer and liable for the substantive offence just as by sec. 34 all the accused are equally liable for the murder as though each of them had committed it single-handed." Held—That this was a misdirection. Held further—That the Sessions Judge was in error in not drawing the attention of the jury to some material evidence and to the fact that many of the prosecution witnesses were related to a person who was the prime mover in the prosecution or to one another and to the discrepancies in the evidence and his direction on the
JURY, misdirection to—Verdict when should be interfered with—Test whether misdirection occasioned failure of justice.} The accused were found not guilty by the unanimous verdict of the jury, and acquitted by the Sessions Judge. On appeal by the Local Government against the acquittal on the ground of misdirection in the Judge's charge to the jury: Held—That though there was misdirection this did not justify a reversal of the verdict of the jury unless the misdirection in fact occasioned a failure of justice. The High Court not being prepared to hold that the jury's verdict was due to the misdirection in the charge and that apart from this they would not have come to the same conclusion, the acquittal was not disturbed. SUPERINTENDENT AND REMEMBRANCE	

JURY—*conold.*

evidence in one instance was not borne out by the record. That the attention of the jury should have been directed to the individual cases of the three accused. On the ground of misdirection the High Court set aside the verdict of murder as regards all the accused and holding that there was no misdirection as to the charge under sec. 364, I. P. C., upheld the conviction of two of the accused on that charge, but set it aside in the case of the other accused and set aside the conviction of two of the accused under sec. 143 and upheld it in the case of the other. **KING-EMPEROR v. DURGA-CHARAN BEPARI** 1002

trial by—Heads of charge must be sufficiently full to enable High Court to ascertain what was actually said to the jury—Verdict set aside on ground of misdirection and accused acquitted. The law requires the Judge to record only the heads of charge to the jury but this record should be sufficient to enable the High Court to ascertain what was actually said to the jury. The High Court set aside the verdict on the ground of misdirection to the jury and acquitted the accused. **ABDUL GOFUR v. KING-EMPEROR** 996

LEGAL PRACTITIONERS ACT (XVIII of 1879), s. 13—Pleader refusing to appear in Court in pursuance of a resolution of the Bar Association to boycott that Court, propriety of—Duties and obligations of pleaders—Proper course for pleaders when ill-treated by any Court. Some pleaders refused to appear in a certain Court in pursuance of a resolution of the Bar Association to boycott that Court as a protest against its ill-treatment of pleaders. Proceedings under sec. 14 of the Legal Practitioners Act were drawn up against several pleaders for failure to appear in Court in matters which had been entrusted to them by their clients. The pleaders concerned having intimated their unqualified regret to the High Court for the course adopted by them: Held—That having regard to their unqualified expression of regret the proceedings should be dropped. That the Court regarded the action of the pleaders as a very serious matter. The pleaders deliberately abstained from attending the Court and took part in a concerted movement to boycott the Court, a course of conduct which was not justified. The pleaders had duties and obligations to their clients in respect of suits and matters entrusted to them which were pending in the said Court. There was a further and equally important duty and obligation upon them, viz., to co-operate with the Court in the orderly and pure administration of justice. By the course which they adopted, the pleaders violated and neglected their duties and obligations in both these respects. If the pleaders thought they had a just cause of complaint, they had two courses open to them; to make a representation to the District Judge or to the High Court. They took neither of these alternatives, but they adopted the high-handed

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and unjustifiable course of boycotting the Court. **IN THE MATTER OF TARINI MOHAN BARARI** 580

13, cl. (b) and (f), 14—Vakalat-nama acceptance of, effect of—Pleader if bound to attend to case at every stage—Special contract, proof of—Onus—Fees, non-payment of, if ground for Pleader discharging himself—Justifying reasons for non-attendance—Proper procedure for Pleader discharging himself—Reasonable notice to client and permission of Court, if necessary—Civil Procedure Code (Act V of 1908), Gr. III, rr. (1) and (4), cl. (1) and (2)—Pleader declining to attend Court in deference to a resolution passed at a public meeting to cease all public work to express dissatisfaction with public administration—Duty towards client and to Court—Pleader's position and functions, nature of—Evidence Act (I of 1872), sec. 157—Petition of client if admissible to prove charge against Pleader, of professional misconduct—Warning to Pleader, for first offence. In May 1921, there was considerable excitement in the town of Noakhali due to sympathy for some tea garden coolies stranded at a neighbouring place called Chandpur. At a public meeting a resolution was passed that a complete hartal, i.e., cessation of public activity of every description, should be observed as an expression of the indignation of the community. At a second public meeting it was resolved that those who would not follow the previous resolution should be punished with social boycott or in some equally deterrent manner. Subsequently an informal meeting was held in the Bar Library and the opinion was expressed by the majority that it was not safe to disregard the public feeling which ran very high. The Pleaders, with the exception of two, accordingly ceased to attend Courts during the period of the hartal from the 23rd May to 3rd June. The consequence was that cases, when they were taken up for disposal, had either to be postponed, or decided *ex parte* or dismissed for default. Proceedings were then drawn up against several Pleaders who had filed vakalatnamas in those cases, for grossly improper conduct under sec. 13 cl. (b) of the Legal Practitioners Act. The Pleaders filed written explanations and the clients were examined as witnesses. In one case, a petition filed in the suit by the client on the date on which his pleader failed to appear, in which he stated that the Pleader had declined to attend Court on account of the hartal was admitted in evidence. The Pleaders stated *inter alia* that they were afraid to go against public opinion and preferred to "bow down to the popular will, that they had not been paid fees for the dates on which they did not appear and that they had not agreed nor were bound to appear in Court on all the dates fixed for the hearing of the suits: Held, per Sanderson,

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C. J.—That a vakalatnama was much more than a mere authority to act, and it was the duty of a Pleader who had accepted a vakalatnama and had been asked to go to Court to do so to protect his clients' interests, unless it was proved that his obligations towards his client, entailed by the acceptance of the vakalatnama, were limited by a special arrangement, accompanying the acceptance of the vakalatnama; but no such special arrangements were proved by the Pleaders, upon whom the onus of proving it lay. **Quære:—** Whether a Pleader can divest himself of his duty arising from the acceptance of the vakalatnama without the leave of the Court. **Held:—** That, in any case, the Pleaders were bound to give the clients reasonable notice so as to afford the clients reasonable opportunity of obtaining other legal assistance. In the absence of any proof that any fee was asked or that there was any arrangement that a fee should be paid before the Pleaders would attend Court, the mere fact that no fees were tendered or paid was no justification for a Pleader's refusal to attend to his client's further interests. Pleaders have a duty not only towards their clients but also towards the Court and it was clearly their duty to co-operate with the Court in the orderly and pure administration of justice. They would not be justified in allowing their fear of humiliation and inconvenience to override their duty to their client and to the Court and that was no adequate reason for abstention from Court. **Held, however, on the facts:—** That the Pleaders willingly acquiesced in the boycott of the Courts and thereby lent support to the movement, which was calculated to paralyse the administration of justice. Therefore the Pleaders are guilty of grossly improper conduct within the meaning of cl. (b) of sec. 13 of the Legal Practitioners Act, and of such misconduct as would bring their case within cl. (1) of the section. The contents of the petition in the suit filed by the client were admissible in evidence under sec. 137 of the Evidence Act in corroboration of the evidence which he had already given at the time when his attention was directed to the contents of the petition and when he said the contents were true to his knowledge. **Per Woodroffe, J.**—That it was open to any practitioner for reasons personal to himself to refuse to practise in a particular Court or before a particular Judge. But he can adopt this course either by refusing briefs in such Court, or before such Judge, or, if he has accepted a brief or vakalatnama, by first properly discharging himself on due notice to the client and in the latter case to the Court. But concerted action by a whole body of legal practitioners to boycott a Judge or Court in protest against an alleged wrong of one of its members or in respect of its conduct in the administration of justice generally is not permissible because the Bar cannot constitute itself an authority to adjudge on such

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grievance and its duty is not to impede the administration of justice by collective abstention from Court, but to seek relief by representation to the High Court. It would not be possible to charge a legal practitioner with grossly improper conduct, whatever his liability to his client might be, if he omitted to carry out his duty to his client by reason of his genuine fear of any real and substantial injury, physical or otherwise, to himself or family. Nor would it make any difference if such fear were, in fact, unfounded if, in fact, it was sincerely entertained. But in these cases such risk or fear was not the operative cause on the minds of the Pleaders in inducing them not to attend. They bowed to the popular will not because they were afraid of it but because they approved of it. That these proceedings were quasi-criminal proceedings in the sense that they might result in penalties, and not in the sense that all rules of procedure applicable in criminal trials are necessarily in force in a quasi-criminal proceeding. It was open to the Pleader to say nothing or to give no explanation, but if the Pleader did offer an explanation the Court might take it into account in ascertaining whether the charge was made out. The onus undoubtedly was on the party making the charge. That the previous petition of the client was evidence of a step taken in the proceeding and would be corroborative to the extent that there was evidence on the record which it might corroborate. If a Pleader has accepted a vakalatnama in general and common form, the onus of proving any special contract accompanying the acceptance of the vakalatnama is on the Pleader. If again, it is alleged that the Pleader has discharged himself, he must show that he has properly done so with sufficient notice to his client and with intimation to Court. If a Pleader stipulates for payment of fees before he does any work, he is not bound to do such work without such payment. If, however, he accepts a vakalatnama without such stipulation he must proceed to represent him even though unpaid his fees until either his client discharges him or he properly discharges himself. **Per Woodroffe and Mookerjee, JJ.**—That the cases fell under both cl. (b) and (f) of sec. 13 of the Legal Practitioners Act, i.e., under cl. (b) in so far as they involved neglect of duty towards the client in accepting vakalatnama and without excuse not fulfilling the duties involved in such acceptance and under cl. (f), in so far as the practitioners' conduct was directed against the Court by abstention from attendances on account of the hartal. **Per Mookerjee, J.**—In view of the definite provisions for appointment and discharge of Pleaders [Vide Ord. III, rr. 1 and 4 (1) and 4(2), Criminal Procedure Code], Pleader who has accepted a vakalatnama and filed it in Court is ordinarily bound to appear and conduct his case, in the absence of an agreement to the contrary. It is conceivable that the vakalatnama may not set

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out explicitly all the terms of the engagement between the Pleader and his client, and amongst these there may be implied terms sanctioned by well-known and well-established usage of the profession. *Re, Gopinath Mudduk*, W. R. 7 (1870), and *Ram Koer v. Pana Koer*, 3 Shome 75 (1880), referred to. The acceptance of a vakalatnama with the usual terms, which is filed by the Pleader in Court, prima facie places him under an obligation to appear and not act on behalf of his client, and if he fails to do so, he must be ready to justify his conduct by proof that the client had failed to fulfil an implied term of the engagement. *Muni v. Venkata*, I. L. B. 37 Mad. 298: s. c. 23 M. L. J. 477 (F. B.) (1912), *Kally v. Carapiet*, 2 Shome 124 (1878), *Re, A Solicitor*, 4 B. L. R. 29 (P. C.) (1870), and *Satish v. Sarada*, 19 C. L. J. 432 (1891), and several other cases referred to. When a Pleader has accepted a vakalatnama with or without implied conditions, his liability continues, till he has discharged himself by recourse to the appropriate procedure. But this is not a matter solely between the Pleader and his client. The appointment of a Pleader when filed in Court with his acceptance continues in force until determined with the leave of the Court by a writing signed by the client or the Pleader as the case may be. *Atul v. Lakshan*, I. L. R. 36 Cal. 609 (1909), and *Prabhulal v. Kumar Krishna*, 20 C. W. N. 437: s. c. 23 C. L. J. 326 (1916), and several other cases referred to. It is further well-settled that a legal practitioner must always give a reasonable notice of his withdrawal from the case to his clients. The failure of a Pleader to appear to conduct the case before he has discharged himself in the manner provided by law, unless such failure can be justified renders him liable to disciplinary action by the Court. Overriding pressure of circumstances beyond the control of the Pleader may be a reason justifying a failure to attend to a case, but to avail himself of it, it is essential that the Pleader should in full appreciation of his duty as the representative of his client and as an officer of the Court, have been sincerely anxious to protect the former and assist the latter. The relation of Pleader and client involves the highest personal trust and confidence, so much so that it cannot be delegated without consent. A Pleader is more than a mere agent or servant of his client. He is also an officer of the Court and as such owes the duty of good faith and honourable dealing to the Court before which he practises his profession. *Muruga v. Rajasami*, 22 Mad. L. J. 284 (1912), referred to. The practice of the law is in the nature of a franchise from the State conferred only for merit and may be revoked whenever misconduct renders the Pleader holding the license unfit to be entrusted with the powers and duties of his office. Any attempt on the part of a Pleader to boycott the Courts or to obstruct the administration of justice by a resort to any form of device constitutes ground for disbarment or suspension. Proceedings under sec. 14, Legal Practitioners Act, are not of a criminal nature. They are undoubtedly a

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judicial proceeding. They are neither civil suits nor criminal prosecutions, but special proceedings resulting from the inherent power of the Courts over their officers. The form of the proceeding, however, is not of controlling importance, so long as the essentials of fair notice and opportunity to be heard are present. The essence of the matter is that the Pleader must be allowed an opportunity of making his defences. It is not obligatory on the Pleader to submit a written defence or to be present at all. But if he submits a written statement in answer to the charge, the Court is bound to take it into consideration and may draw such inference as may legitimately arise from its contents. In such a case it is not obligatory on the Court to rule out all conceivable hypothetical grounds which could have but proved not been set up in answer to the charge. **IN THE MATTER OF EMPEROR v. RAJANI KANTA BOSE.** For other cases under the Legal Practitioners Act, See Civil Index ... 589

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THE
Calcutta Weekly Notes

LAW NOTES

AND

NOTES OF CASES

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

The English Law Courts.

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JUDGES OF THE HIGH COURT.



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HON'BLE SIR LANCELOT SANDERSON, Kt., K.C. (*Bar-at-Law*).

Quisne Judges:

HON'BLE SIR JOHN GEORGE WOODROFFE, Kt., M.A., B.C.L. (*Bar-at-Law*).

„ „ ASUTOSH MOOKERJEE, Kt., C.S.I., M.A., D.L.

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[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

1921.

Heard, 24, 25, 28,

February and 1,
March.

Judgment, 5, May.

AROMILLI PERRAZU
and ors., Appellants,

ARUMILLI SUBBA-
RAYADU and ors.,
Respondents.

Hindu law—Joint family—Karta, position of, of that of trustee in the strict sense—Accountability for money misapplied as karta—Interest payable thereon—Discretion of Courts in India, Privy Council if will interfere with—Adoption by Sudra—Partition among adopted son and after-born sons—Shares, if equal—Dattaka Chandrika, authority of, in Southern India and Bengal.

The trial Court directed the karta of a joint Hindu family to pay interest at 9 per cent. per annum on moneys misapplied by him, but the High Court on appeal reduced it to 6 per cent. per annum:

Held, by the Judicial Committee, that it would require very special and unusual circumstances to induce it to vary such a decision which rested upon discretion even though in this matter the view of the High Court differed from that of the trying Court as to the way in which that discretion should be exercised. On the merits of the matter, too, the Judicial Committee agreed with the High Court.

There are a number of fiduciary relationships in India to which the rules applicable to strict accounts between trustees and cestui que trusts in England cannot in their entirety apply—the office of

manager of a joint Hindu family affording one such instance. In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with.

The rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family, an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption, although not supported by any ancient text of the Smritis or by the Mitakshara is not inconsistent, so far as Sudras are concerned, with the Smritis or the Mitakshara, and having been accepted and acted upon for at least more than a century in the Presidency of Madras until the law on the subject was disturbed in 1918 by the decision of the Madras High Court in *KARUTURI GOPALAM v. KARUTURI VENKATARAGHAVULU* (7), should be affirmed as the law applicable in such cases in that Presidency.

KARUTURI GOPALAM v. KARUTURI VENKATARAGHAVULU (7) overruled.

MOHON GHOSH MOULIK v. MOHON GHOSH MOULIK (10) affirmed.

The Dattaka Chandrika has been for long accepted in the Presidency of Madras as a treatise on adoption of the

*L. E. L. 40 Wad 532; s. c. 29 M. L. J. 710 (1915).
(110, 20 O. W. N. 601 (1916).*

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highest authority. It does not however follow from this, that comments and propositions contained in it, apparently novel when the *Dattaka Chandrika* was first accepted in Southern India as an authority on the law of adoption, if not based upon ancient texts which can with some certainty be identified, have been accepted by the Hindus of Southern India as part of Hindu law.

Appeal from a judgment and decree of the Madras High Court, dated the 13th October 1916, modifying a judgment and decree, dated 13th December 1913, of the Court of the temporary Sub-Judge of Rajamundry.

The facts of the case will sufficiently appear from their Lordships' judgment.

Mr. A. M. Dunne, K. C. (with *Messrs. J. M. Parikh and K. V. L. Narasimham*) for the Appellants. The questions for decision are (1) the share an adopted son takes in Hindu law, the High Court having decided that he gets only one-fifth of a natural son's share; (2) Is the High Court right in refusing to order a general account against Plaintiff although we have proved numerous classes of fraud.

There are concurrent findings as to adoption. After adoption Plaintiff had natural sons. If the parties were not Sudras, the adopted son would get only $\frac{1}{4}$ of the natural son's share. It has been decided in Bengal among Kayasthas, that is Sudras, that the adopted son gets the same share as a natural son.

Dattaka Chandrika gives $\frac{1}{2}$ share of a natural born son to adopted son. This is inapplicable to Sudras. *Dattaka Chandrika* has been recognised by the Board as the leading authority on adoptions.

Golap Chandra Sastri's Hindu Law, pp. 657 and 658: quotes *Vyavashita Chandrika*, paras. 17 and 19; para. 29 does not apply to Sudras. *Karuturi Gopalam v.*

Karuturi Venkataraghavulu (7) is not correctly decided. *Strange's Hindu Law*, Edn. (1825), Vol. I, bottom of p. 86 and top of p. 87, says, "among the Sudras the after-born son and adopted son share equally," *McNaghten's Hindu Law* (1865 Edn.), Vol. I, pp. 70, 66; in *Raja v. Subbarayya* (5), the question was between the adopted son of one brother claiming against the natural son of another brother. *Turner, C. J. and Muttuswami Iyer, J.*, at p. 254, clearly acknowledge the authority of the *Dattaka Chandrika*.

Baramanund Mahanta v. Krishna Chhuran (11) relied on in *Asita Mohon Ghosh Moulik v. Nirode Mohon Ghosh Moulik* (10). This last case came before the Board in 1920, *Asita Mohon v. Nirode Mohon* (12), but the Calcutta judgment is very important, as it refers to a number of authorities. *Sri Balusu Gurulingaswami v. Sri Balusu Rummamlakshamma* (3) and *Nagindas v. Bachoo* (13).

As to *Karuturi Gopalam v. Karuturi Venkataraghavulu* (7)

[*LORD SHAW*.—Here we have a case which says that when we get to inheritance we should be guided by the paramount authority of the *Mitakshara*.]

I say this is a question of status and not of inheritance.

[*LORD BUCKMASTER*.—Whether a person is an adopted son is a question of status, but what he takes is a question of inheritance.]

Sri Balusu Gurulingaswami v. Sri Balusu Rumlakshamma (3) and *Ran-*

(3) *L. R.* 26 I. A. 113 at p. 131: s. c. 3 O. W. N. 427 (1899).

(5) *I. L. R.* 7 Mad. 253 (1883).

(7) *I. L. R.* 40 Mad. 632 at p. 635: s. c. 29 M. L. J. 710 (1915).

(11) 14 O. L. J. 183 (1884).

(10) 20 O. W. N. 901 at p. 908 (1916).

(12) *L. R.* 47 I. A. 140: s. c. 24 O. W. N. 794 (1920).

(13) *L. R.* 43 I. A. 56: s. c. 20 O. W. N. 703 (1915).

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gama v. Atchma (4) establish the authority of Dattaka Chandrika.

There is really no conflict between the Mitakshara and the Dattaka Chandrika. One deals more specifically with the case of an adopted son. I say that the Mitakshara does not deal with the case of an adopted son in the case of Sudra. Here we have a book (Dattaka Chandrika) which deals with the case of an adopted son among Sudras, and which has been acknowledged as an authority.

Mr. J. M. Parikh (following):—The general rule is that the adopted son succeeds to an equal share. The exceptions must be proved. The Mitakshara specially lays down that among the twice born the adopted son takes $\frac{1}{2}$. This is an exception. But it mentions no such exception in the case of Sudras. *Nagindas v. Bachoo* (13) lays down the position of an adopted son.

Where there is a conflict between Dattaka Chandrika and Dattaka Mimansa, it is the Chandrika that is paramount in Madras.

The cases relied on in *Karuturi Gopalam v. Karuturi Venkataraghavulu* (7) are none of them cases of Sudras. The Bonibay case relied on was reversed on appeal: *Raghabanand v. Sadhu Churn* (6) cited there was not the case of a Sudra, this point was not touched.

Mr. L. DeGruyther, K. C. (with Messrs. Eddis and Dubé) for the Respondents.

[LORD BUCKMASTER.—You need not trouble about the general accounts, but with the special items.]

We have no evidence that Defendant or his wife was in possession of some of these funds. Evidence of the Defendant is that the monies belonged to his wife. There is other evidence as well. This is merely a question of fact.

The manager of a family has a perfect right to keep the money without interest. He cannot be charged for interest. The promissory notes do not prove that he got the interest. All that the Court could decide was a partition of joint family property.

Secs. 293 and 294 of Mayne's Hindu Law deal with the question of accounts. As to the share of the adopted son, the original authority is undoubtedly the Vedas, Smrities, etc. Then we get the commentaries thereon, the Mitakshara and Dayabhaga. These are now the law. All the other commentaries like Dattaka Chandrika, etc., are still merely commentaries. These cannot deviate from the Mitakshara which prevails in Madras. Stokes Hindu Law, p. 410; also p. 420 verse 24 (Stokes).

[LORD SHAW.—Refers to p. 416, text 16 (Stokes).]

Refers to p. 426, sec. 12, para (2). There is no special rule about Sudras, on this point except as provided by sec. 12; Mayne para. 27 deals with the sources of Hindu law in Southern India. Of these I can place before you two. Setlur's collection of texts on Hindu Law of Inheritance at p. 274, Chap. X, para. 16; at p. 161. Stokes p. 301 (Dayabhaga). The Mayukha (Stokes, p. 66). All these take the same view. Again Stokes, p. 516. Mayne, p. 16, sec. 16. All these are based on the texts of Katyayana and Vashistha (cf Mayne, sec. 24); Mr. Shama Charan Sarkar's Vyavashta Chandrika, p. 169; the rule he lays down is that the adopted son might get an equal share in certain circumstances.

(4) L. R. 26 I. A. 158 at p. 161; s. c. 3 C. W. N. 454 (1899).

(6) I. L. R. 4 Cal. 425 (1878).

(7) I. L. R. 40 Mad. 682; s. c. 29 M. L. J. 710 (1915).

(13) L. R. 43 I. A. 56 at p. 67; s. c. 20 C. W. N. 702 (1915).

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[LORD BUCKMASTER.—That refers to "good sons" and so seems to be mere a reward for goodness.]

P. 269, where he deals with a legitimate son. Stokes, p. 595, sec. 43; Dattaka Mimamsa, Stokes, pp. 657 and 660, sec. 82, refer to Sudras.

Refers to *Ganga Sahai v. Lekhraj Singh* (14), *Collector of Madura v. Mootoo Ramalinga*, *Ramnad case* (2), *Sri Balusu Gurulingaswami v. Sri Balusu Rimalakshamma* (3), *Ayyavu v. Nelayathakshi* (8), *Raghubanand v. Sadhu Churn* (6), *Giripapa v. Ningapa* (15), all cases of Sudras referred to in *Karuturi Gopalam v. Karuturi Venkataraghavulu* (7); only case to the contrary is *Raja v. Subbaraya* (5); *Bhagwan Singh v. Bhagwan Singh* (4), *Puttu Lal v. Parbati* (16) and *Ayyavu Muppanar v. Nelayathakshi* (8).

Stoke's Hindu Law, Dattaka Mimamsa, sister's son cannot be adopted, p. 659. Mitakshara (p. 426, Stokes) and Mimamsa (p. 659, Stokes) compared.

Ghose's Hindu Law, pp. 712. *Rekti v. Lakhpatri* (17). Authenticity is questioned in this case. Dattaka Mimamsa, p. 595 (Stokes). Mimamsa says in terms that the rule is applicable to Sudra (Stokes) pp. 588 and 592, sec. 29. Mayne, sec. 250, Gautama, (Sacred Books of the East, Vol. II, p. 229).

(2) 12 M. I. A. 397 (1869).

(3) L. R. 26 I. A. 113 at pp. 129, 130-142 s. c. 3 C. W. N. 427 (1899).

(4) L. R. 26 I. A. 153 at p. 161: s. c. 3 C. W. N. 454 (1899).

(5) I. L. R. 7 Mad. 253 (1893).

(6) I. L. R. 4 Cal. 425 (1878).

(7) I. L. R. 40 Mad. 632, 638; s. c. 29 M. L. J. 710 (1915).

(8) 1 Mad. H. C. R. 45 (1862).

(14) I. L. R. 9 All. 253 at p. 322 (1886).

(15) I. L. R. 17 Bom. 100 (1892).

(16) L. R. 42 I. A. 155, 161: s. c. 19 C. W. N. 841 (1915).

(17) 20 C. W. N. 19: s. c. 20 C. L. J. 310 (1914).

The only thing against me is this verse in Chandrika; it is not founded on any of the Smrities, etc. Case recently before the Board, where they were two brothers and one had an adopted son and the other a natural son, in a case of partition. The Board decided that the adopted son represented his father. *Raja v. Subbaraya* (5) was referred to.

Mr. A. M. Dunne, K. C., in reply. As regards accounts, see *Abhoy Chandra v. Pcari Mohon* (18). I have proved that interest has been received. The authority of Dattaka Chandrika has already been dealt with by this Board as well as the Calcutta High Court. In the case in *Asita Mohon Ghosh Moulik v. Nirode Mohon Ghosh Moulik* (19), the whole matter has been considered. One must not look at it from the Madras Court's point of view only. Mitakshara is a commentary only. It is a commentary on Yajnavalkya, a successor of Manu. But this general text is neither in Yajnavalkya nor in Manu, but is taken from Gautama. The only conflict, if any, is between these two commentaries, the Mitakshara and Chandrika. The dissenting judgment of Banerji, J., differing from Sir John Edge in *Bhagwan Singh v. Bhagwan Singh* (19) came to this Board in *Bhagwan Singh v. Bhagwan Singh* (4).

Dattaka Chandrika is referred to in *Balasu v. Balasu* (3).

Mitakshara, p. 420, Stokes. Dattaka Chandrika, p. 647, Stokes. Yajnavalkya, Mandlik's Chap. II, p. 219, West and

(2) L. R. 26 I. A. 113 at p. 131: s. c. 3 C. W. N. 427 (1899).

(4) L. R. 26 I. A. 153 at p. 161: s. c. 3 C. W. N. 454 (1899).

(5) I. L. R. 7 Mad. 253 (1893).

(10) 20 C. W. N. 901 (1916).

(19) 5 Beng. L. R. 347 (F. B.) (1870).

(19) I. L. R. 17 All. 294 (F. B.) (1895).

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Buhler, p. 368, p. 358 (Translation of Manu).

[*Mr. DeGruylier*.—This would be contrary to Veeramitrodaya.]

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE. These appeals raise a question of great and far-reaching importance with regard to the rights of succession in the Presidency of Madras, but this is associated with a series of relatively unimportant matters relating to questions of accounts that have arisen in these circumstances.

The first Plaintiff in the suit, who is the first Respondent to each appeal, was the manager for many years of a joint family estate which appears greatly to have prospered under his care. Distrust, however, arose, and was apparently well justified, as to his dealing with certain portions of the estate, and elaborate enquiries were set on foot outside the Courts for the purpose of ascertaining what the true position was. This first Respondent—uneasy, it is asserted, as to the prospect of proceedings being brought against him as the result of these enquiries—instituted proceedings himself, to which the Appellants were parties, alleging that they also had been in custody of part of the joint family estate, and asking for accounts and consequential relief, to which demand among other answers, a claim was put forward that the Plaintiff should render an account of the joint family properties and his management from 1898 onwards. The questions associated with these claims have been before the Subordinate Judge and before the High Court. Both these Courts refused the claim for the general account and decided the various questions in issue that were raised on the accounts. Apart from the dispute as to the rights of succession, the claim for the general ac-

count and the following items only are the subject of these consolidated appeals: First, the Appellants say that the Plaintiff should pay interest at 9 per cent. on the moneys misapplied in accordance with the direction of the Subordinate Judge, this direction being overruled by the High Court, who reduced it to 6 per cent.; secondly, they assert that the High Court was wrong in deciding that certain items of Sch. B and Sch. C of the Supplement Schedule B were the joint property of the family; and finally they assert that the High Court was wrong in excluding from the items on which interest was payable a sum of Rs. 7,000, which was the subject of a promissory note held by the Plaintiff.

With regard to the claim for the general account, this has been refused by both Courts. The High Court based their decision upon the ground that all the items in respect of which the Plaintiff was alleged to have been guilty of misconduct had been investigated and set out in the schedules which were before the consideration of the learned Judge, who had dealt with them item by item as appeared in his judgment. They continue in these words:—

"What more could be done, even if we direct general accounts, it is difficult to see."

Their Lordships are entirely in agreement with this view. The learned Subordinate Judge himself stated that it appeared that all possible items of collection by the first Plaintiff had been proved as far as possible by the indefatigable energy of the Defendants Nos. 1 and 3. He also added that he thought delay was a good reason for refusing the claim. Their Lordships think that the High Court rightly interpreted the judgment of the Subordinate Judge, and that in substance, if not in actual words, both Courts have decided that in effect the account asked for

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has already been taken and that it would be a needless prolongation of litigation and waste of cost if a further account were ordered. This conclusion is the one at which their Lordships have themselves arrived, and they therefore think that upon this point the appeal must fail.

With regard to the interest, the matter can be briefly dealt with. The High Court have considered that 6 per cent. simple interest is sufficient. It would require very special and unusual circumstances to induce this Board to vary such a decision, which rests upon discretion, even though in this matter the view of the High Court differed from that of the Subordinate Judge as to the way in which that discretion should be exercised. But they may add that if the matter were one upon which an independent judgment was required, they think that the judgment of the High Court was correct.

As to the items claimed by some of the Defendants as separate property this depends upon evidence and the Courts have differed as to its effect. Their Lordships think that the judgment of the High Court is correct as to its interpretation. The first Defendant asserts that the property was bought with moneys belonging to his wife, and he accounts for these moneys by stating :—

“My mother-in-law gave property to my wife just before her death. My wife told me of her gift of property to her. I was not present at the time.”

And this is supported by the evidence of the Defendant's brother-in-law, whose evidence is in these terms :—

“My sister sold away her husband's properties to which she succeeded. No; she obtained 4 acres from her husband's family for maintenance. She also purchased 10 acres. Subsequently she sold away all the 14 acres of land.”

The wife was not examined to support the claim. It appears that the learned

Subordinate Judge based his judgment upon the view that there was nothing improbable in the Defendant's wife having inherited the amount necessary for the purchase of the property. That would be a potent reason if there were substantial evidence to show that such inheritance had in fact been acquired. In their Lordships' opinion such evidence is not forthcoming, and they think upon this point also the judgment of the High Court is correct, though it is liable to be misunderstood from the form of the judgment, which suggests as a reason that the first Defendant's story was contradicted by one of his own witnesses whose evidence was inadmissible. This would apparently leave the first Defendant's story unchallenged, but in truth his account was never sufficiently substantiated, and for this reason that claim fails.

With regard to the last matter of the Rs. 7,000, it is extremely difficult to extract the reasons why the High Court dealt with this sum differently from other amounts which appear in the same account, though in fact it was added as an additional item. There is, however, nothing to show their Lordships that it was so dealt with by the first Plaintiff as to render him liable to account for anything more than the actual interest that he received upon it; but to this extent he is accountable.

Their Lordships desire once more to repeat the warning they have often given against attempting to apply without qualification in India the rules applicable to strict accounts between trustees and *cestui que trusts* that exist in this country, because in truth there are a number of fiduciary relationships in India to which these rules cannot in their entirety apply. This does not mean that breach of established duty should be less severely dealt with in India than in this country, but

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that there are fiduciary relationships which do not involve all the duties which are imposed upon trustees here. The office of manager of a joint family estate affords an illustration of this difference. In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with. Their Lordships cannot find in this case anything to render the first Respondent liable beyond the extent to which they have referred. On this point also, except to the extent above mentioned, the Appellants fail.

The next question which it is necessary to consider is that which is raised by the second of these two consolidated appeals in which the Defendants Arumilli Ramanna and his three sons, Arumilli Ragavudu, Arumilli Venkataratnan and Arumilli Subbarayadu are the Appellants, and the Plaintiffs are the Respondents. The parties are Sudras and belong to a family of Sudras, of the Presidency of Madras, which in general is governed by the law of the Mitakshara. Arumilli Ramanna was, as has been concurrently found by the Courts below, adopted by the Plaintiff, Subbarayadu, as his son when that Plaintiff was childless. Ramanna was by birth a son of Venkiah, who was a brother of that Plaintiff. After Ramanna had been adopted that Plaintiff's sons, Ramamurti and Periah, who are respectively the second and third Plaintiffs, were born, and the question to be considered in the second of these two appeals is whether in the Sudra caste in the Presidency of Madras an adopted son on partition of the family property shares equally with a son of his adoptive father born subsequently to his adoption. The question

is an important one, and is by no means an easy one for this Board to decide. The question depends on a text of the Dattaka Chandrika and on the authority to be allowed in the Presidency of Madras to that text.

So far as ancient texts and recognised Sanskrit commentaries on Hindu law are concerned, the earliest authority for the proposition that amongst Sudras an adopted son, on a partition of the property of the joint family, shares equally with a legitimate son of the adoptive father, born subsequently to the adoption, is that of the Dattaka Chandrika. In sec. V of the Dattaka Chandrika ("Hindu Law Books" edited by Whitley Stokes, 1865) which deals with "the succession by inheritance of adopted sons lineally and collaterally," the commentator, after referring to rights of members of a Hindu joint family generally to share in a partition of the family property, said:—

"29. The mode, however, of partition between the son of the wife, the son given, and the rest and the legitimate son, which has been propounded in what preceded, does not apply to the Sudra tribe."

After some further observations, the commentator further said:—

"32. Accordingly, the text subjoined must be construed as referring merely to Sudras. 'A son given being thus adopted, if by any chance, a legitimate son should be born let them be equal partakers of the father's estate.' So also in the following text, the equal participation of all lawfully begotten Sudras having been first propounded, the succession to equal shares of the other sons likewise is subsequently declared by the sentence ('if there be an hundred sons') occurring therein. 'For a Sudra is ordained a wife of his own class and no other. Those begotten on her shall have equal shares; if there be an hundred sons (the same mode of partition

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shall obtain).’ If the sentence in question be referred to the real legitimate son only, the position contained in it being obtained from what preceded, its repetition would be unmeaning.”

For those statements as to the right amongst Sudras of the adopted son to share equally on partition with the subsequently born legitimate son of the adoptive father, the author of the *Dattaka Chandrika* did not state who his authority was. He quoted a text from *Vridhdha Gautama* to the effect that an adopted son and an after-born son share equally, which is not accepted by the Courts in India or by the followers of the *Mitakshara* or by the followers of the *Daya Bhaga* as a correct statement of the law applicable to all Hindus, and drew his inference that it was applicable to Sudras from texts which do not propound any such proposition, and, so far as their Lordships understand them, do not suggest the conclusion expressed on this subject by that commentator.

The *Dattaka Chandrika* has been treated by the Board as a high authority. As early as 1846 Lord Kingsdown, then Mr. Pemberton Leigh, in delivering the judgment of the Board in *Ryngama v. Atchama* (1), in reference to the *Dattaka Chandrika* and the *Dattaka Mimamsa*, said :—“ They are written on the particular subject of adoption; they enjoy, as we understand, the highest reputation throughout India.”

In *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (2), which was an appeal from the High Court at Madras, Sir James Colville, in delivering the judgment of the Board, referring to the *Dattaka Mimamsa* and the *Dattaka Chandrika*, said :—“ Again, of the *Dattaka Mimamsa* of Nanda Pandita, and the *Dattaka Chandrika* of Davanda Bhatta, two Treatises on the particular subject of adoption, Sir

William Macnaghten says that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the southern Jurists, while the former is held to be the infallible guide in the Province of Mithila and Benares.”

It has since then been ascertained that Davanda Bhatta was not the author of the *Dattaka Chandrika*. Sir James Colville, in the passage above quoted, was referring to the authority of the work itself.

In *Sri Balusu Gurulingaswami v. Sri Balusu Humalakshamma* (3), which was an appeal from the High Court at Madras, Lord Hobhouse in delivering the judgment of a Board consisting of himself, Lord Macnaghten and Sir Richard Couch, said : “ The date of the *Dattaka Chandrika* is not certain; but it is at all events very much later than the *Smritis*, and it stands only on the footing of a work by a learned man. Messrs. West and Bhüler in their valuable work on Hindu law, 3rd ed., p. 11, speak thus : ‘ The *Dattaka Mimamsa* and the *Dattaka Chandrika*, the latter less than the former, are supplementary authorities on the law of adoption. Their opinions, however, are not considered of so great importance but that they may be set aside on general grounds in case they are opposed to the doctrines of the *Vyarahava Mayukha* or the *Dharmasindhu* and *Nirnayasindhu*.’ This is spoken with special reference to Bombay and Western India. But both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Knox, J., in saying that their authority is open to examination, explanation,

(1) 4 M. I. A. 1 at p. 97 (1846).

(2) 12 M. I. A. 397 at p. 497 (1868).

(3) L. R. 26 I. A. 218 at p. 231, C. S. C. W. N. 437 (1899).

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criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But, so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge."

"In *Bhagwan Singh v. Bhagwan Singh* (4), which was an appeal from the High Court at Allahabad, Lord Hobhouse in delivering the judgment of a Board consisting of himself, Lord Macnaghten, Lord Morris and Sir Richard Couch, in referring to the Dattaka Mimamsa and the Dattaka Chandrika said: "If there were anything to show that in the Benares School of Law these works had been excluded or rejected, that would have to be considered. But their authority has been affirmed as part of the general Hindu law, founded on Smritis as the source from whence all Schools of Hindu Law derive their precepts. In Doctor Jolly's Tagore Lecture of 1883, that learned writer says: 'The Dattaka Mimamsa and Dattaka Chandrika have furnished almost exclusively the scanty basis on which the modern law of adoption has been based.' Both works have been received in Courts of law, including this Board, as high authority. Lord Kingsdown's words in *Bangama v. Atchama* (1) have already been quoted and those of Sir James Colville in the case of *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (2). As has been said, Sir James Colville quotes with assent the opinion of Sir William Macnaghten, that

both works are respected all over India, that when they differ the Chandrika is adhered to in Bengal and by the Southern jurists while the Mimamsa is held to be an infallible guide in the Provinces of Mithila and Benares. To call it infallible is too strong an expression, and the estimates of Sutherland, and of West and Bühler, seem nearer the true mark: but it is clear that both works must be accepted as bearing high authority for so long a time that they have become embedded in the general law."

"There can be no doubt that the Dattaka Chandrika has been for long and still is accepted in the Presidency of Madras as a treatise on adoption of the highest authority. It is not primarily a work dealing with rights of inheritance or with rights of coparcenary in property acquired by birth or adoption, but it does necessarily deal with such subjects as the occasion requires. It is not known who was the author of the Dattaka Chandrika, and the doubt as to its authorship makes it impossible to fix with any certainty the date when it was written, but it is believed to be an earlier work than the Dattaka Mimamsa, which was written by Nanda Pandita, who is known to have lived about 300 years ago. When the Dattaka Chandrika was first accepted in Southern India as an authority on the law of adoption, it would probably be impossible now to ascertain. It, however, appears to their Lordships that it does not necessarily follow from the fact that the Dattaka Chandrika has been long accepted in Southern India as a high authority on the law of adoption that comments and propositions, apparently then novel, contained in it, if not based upon ancient texts which can with some certainty be identified, have been accepted by the Hindus of Southern India as part of the Hindu law. It thus becomes necessary to ascertain, if possible, whether the rule pro-

(1) 4 M. L. A. 1 at p. 97 (1846).

(2) 12 M. L. A. 397 at p. 437 (1868).

(3) L. R. 20 F. 136 at p. 161. a. c. 3 C.

W. N. 44 (1899).

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pounded for the first time, it is believed, in paras. 29 and 32 of sec. 5 of the *Dattaka Chandrika*, which have been quoted above, ever was accepted and acted upon by the Hindus of the Presidency of Madras as Hindu law.

Mr. W. Macnaghten in his "Principles and Precedents of Hindu Law," which was published at Calcutta in 1829 and is a recognised authority on Hindu law, said at p. 70 of Volume I: "Where a legitimate son is born subsequently to the adoption, he and the son adopted inherit together, but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other Schools." In a note to that passage, Macnaghten stated: "It is laid down in the *Dattakachandrika* that in the case of *Sudras*, if a legitimate son be subsequently born, he is entitled to an equal share only with the adopted son, and this rule prevails accordingly in the Southern Provinces."

It has been suggested, in reference to his note which has been quoted, that Mr. William Macnaghten, when he wrote his book, had no special knowledge of the law affecting *Sudras* in the Presidency of Madras, but even if that suggestion is well founded, it cannot be suggested that Sir Thomas Strange, when he wrote his well-known book on Hindu law, which was published in 1830, did not know what was the then accepted law in the Presidency of Madras as to the rights of an adopted son amongst *Sudras*. Sir Thomas Strange had been Chief Justice of Nova Scotia; he commenced his judicial experience in India in 1798, when he was appointed Recorder of Madras, and became a celebrated Indian jurist. He was Chief Justice of the Supreme Court at Madras from 1800 until 1817. At page 99 of Volume 1 of his "Hindu Law" in reference to the right of inheriting on the death

of a Hindu father, Sir Thomas Strange stated:—"Among *Sudras* in the same event (the death of the father), the after-born son and the adopted son share equally the paternal estate." That statement was doubtless based on the text of the *Dattaka Chandrika* which has been quoted. Sir Thomas Strange knew that according to Hindu law as applicable to the twice-born classes, the share to which an adopted son would be entitled on partition would be less than the share of the legitimate son born to the adoptive father subsequently to the adoption, and he would not have stated that amongst *Sudras* those sons would take equal shares if from his judicial experience in Madras he had any doubt that the rule propounded in the *Dattaka Chandrika* had not been accepted and acted upon in the Presidency of Madras.

The earliest reported case in the Presidency of Madras, so far as their Lordships are aware, in which this question as to the right amongst *Sudras* of the adopted son to share equally in the property of a joint family with the subsequently born legitimate son of the adoptive father was mentioned, came on appeal before the High Court at Madras in 1883. In that case [*Raja v. Subbaraya* (5)], the Plaintiff sued for partition and to recover from the Defendant one-half of certain movable and immovable properties on the ground that he was an adopted son of the deceased undivided brother of the deceased father of the Defendant. The parties were *Sudras*, and the Defendant contended that the Plaintiff was entitled to one-fifth only of the estate, and that he, the Defendant, was entitled to four-fifths under the Hindu law. In that case Turner, C. J., and Muttuswami Ayyar, J., on appeal, delivered the following judgment:—

"There is no valid ground for the contention that if the adoption be proved the

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Plaintiff should take but a fifth share. By representation the adopted son takes the share which his adoptive father would be entitled to take on partition. With all deference to the authority of the High Court of Calcutta in *Raghubanund Doss v. Sadhu Churn Doss* (6), we doubt whether the passage in *Dattaka Chandrika*, sec. 5, para. 25, even with the addition suggested, has been correctly interpreted. If there be such a special rule, as is suggested, it is not applicable at all events to Sudras, among whom the adopted son is declared entitled to take an equal share with a legitimate son who is born subsequently to the adoption. We agree with the Judge that the Plaintiff would take his father's share, a moiety, if he were really adopted."

It has been objected, and correctly, that the dictum in that case that amongst Sudras an adopted son is entitled to take an equal share on partition with a legitimate son born subsequently to the adoption, was not necessary to the decision of the appeal then before the Madras Court, and that the opinion on that subject expressed by Turner, C. J., and Muttuswami Ayyar, J., must be regarded as *obiter*. Nevertheless it was the opinion of the then Chief Justice of Madras, who was an able and careful lawyer, and of Mr. Justice Muttuswami Ayyar, who was a member of a Brahmin family of the Madras Presidency, and who earned for himself the well-deserved reputation of being one of the most accomplished and reliable lawyers in India in cases involving a knowledge of Hindu law. That opinion of those learned Judges, although strictly it was an *obiter dictum*, was deserving of respect, and was probably expressed in answer to some argument of counsel in the case. If the rule propounded in the *Dattaka Chandrika* that amongst Sudras

the adopted son and the subsequently born legitimate son shared equally had been seriously questioned in the Presidency of Madras, it is impossible to believe that Mr. Justice Muttuswami Ayyar should in 1888 not have been aware that the rule had not been accepted and acted upon in that Presidency as correct.

The next reported case relating to Sudras in the Madras Presidency, of which their Lordships are aware in which the rule in question here of the *Dattaka Chandrika* was considered, is that of *Kuruturi Gopalani v. Kuruturi Venkata-raghavulu* (7), which came on appeal before the High Court at Madras in 1915. In that case the parties were Sudras, and the Plaintiff, who was the Respondent to the appeal, had been adopted in 1898 by one Venkana, a Sudra, who died in 1902 leaving him surviving the Plaintiff, the first Defendant, who was the legitimate son of Venkana, born to him subsequently to the adoption of the Plaintiff, and his widow, who was the natural mother of the first Defendant, and was the second Defendant. During the minority of the Plaintiff and the first Defendant, the widow managed the estate. The Plaintiff attained majority in 1907, and brought the suit in 1910 for partition and delivery to him of half of the family estate, alleged mismanagement of the estate by her of portions of the estate for the benefit of the first Defendant, and claimed an account. The first Defendant, through his mother as his guardian, pleaded, amongst other things which are not material to the question to be considered here, that the Plaintiff, as an adopted son, was entitled only to a fifth share of the estate, and that he, the first Defendant, was entitled to the remaining

(7) I. L. B. 40 Mad. 632 : s.c. 29 M. L. J. 710 (1916).

(6) I. L. B. 4 Cal. 425 (1879).

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four-fifths. The suit was tried by A. Sambamurti Ayyar, a Hindu, the then Subordinate Judge of Rajahmundry, who decreed to the Plaintiff a half share in all the family properties, and finding that there had been malversation of the estate by the second Defendant for the benefit of the first Defendant, made a decree for restitution.

It is to be observed that the learned Hindu Subordinate Judge, who tried that suit in or after 1911, must have believed that in the Presidency of Madras the rule of the Dattaka Chandrika, that amongst Sudras an adopted son was entitled to share equally on a partition with the subsequently born legitimate son of the adoptive father, was the rule to be applied in the Presidency of Madras in cases in which the parties were Sudras. The appeal from that decree of the Subordinate Judge of Rajahmundry came before Wallis, C. J., and Seshagiri Ayyar, J. Seshagiri Ayyar, J., wrote the judgment, with which Wallis, C. J., concurred. The learned Judges of the High Court held that they were not bound by the opinion on the question of the right amongst Sudras of an adopted son to share equally with the subsequently born son of the adoptive father in the property of the joint family which had been expressed by Turner, C. J., and Muttuswami Ayyar, J., in *Raja v. Subbaraya* (5) on the ground that the opinion was *obiter* and on the ground that the attention of those learned Judges had not been drawn to the case of *Ayyavu Muppanar v. Nelayathakshi Ammal* (8), and having considered some ancient texts and the Mitakshara came to the conclusion that the rule propounded on this subject in the Dattaka Chandrika was not binding upon them and that the dictum based on

the authority of the Dattaka Chandrika should not be followed.

As the reference in the judgment of Seshagiri Ayyar, J., in *Karuturi Gopalam v. Karuturi Venkataraghavulu* (7) to the decision in *Ayyavu Muppanar v. Nelayathakshi Ammal* (8) suggests that if that decision had been brought, in 1883, to the attention of Turner, C. J., and Muttuswami Ayyar, J., in *Raja v. Subbaraya* (5), they would not have expressed the opinion that amongst Sudras the adopted son is entitled to take an equal share with a legitimate son who is born subsequently to the adoption, it is necessary to consider that case. The case of *Ayyavu Muppanar v. Nelayathakshi Ammal* (8) came on appeal to the High Court at Madras in 1862.

The parties to the suit were Hindus, but it does not appear whether the parties were Sudras; all that is stated is that "the parties were of a class not strictly bound by the requirements of the Hindu law." Probably they were Sudras. The Plaintiff had brought his suit for one-fourth of the estate of Ayyavu Muppanar, deceased; the Defendant, a minor appearing through his mother as guardian, was a son of Ayyavu Muppanar, born after the adoption. The main questions considered were whether the adoption had in fact been made; whether if made it was a valid adoption; whether a son, adopted or begotten, could claim maintenance until put in possession of his share of the ancestral estate; and whether as against an adopted son suing for his share of the ancestral estate the law of limitation does not begin to run until the allotment of such share has been demanded and refused. The question as to whether the adopted son was entitled to more than one-fourth share does

(b) I. L. R. 7 Mad. 253 (1883).

(8) 1 Mad. H. C. R. 45 (1862).

(5) I. L. R. 7 Mad. 253 (1883).

(7) I. L. R. 40 Mad. 632 s. c. 29 M. L. J. 710 (1915).

(8) 1 Mad. H. C. R. 45 (1862).

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not appear to have been raised or considered. Strange and Frere, JJ., considered Chap. I, sec. 11, para. 24, of the Mitakshara and decided that the estate should be divided into five portions of which the begotten son should have four and the adopted son one. The Dattaka Chandrika was not so far as appears alluded to. Even if it be assumed that the parties were Sudras their Lordships are unable to regard that case as an authority on the question which was before the High Court at Madras in *Karuturi Gopalam v. Karuturi Venkataraghavulu* (7) and which has to be considered in this appeal.

In the present case, the subject of this appeal, the suit was brought in the District Court of Godavari on the 26th November, 1909; it was transferred to the Court of the Subordinate Judge of Rajahmundry. The Subordinate Judge who tried the suit was A. Sambamurti Ayyar, and he delivered his judgment in it on the 13th December 1913. There were six issues framed, but the material question so far as the second of these appeals is concerned relates to the share to which the adopted son and through him his sons were entitled on partition of the family property. The Plaintiffs were Arumilli Subbarayadu and his two minor naturally-born sons. The Defendants Nos. 1, 2 and 3 were sons of Venkiah who had been the only brother of the Plaintiff Arumilli Subbarayadu; Defendant No. 5 was a son to Defendant No. 1; Defendant No. 6 was a son of Defendant No. 2; Defendant No. 4, was the adopted son of the Plaintiff Arumilli Subbarayadu, but was described in the plaint as a son of Venkiah, and Defendants Nos. 7, 8 and 9 were the minor sons of Defendant No. 4. The other Defendants are immaterial so far as the second of these two consolidated ap-

peals is concerned. In the plaint the adoption by the Plaintiff Arumilli Subbarayadu of Arumilli Ramanna, Defendant No. 4, was ignored, and it was alleged in the plaint that the "Plaintiffs are entitled to a half-share in the entire family property and the Defendants Nos. 1 to 9 are entitled to a half-share." In the written statement of the Defendants Nos. 1, 2, 3, 5 and 6 it was alleged that the Plaintiff Arumilli Subbarayadu had adopted the Defendant No. 4, A. Ramanna, as his son in 1896. In the written statement of the Defendants Nos. 4, 7, 8 and 9, who are the Appellants in the second of these consolidated appeals, it was alleged that the Plaintiff Arumilli Subbarayadu had adopted the Defendant No. 4, Arumilli Ramanna, in 1896 and that as an adopted son he was entitled to an equal share along with the Plaintiffs.

The fact and the validity of the adoption were disputed, but the Subordinate Judge, on the clearest evidence, found that the adoption was proved and was valid, and having so found that issue he in the thirtieth paragraph of his judgment recorded his finding as to the share in the family property which the Defendant No. 4 as an adopted son in the Sudra family was entitled to, thus:—

"30. As regards the share to which the fourth Defendant should be entitled according to law, there is practically no dispute. The parties belong to the Sudra caste and the law is clear that amongst the Sudras the adopted son shares equally with the subsequent born Aurasa sons [see *Raja v. Subbaraya* (5) and *Ramasami v. Sundarlingasami* (9)]. Thus, the first Plaintiff's branch consisting of Plaintiffs Nos. 1 to 3 and the fourth Defendant will have to divide amongst themselves a half share of the family property

(7) I. L. R. 40 Mad. 682 (a. c. 29 M. L. J. 10 (1915)).

(5) I. L. R. 7 Mad. 268 (1883).

(9) I. L. R. 17 Mad. 422 at p. 425 (1894).

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and the fourth Defendant's share therein would, therefore, be one-eighth of the whole property. This is my finding on issue I (a)."

It may be mentioned that their Lordships have been unable to ascertain what was the case which the Subordinate Judge referred to as *Ramasami v. Sundarlingasami* (9). That judgment of the Subordinate Judge was delivered on the 13th December 1913, and it is to be noticed that up to that date the Plaintiffs do not appear to have contended that amongst Sudras an adopted son was not entitled to share on partition of the family property equally with the legitimate sons of the adoptive father born subsequently to the adoption. They apparently raised that point for the first time in their memorandum of appeal to the High Court on the 24th March 1914. The judgment of the High Court appears to have been delivered on the 13th October 1916. Their Lordships do not know when the appeal to the High Court in *Karuturi Gopalam v. Karuturi Venkataraghavulu* (7) was presented, but the appeal to the High Court in that case was heard in August and September 1915. That was an appeal from a decree of the same Subordinate Judge.

The learned Judges, Ayling and Srinivasa Aiyangar, JJ., who heard the appeal to the High Court in this present suit, briefly dealt with the rights of an adopted son amongst Sudras as follows:—

"As to the share of the adopted son, it has been decided now that the fact of the adopted son being a Sudra does not give him an equal share with the natural-born sons. [*Karuturi Gopalam v. Karuturi Venkataraghavulu* (7)]. The dictum in

Raja v. Subbaraya (5), which has been followed by the lower Court has been disapproved in that case. The fourth Defendant's share will, therefore, be altered to one-thirteenth of one half of the family property."

From the decree of these learned Judges this appeal has been brought.

The inference which their Lordships draw from the materials before them is that the rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption had been accepted and acted upon for at least more than a century in the Presidency of Madras, as the law applicable in such cases to Sudras until the law on that subject was disturbed in 1915 by the decision of the High Court at Madras in *Karuturi Gopalam v. Karuturi Venkataraghavulu* (7). It also appears to their Lordships that that rule of the Dattaka Chandrika, although not supported by any ancient text of the Smritis or by the Mitakshara, is not inconsistent so far as Sudras are concerned with the Smritis or the Mitakshara.

What has been said in the preceding paragraph is sufficient to dispose of the second of these consolidated appeals from the High Court at Madras, but as the Dattaka Chandrika is considered in Bengal as a high authority it will be satisfactory to consider what view has been expressed by the High Court at Calcutta about the rule of the Dattaka Chandrika as to the right of an adopted son in a Sudra family to share equally on a partition of the joint family property with a legitimate son of the adoptive father born subsequently to the adoption. The latest

(7) 1. L. R. 40 Mad. 632 : s. c. 29 M. L. J. 719 (1915).

(9) 1. L. R. 17 Mad. 422 at p. 425 (1894).

(5) 1. L. R. 7 Mad. 253 (1883).

(7) 1. L. R. 40 Mad. 632 : s. c. 29 M. L. J. 719 (1915).

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case of which their Lordships are aware in which the subject was discussed in the High Court at Calcutta was that of *Asita Mohon Ghosh Moulik v. Nirode Mohon Ghosh Moulik* (10), which came on appeal before Chaudhuri and Newbould, JJ., from a decree of the 30th March 1912, of Babu Kunja Behary Gupta, Additional Subordinate Judge of Birbhum, who, having found that the parties were Sudras, held that the adopted son was entitled to share equally with the after-born natural son. The learned Judges of the High Court say: "Clear authority for the proposition (the right of a Sudra's adopted son to share equally with the after-born legitimate son) is to be found in the Dattaka Chandrika (see V, secs. 29 to 32). The Dattaka Chandrika is a work of undoubted authority in Bengal . . . In *Baramanund Mahanti v. Krishna Charan Patnaik* (11) a Bench of this Court accepted the law as laid down in the Dattaka Chandrika on this point . . . There are no other decided cases exactly on the point (in the High Court at Calcutta). We feel bound to attach great weight to the fact that those decisions have remained unchallenged for over thirty years." The learned Judges then considered some texts of Mann, Yajnavalkya and the Mitakshara, and some other commentaries and concluded as follows: "Having regard to the above we cannot say that the Dattaka Chandrika has in any way deviated from the Smritis." The judgment is a long one as it also dealt with several other matters which do not affect the question here.

The result is that interest actually received on the sum of Rs. 7,000 must be allowed, and to this extent the decree must be varied, but subject thereto the first appeal must be dismissed. The slight altera-

tion does not deprive the Respondents, who appeared, of their right to the costs.

The second appeal (No. 19 of 1919) must be allowed. The decree of the High Court must be set aside with costs so far as it varied the declaration in the decree of the Court of the Subordinate Judge as to the shares to which the parties are entitled, which last-mentioned decree must to that extent be affirmed and restored.

The Appellants in the first appeal will pay the costs of the first three Respondents who alone appeared, and the Respondents in the second appeal will pay the Appellants' costs of that appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor: Mr. Edward Dalgado for the Appellants.

Solicitor: Mr. Douglas Grant for the Respondents.

R. M. P.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1890 OF 1919.

<p>SANDERSON, C. J. RICHARDSON, J. 1921, 17, June.</p>	}	<p>SARBESWAR PATRA, Plaintiff, Appellant, v. MAHARAJAH SIR BEJOY CHAND MOHATAP and ors., Defendants, Respondents.</p>
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Bengal Tenancy Act (VIII of 1885), sec. 160—Occupancy right, if may be acquired by settled raiyat so as to be protected.

A raiyat holding at a fixed rate from the inception of the tenancy may subsequently acquire a right of occupancy, e.g., by continuous occupancy for twelve years, so as to be protected under sec. 160, Bengal Tenancy Act.

BEUT NATH NASKAR v. SURENDRA NATH

(10) 20 C. W. N. 901 (1916).

(11) 14 C. J. 183 (1884).

SARBEESWAR PATRA v. MAHARAJAH SIR. HIRDOY CHAND MOHAPAT.

DUTT (1) and AKHIL CH. SEN v. TRIPURA CH. CHAUDHURY (3) considered.

This was an appeal against the decree of Babu Sarat Chandra Bosu, Subordinate Judge of Zillah Bankura, dated the 23rd of June 1919, reversing the decree of Babu Thakurdas Banerjee, Munsif, Second Court at Bistupur, dated the 1st of February 1918.

The facts of the case will sufficiently appear from the judgment.

Babus Ram Chandra Majumdar and Narendra Nath Choudhury (for Babu Kiron Chandra Neogy) for the Appellant.

Babus Bepin Behari Ghose and Sarat Kumar Mitter for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Plaintiff against the judgment of the learned Subordinate Judge of Bankura. The suit was brought for a declaration of the Plaintiff's *jote* title in certain land, for recovery of possession thereof and for Rs. 15 as the price of paddy alleged to have been wrongfully taken by the Defendant No. 1. The learned Judge stated the respective cases as follows :—

“The Plaintiff's case is that in Mouza Chuamasina, he held 11 bighas of land with occupancy rights at a *jama* of Rs. 5. This *jama* was held formerly by him under the *malik* Hridoy Nath Sirkar : after his death under his son Ashutosh Sarkar and then under Ashu's vendee Haridas Choudhury. Out of these 11 bighas, 5 bighas form the subject of the suit. The Plaintiff alleges that he was in possession of the disputed land through his *bhagchasi*, Defendant No. 2 and got his share of *naon* paddy of 1 bigha in 1323 and that his share of the *heet* paddy grown on the remain-

ing 4 bighas was stocked in the house of Defendant No. 2, but Defendant No. 1 forcibly took it away on the allegation that the lands had been made *khas* by Defendant No. 3, the Moharaja of Burdwan, by purchasing the same in execution of a decree for arrears of rent against the *maliks* and had been settled with him.”

“The substantial defence of the Defendants Nos. 1 and 3 is that the interest of Ashutosh Sarkar and Haridas Choudhury in the lands was that of occupancy raiyats which was purchased by Defendant No. 3 on 2-11-14 in a rent sale, that a notice under sec. 167 having been given to the Plaintiff, among other persons, on 7-5-15 he became entitled to *khas* possession and that he has accordingly taken the paddy from Defendant No. 2.”

“The lower Court” (i.e., the first Court) “decreed the suit on the finding, that the *status* of the Plaintiff's landlord was that of a tenure-holder and that the Plaintiff is a raiyat with rights of occupancy which being a protected interest under sec. 160, Bengal Tenancy Act, his right was not annulled by service of notice under sec. 167.”

The first question, with which the lower Appellate Court dealt, was the *status* of the Plaintiff's landlord : The lower Appellate Court agreed with the Court of first instance that Hridoy Sirkar was a tenure-holder, and that his right of an occupancy raiyat, as alleged by the Defendant, had not been proved.

That finding, therefore, so far as it went, was in favour of the Plaintiff. The learned Subordinate Judge then proceeded to consider the *status* of the Plaintiff, and on this question he disagreed with the finding of the Court of first instance.

The learned Munsif had decided that the Plaintiff held the land in suit as a raiyat for more than 12 years continuously, that under the provisions of sec. 20 of

(1) 13 C. W. N. 1025 (1909).

(3) S. A. No. 847 of 1913. Dated 26th May 1915. Unreported.

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the Bengal Tenancy Act, he had become a settled raiyat of the village and that under the provisions of sec. 21 of the same Act he had acquired a right of occupancy in the land in suit. Consequently the learned Munsif held that the Plaintiff had a protected interest under sec. 160 of the Bengal Tenancy Act which could not be annulled by the service of notice under sec. 167 of that Act. The learned Munsif decreed the suit.

The lower Appellate Court overruled this last mentioned finding and held that although the Plaintiff, who was a raiyat at fixed rate, had occupied the lands for more than 12 years, he did not acquire a right of occupancy, which was protected under sec. 160.

The learned Subordinate Judge further held that notice had been properly served on the Plaintiff, that the Plaintiff's interest not being a protected one, it became annulled and that the Defendant No. 3 was entitled to take *khas* possession of the disputed land. He therefore held that the Plaintiff had no cause of action, allowed the appeal and dismissed the Plaintiff's suit.

The question in this appeal is whether the decision of the lower Appellate Court on this point is correct.

The facts, which it is necessary to state for the purpose of my judgment, are as follows: The land in question was settled to the Plaintiff by Hridoy Sirkar in 1301 B. S. at a *jama* of Rs. 5 per annum and he had regularly paid rent for it since the year 1303 B. S.

The Plaintiff reclaimed the lands, which he himself cultivated in the first instance, and subsequently the land was cultivated by the Plaintiff's "*bhagchasis*." The quantity of land is far below 100 bighas.

Consequently, as held by both the lower Courts, the Plaintiff is a raiyat.

The lower Appellate Court has found that the Plaintiff's *jama* was "*darmokarari*" which merely meant a *jama* "at a fixed and permanent rate of rent." This is a finding which this Court, on second appeal, must accept, and indeed it has not been called in question by either side in this Court.

It must be taken therefore that the Plaintiff from the beginning of his tenancy was a raiyat holding at a fixed and permanent rate of rent. It is also clear that the Plaintiff held the lands in suit as a raiyat for more than 12 years continuously. On behalf of the Plaintiff Appellant it was contended that in view of the abovementioned facts the Plaintiff was by reason of the terms of sec. 20 of the Bengal Tenancy Act a settled raiyat of the village, and by reason of sec. 21 of the Bengal Tenancy Act he acquired a right of occupancy in the land in suit, that such right of occupancy was protected by sec. 160 of the Bengal Tenancy Act and could not be annulled by notice under sec. 167.

On the other hand it was contended on behalf of the Respondents (1) that the right claimed by the Plaintiff is not protected under sec. 160 of the Bengal Tenancy Act, because the Plaintiff is not a mere occupancy raiyat. (2) That a raiyat at a fixed rent has a higher *status* than a mere occupancy raiyat and that a raiyat, holding from the inception of the tenancy at a fixed rent, cannot subsequently acquire a right of occupancy, so as to obtain a protected interest under sec. 160.

Several cases were referred to during the course of the argument. The first in order of date was *Bhut Nath Naskar v. Surendra Nath Dutt* (1) which was decided in 1909. In that case Doss, J., held that it was not possible for a raiyat of a holding at a fixed rate to have in the same holding a right of occupancy at

(1) 13 C. W. N. 1025 (1909).

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the same time, the incidents of the two holdings being so diverse in their character.

There was an appeal from the learned Judge's judgment which was heard by Jenkins, C. J. and Mookerjee, J., Jenkins, C. J., held that the appeal should be dismissed on the ground that the interest of the Defendant was a tenure and therefore not a protected interest within the meaning of sec. 160 of the Bengal Tenancy Act: the learned Chief Justice expressly refrained from discussing the above-mentioned question which was considered by Doss, J.: as it was unnecessary for the decision of the case. The other learned Judge, Mookerjee, J., did deal with that question and stated the point as follows:— "As regards the second contention of the Appellants that if they are *raiyyats* holding at a fixed rate of rent they have also acquired a right of occupancy, I am unable to hold that the argument is well founded," and after stating his reasons in respect thereof the learned Judge held that the view taken by Doss, J., was correct.

It was urged by the learned Vakil for the Appellant that this decision of the learned Judge was not necessary for the disposal of the case, that it was not the judgment of the Court, but of one Judge only and was not binding upon this Court. This position was not denied by the learned Vakil for the Respondent: I agree that, having regard to the fact that the learned Chief Justice decided the case on the ground that the Defendant's interest was a tenure and expressly refrained from giving any opinion on the point now under consideration, the case cannot be held to be binding on this Court though, it goes without saying, that the observations of the learned Judge who did deal with this question, are entitled to much weight and consideration.

The next case in order of the date was *Abdul Goni Chowdhury v. Makbul Ali* (2) decided by Holmwood and Chapman, JJ., on 28th July 1914. At p. 748, the learned Judges are reported to have said:—"It may be argued that a person who takes the tenancy originally as a raiyat at fixed rates does not thereby acquire an occupancy right. But that does not imply that a man who has already obtained occupancy rights can by obtaining a grant of fixed rent lose that occupancy right. That appears to us to be neither in accordance with equity nor common sense of the wording of the law."

Reference was then made to an unreported case decided by Woodroffe and Newbould, JJ., [*Akhil Ch. Sen v. Tripura Ch. Chaudhury* (3).] In that case Woodroffe, J., said as follows:—"From this it appears that what was given was a permanent *ryoti* interest described as *Istemrari Kaimi ryoti* and *Istemrari daimi kaimi pottah*. If this was the grant of a permanent interest, and, if, as admitted, at the date of this grant, there was no occupancy right which had matured, then it seems to me not possible that an occupancy right could be acquired after the date of the grant. But if we read this document in reference to this permanency as relating solely to the fixity of rent, then I think the argument of the learned pleader for the Respondents avails, that the Appellants would in that case be in the position of a raiyat at fixed rates. It is not every raiyat who is protected, but only an occupancy raiyat, and I think the distinction on which he has relied and which is that set out in the Bengal Tenancy Act distinguishing occupancy raiyats from raiyats at fixed rates

(2) T. L. R. 43 Cal. 745; s. c. 20 C. W. N. 185 (1914).

(3) S. A. No. 847 of 1913. Dated 26th May 1915. Unreported.

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and non-occupancy raiyats must be borne in mind and on this point he has referred to the case *Panchi Dassi v. Bala Das*, 13 Calcutta Weekly Notes 1025. I must hold therefore that the Appellants were not occupancy raiyats. They were therefore not protected from eviction in respect of the dags covered by Group I." I think that in the above judgment the name of the case *Panchi Dassi v. Bala Das* is a mistake: the reference, 13 Calcutta Weekly Notes 1025, is that of the case of *Bhut Nath Naskar v. S. N. Dutt*, which is evidently the case the learned Judge intended to mention: *Panchi Dassi v. Bala Das* is reported at p. 1031, and does not seem to be material to the question which was being considered by the learned Judge. This judgment on the face of it appeared to be a decision directly in point; but on reference to the record it appeared that the Plaintiff had purchased the Taraf at a Revenue sale, and the question was whether the Defendants had a protected interest under sec. 37 of the Revenue Sale Law, Act XI of 1859.

The next case is a decision in the opposite direction, *Lakhi Ch. Saha v. Mokal Ali* (4) which was decided in February 1917 by Fletcher and Richardson, JJ.

The head-note is as follows:—

"A settled raiyat holding land which was sold for arrears of revenue, in the same village as the village of which he is a settled raiyat under the terms of a permanent lease at a fixed rate of rent, has a protected interest within the meaning of the proviso to sec. 37 of the Revenue Sale Law."

The material part of the judgment is as follows:—

"The facts found are these:—First of all, it has been found that the contesting Defendant is a settled raiyat of the village within the meaning of the Bengal Ten-

ancy Act.. Secondly, it has been found that he holds the land in suit which is in the same village as the village of which he is a settled raiyat under the terms of a permanent lease at a fixed rate of rent. Whatever may be the law as regards other classes of raiyats, it is quite clear on the terms of sec. 21 of the Bengal Tenancy Act that, contract or no contract, every raiyat who is a settled raiyat of a village and obtains a raiyatee interest in other lands in that village acquires a right of occupancy in those other lands; and, if that is so, the present Defendant seems to me clearly to have a right of occupancy in the land in dispute. If he has a right of occupancy, he comes clearly within the proviso to sec. 37 of Act XI of 1859, and has an interest which has not been annulled by the sale for arrears of revenue."

It was contended on behalf of the Respondent that this case was not binding on this Court, in respect of the present point, for although sections of the Bengal Tenancy Act were referred to, the question for decision was whether the Defendant had a protected interest within the meaning of the proviso to sec. 37 of Act XI of 1859.

If this be so, then the previous decision of Woodroffe and Newbould, JJ., is in the same position. In my judgment this contention is right. These decisions are not binding on this Court in respect of the point now under consideration although the reasoning of the learned Judge may be of assistance. The reason is that the Court in both these cases was deciding whether the Defendants had a protected interest under sec. 37 of Act XI of 1859. In this case we have to consider whether the Plaintiff had a protected interest under sec. 160 of the Bengal Tenancy Act. Personally, I should have been glad if this matter could have been referred to a Full Bench by reason of the importance

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of the question, but in view of the conclusion at which I have arrived, that neither of the two last mentioned cases is a decision on the point now before us, it is not permissible for us to refer the question to a Full Bench.

The last case to which I need refer is *Lakhi Charan Saha v. Hamid Ali* (5), which was decided in August 1917. Chatterjea and Richardson, JJ., there held that a person who has already acquired an occupancy right does not by obtaining a grant of a fixed rent lose that occupancy right, and such a person is protected from ejectment under sec. 37 of the Revenue Sale Law. In the judgment reference was made to *Abdul Gani v. Makbul Ali* (2) and the following passage occurs :—

“The case of *Abdul Gani v. Makbul Ali* (2) in so far as it holds that a person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose that occupancy right, and that such a person is protected from ejectment, under sec. 37, supports the view we take and to that extent we agree with that decision. If the opposite view were taken, raiyats who might be holding lands for generations and who might have acquired rights of occupancy, would be liable to be ejected by a purchaser at a revenue sale, simply because they may come under the description of raiyats holding at fixed rates under the Bengal Tenancy Act, by reason of their rent being fixed in perpetuity by contract, or by reason of their holding at the same rent from the time of the Permanent Settlement or by reason of a presumption arising under sec. 50 of the Bengal Tenancy Act that they have been so holding, when the clear intention of the legislature is to protect such raiyats

from ejectment at the hands of a purchaser at a revenue sale.”

It therefore appears, that there is no decision of this Court in respect of the point now before us which is binding on this Court and consequently, it is necessary to consider the question with reference to the facts and the sections of the Bengal Tenancy Act.

The learned Vakil for the Respondents did not dispute the proposition laid down in *Lakhi Charan v. Hamid Ali* (5), so that it must now be taken that if a raiyat has acquired an occupancy right, he does not lose that occupancy right, by subsequently having the rent fixed by grant, or by one or other of the ways mentioned in that judgment, and inasmuch as there is no merger, of the two statuses, as was admitted by the learned Vakil for the Respondent, it follows that the two statuses, viz., that of the occupancy raiyat and that of the raiyat holding at a fixed rate would exist in the same person and at the same time.

It follows, therefore, from this that it is not impossible for one person to have in respect of the same land and at the same time a right of occupancy, and the right of a raiyat holding at a fixed rate. In other words the two status may exist in the same person at the same time, even though the incidents of the two kinds of holdings may be diverse in character.

It was, however, contended, as already stated, that if the status of the raiyat was that of a raiyat at a fixed rate from the inception of his tenancy, as in this case, he could not subsequently acquire a right of occupancy so as to be protected under sec. 160 of the Bengal Tenancy Act.

It seems to me, however, that if a right of occupancy can be acquired by a raiyat, who already holds as a raiyat at a fixed rate, there is no reason why he should not be protected as to his right of occu-

(2) I. L. R. 42 Cal. 745 : s. c. 20 C. W. N. 185 (1914).

(5) 27 C. L. J. 284 at p 288 (1917).

(5) 27 C. L. J. 284 (1917).

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pancy under sec. 160, just as much as a person who has acquired a right of occupancy in the first instance and, who subsequently obtains a grant at a fixed rate. The difference is merely in the method of acquisition. In the case of a person acquiring the right of occupancy in the first instance and obtaining the right of a raiyat at a fixed rate subsequently, it is admitted that he has a protected interest under sec. 160, so far as the right of occupancy is concerned. If then the raiyat has in the first instance the right of a raiyat at a fixed rate, and if he subsequently can acquire and does acquire a right of occupancy, I see no reason why he should not be equally protected under sec. 160.

But it was urged on behalf of the Respondents, and this was the real point of the learned Vakil's argument, that a raiyat having the higher *status* of a raiyat at a fixed rate, cannot subsequently acquire the lower status of a right of occupancy. In my judgment this argument should not be accepted.

Sec. 20 is part of the Chapter dealing with occupancy raiyats; but it is to be noted that the word "raiyat" is used in that section without any qualification. Under that section, if a person has held land situate in the village for a period of twelve years before or after the commencement of the Act continuously "as a raiyat" he is to be deemed to have become on the expiration of that period a "settled raiyat of the village."

What are the rights of a "settled raiyat of the village?"

That is made clear by sec. 21, which provides as follows:—

"Every person who is a settled raiyat of a village within the meaning of the last foregoing section shall have a right of occupancy in all land for the time being held by him as a raiyat in that village."

So that when a raiyat becomes a settled raiyat of a village he has a right of occupancy in *all* land for the time being held by him as a raiyat in that village.

It is not disputed that these sections apply to the land in question in this suit but as already stated, it was urged that inasmuch as the Plaintiff's interest was in its inception that of a raiyat at a fixed rate, he could not obtain a right of occupancy under sec. 21. I see no reason for limiting the general words of secs. 20 and 21 in this way and in my judgment by reason of the terms of these sections and the Plaintiff's undoubted holding of the lands in question for more than 12 years continuously, the Plaintiff did acquire a right of occupancy therein.

Reference was made to cl. (f) of sec. 160. It does not seem to have been considered in any of the previous cases. It provides as follows:—"Any right conferred on an occupancy raiyat to hold at a rent which was a fair and reasonable rent at the time the right was conferred."

It was admitted by both the learned Vakils that "the rent" referred to in this clause must be a "fixed" rent. This clause therefore is material as showing that the legislature did contemplate that a person might have at the same time not only a right of occupancy but also the right of a raiyat at a fixed rent, and that provided the rent was a fair and reasonable rent at the time the right was conferred not only the right of occupancy would be protected, but the right to hold at that fixed rent also would be protected.

Each of the learned Vakils relied on the clause as being in his favour.

The learned Vakil for the Respondent, while admitting that the clause went to show that the legislature had recognised the possibility of the existence of a right of occupancy and the right of a raiyat to hold at a fixed rent in one and the same

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person at the same time, contended that if the legislature had intended to protect any part of the interest of a raiyat at a fixed rate, who had subsequently become an occupancy raiyat, it would have stated so expressly and therefore it was only the raiyat, who could bring himself within the express words of cl. (f), who would be protected.

On the other hand, the learned Vakil for the Appellant urged that the intention of the legislature was that every right of occupancy, no matter how it was acquired should be protected, and that it was further intended to protect not only the right of occupancy but also the right of the occupancy raiyat to hold at a fixed rent, provided it could be shown that such rent was fair and reasonable at the time the right to hold at the rent was conferred. In my judgment the latter is the preferable construction to place upon the clause; it seems to be an intelligible and reasonable construction.

This however is not conclusive of the case and I do not base my judgment thereon. For the reasons hereinbefore mentioned and on the above-mentioned facts, in my judgment, the Plaintiff had acquired, in addition to his right to hold at a fixed rent, a right of occupancy, and such right of occupancy was protected under sec. 160 of the Bengal Tenancy Act. The result therefore is, in my judgment, that the learned Munsif was right in holding that so far as the Plaintiff's right of occupancy was concerned, it was a protected interest and could not be annulled by the notice which was given by the Defendant No. 3. The Plaintiff consequently had not lost his right of occupancy in the land in suit, and the Defendants Nos. 1 and 3 had no right to deprive the Plaintiff of his share of the crops in question.

In my judgment this appeal should be allowed, the decree of the lower Appellate

Court should be set aside and the decree of the learned Munsif should be restored: The Respondent must pay the Appellants' costs in this Court and in the lower Appellate Court.

RICHARDSON, J.—I agree. The subject over which discussion has ranged is whether and to what extent the interest of a raiyat at a fixed rate, who has occupied his holding for a continuous period of more than twelve years, is a "protected interest" within the meaning of sec. 160 of the Bengal Tenancy Act. It is not denied that such an interest, except so far as it is protected, is an "incumbrance" within the meaning of sec. 161. Under sec. 159, a purchaser of a tenure sold under the Act in execution of a decree for arrears of rent takes subject to "protected interests" but with power to annul "incumbrances." The protected interests specified in sec. 160 include:—

"(d) Any right of occupancy"
and

"(f) Any right conferred on an occupancy raiyat to hold at a rent which was a fair and reasonable rent at the time the right was conferred."

The principal question in dispute is whether a raiyat at a fixed rate may become a settled raiyat of the village under sec. 20 of the Act and thus acquire a right of occupancy within the meaning of sec. 21.

The discussion must begin with the fact that a raiyat holding at a fixed rate is a "raiyat" and is so classified in sec. 4 of the Tenancy Act. Raiyats are there divided into three classes, the first being "(a) raiyats holding at fixed rates, which expression means raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity." The other two classes are "(b) occupancy raiyats, that is to say, raiyats having a right of occupancy in the land held by them" and "(c) non-

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occupancy raiyats, that is to say, raiyats not having such a right of occupancy."

Chap. IV of the Act is entitled "raiya's holding at fixed rates" and consists of one section, sec. 18, which marks out the two special incidents of the status of such a raiyat. *Firstly*, he is to be "subject to the same provisions with respect to the transfer of, and succession to, his holding as the holder of a permanent tenure" and *secondly*, he "shall not be ejected by his landlord, except on the ground that he has broken a condition consistent with this Act, and on breach of which he is, under the terms of a contract between him and his landlord, liable to be ejected."

Now, stopping there, in my opinion, it might plausibly be contended that the second incident amounts in itself to a statutory right of occupancy, because it protects the raiyat at a fixed rate from eviction except on one specified ground. What is the statutory right of occupancy unless it is the protection from eviction which the Act gives to a raiyat? The status of an occupancy raiyat in respect of his right of occupancy is similarly described in sec. 25. The occupancy raiyat is merely protected from eviction except on two specified grounds, the first of which is "that he has used the land comprised in his holding in a manner which renders it unfit for the purposes of the tenancy" and the second is the very ground on which a raiyat at a fixed rate may be evicted. The latter, therefore, would seem to enjoy under the Act a superior right of occupancy. He can be evicted only on one ground while the occupancy raiyat may be evicted on either of two grounds.

It is true that a permanent tenure-holder is also protected from eviction save on the one ground on which a raiyat at a fixed rate may be evicted (sec. 10). But a tenure-holder cannot claim a right of occupancy: the term is applicable only to

raiya's, raiyats being regarded as the actual occupiers and cultivators of the soil. A non-occupancy raiyat also receives some measure of protection (sec. 44) but has no permanent right. The right of occupancy is a permanent right which the law guarantees to certain raiyats. *Prima facie* it seems anomalous that raiyats of a superior status should not, while raiya's of an inferior status should, possess that right.

If it be that a raiyat at a fixed rate has a right of occupancy under sec. 18, the discussion ends there. But it would be unsafe to act on a view which, so far as I am aware, has not previously been suggested and is, contrary to the assumption generally made. The point as I have said was not argued nor is it necessary for the purpose of the present case to say that a raiyat at a fixed rate has *ipso facto* a right of occupancy, inasmuch as the Plaintiff has continuously held his land for a period of more than twelve years.

I will assume therefore that while the Bengal Tenancy Act by sec. 19 saves rights of occupancy acquired before November 1885, when the Act came into force, since that date a right of occupancy in the strict or statutory sense can only be acquired (apart from custom) in the manner provided by secs. 20 and 21. Those sections with sec. 19 will be found at the beginning of Chap. V under the heading "occupancy raiyats" and the sub-heading "general."

Now, reverting to the classification of raiyats in sec. 4, no doubt when a non-occupancy raiyat acquires a right of occupancy as he undoubtedly may, he ceases to be a non-occupancy raiyat. That must be so by force of the terminology. But inasmuch as it is conceded that an occupancy raiyat may (without losing his right of occupancy) become a raiyat at a fixed rate, there appears to be no reason why a

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raiyat at a fixed rate, if he has not already a right of occupancy, should not be able to acquire such a right in addition to his other rights. I am not convinced that the status of a raiyat at a fixed rate cannot be satisfactorily or logically combined with that of an occupancy raiyat. The higher status would supersede so much of the lower as might be inconsistent with it and either status might be used as a shield so far as it extended. For instance, as regards eviction, an attempt to evict a raiyat possessing the combined rights on the ground that he had used the land so as to make it unfit for the purposes of the tenancy would be met by the plea of "raiyat at a fixed rate." The same answer would be given to a claim by the landlord to enhance the rent. No objection can be taken to the transfer of the holding of a raiyat at a fixed rate, on the ground that the consent of the landlord has not been obtained, though the question might arise whether the transferee has obtained in virtue of the transfer a right of occupancy. It may well be that under the Tenancy Act a raiyat at a fixed rate is for all purposes other than a sale of the tenure under which he holds for arrears of rent, sufficiently protected whether he has a right of occupancy or not. But I fail to see why merely on account of the other rights which he possesses he should be denied the protection which a right of occupancy would give him in the event of such a sale.

If there is nothing inherently contradictory or impossible in the combination of the two statuses, then, if we turn to secs. 20 and 21, we find it provided, in sec. 20, that "every person who for a period of twelve years . . . has continuously held as a raiyat land situate in any village . . . shall be deemed to have become on the expiration of that period, a settled raiyat of that village," and, in sec.

21, that "every person who is a settled raiyat of a village . . . shall have a right of occupancy in all land for the time being held by him as a raiyat in that village."

The language is certainly wide enough to cover the case of a raiyat at a fixed rate. No doubt, these sections occur in a Chapter headed "occupancy raiyats," but they deal with the acquisition of rights of occupancy. The expression "land held as a raiyat" in sec. 20 must include land held as a non-occupancy raiyat. Why should it not include land held as a raiyat at a fixed rate? It is nothing to the purpose to say that the word "raiyat" in sec. 85 does not include a raiyat at a fixed rate. The Act has to be construed as a whole and in the case of a raiyat at a fixed rate, sec. 85 has to be read with sec. 18 and construed accordingly. Apart from the rights of transfer conferred or recognised by sec. 18, the word "raiyat" in sec. 85 would include a raiyat at a fixed rate.

Then, if a raiyat at a fixed rate may and does acquire a right of occupancy under secs. 20 and 21, he will become for certain purposes at any rate an occupancy raiyat and will be entitled to protection as such under sec. 160 of the Act.

Otherwise a raiyat at a fixed rate would be entitled to no protection at all under sec. 160 unless he was entitled to a right of occupancy acquired before the Bengal Tenancy Act came into force. He does not hold an under-tenure and cannot claim the protection given to under-tenures. As Banerjee, J., said in *Nilmani v. Mathura* (6), sec. 18 "does not make all the incidents of a permanent tenure applicable to a raiyat's holding at fixed rates, but makes only the provisions with respect to transfer and succession applicable."

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In any case, the protection which sec. 160 gives a raiyat at a fixed rate is a qualified protection. Assuming that his status does not as such entitle him to a right of occupancy, then, unless, he otherwise has, or until he has acquired a right of occupancy, he is not protected at all. If he has a right of occupancy, that right is protected by cl. (d) while his right to hold at a fixed rate, if protected at all, is only protected to the extent indicated in cl. (f).

Cl. (f) does not appear to have been considered in any previous case. The question was put in the course of the argument whether the clause has any meaning unless it refers to the rent of a raiyat at a fixed rate who is also an occupancy raiyat. No satisfactory reply was received. It was suggested for the Respondent landlord that the words referred to an ordinary occupancy raiyat who has acquired the right to hold at a fixed rate. But, as already stated, if an occupancy raiyat can acquire the status of a raiyat at a fixed rate and keep his right of occupancy, there can be no reason why a raiyat at a fixed rate should not acquire a right of occupancy, and, if so, it would seem to be an unduly narrow construction to say that the clause only applies where the right to hold at the rent was conferred on a person who was at the time an occupancy raiyat and has no application where the raiyat at a fixed rate subsequently acquires a right of occupancy.

It was suggested also that an occupancy raiyat who acquires the right to hold at a fixed rate occupies a position midway between that of an occupancy raiyat and that of a raiyat at a fixed rate. But if that is not the previous suggestion in another form, I can find no justification for it or for saying that the classification in sec. 4 is not a complete classification. An occupancy raiyat who acquires the right to hold at a rent or rate of rent fixed

in perpetuity is a raiyat at a fixed rate.

In the absence of all previous discussion on the topic, I am not prepared to say that cl. (f) can only refer to a rent which has been permanently fixed. It has occurred to me that inasmuch as the interest of an occupancy raiyat so far as it is not protected, is an incumbrance and apart from cl. (f) only the right of occupancy is protected, the words would cover the case of an ordinary occupancy raiyat, holding at a rent which apart from the sale for arrears could not have been altered for fifteen years from the date on which it was fixed (See secs. 29 (c), 37 and 40-A). It is also conceivable that an occupancy raiyat might by agreement have the right to hold for a limited period at a stated rent.

However that may be, if a raiyat at a fixed rate may and does acquire a right of occupancy and become for some purposes an occupancy raiyat, the words, whatever other application they may have, seem capable of being understood as protecting his rent provided it was a fair and reasonable rent at the time the right to hold at that rent was conferred.

This question of rent, however, does not arise in the present case in which the raiyat is the Plaintiff in an action sounding in tort and I refrain, therefore from expressing a final opinion on the meaning of cl. (f). I will only add that in the view of its meaning which I have indicated as a possible view, cl. (f) would be the counterpart of such a saving clause as that contained in sec. 11 of the *patni taluks* Regulation (Regulation VIII of 1819) and in sec. 16 of the Bengal Rent Recovery (Under-tenures) Act of 1865 (Bengal Act VIII of 1865). Sec. 16 lays down that "the purchaser of an under-tenure sold under this Act shall acquire it free from all incumbrances" subject, *inter alia*, to the proviso (which follows the third clause of sec. 11 of the Regulation) "that

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nothing herein contained shall be held to entitle the purchaser to eject *khudkast* raiyats or resident and hereditary cultivators nor to cancel *bond fide* engagements made with such class of raiyats or cultivators aforesaid by the late incumbent of the under-tenure or his representatives except it be proved, in a regular suit, to be brought by such purchaser for the adjustment of his rent that a higher rent would have been demandable at the time such engagements were contracted by his predecessor."

In the old days the *khudkast* raiyat, or resident cultivator, holding at the customary *pergana* rate, was distinguished from the *paikasht* raiyat, or non-resident cultivator, who was a tenant-at-will or tenant from year to year. The distinction was largely obliterated by the Bengal Rent Act (Act X of 1859) which introduced the new division of occupancy and non-occupancy raiyats and enabled the *paikasht* raiyat to acquire the privileges of the *khudkast* raiyat. The *khudkast* raiyat, however, still survives in the enactments to which I have just referred and no doubt at the present day every occupancy raiyat would be regarded as a *khudkast* raiyat [cf. *Sheikh Mahomed Assanoollah v. Shamshir Ali* (7)].

The Bengal Tenancy Act merely evolves the policy of Act X of 1859 and the question occurs whether there is anything in the history of the subject to suggest that a raiyat at a fixed rate should be disabled from acquiring the right of occupancy.

It is clear from secs. 3 to 6 of Act X that the Act regarded raiyats who had held their land at a rent unchanged from the time of the permanent settlement as occupancy raiyats. Under sec. 3, "Raiyats who hold lands at fixed rates of rent which have not been

changed from the time of the permanent settlement" were to receive *pattas* at those rates. Sec. 4 was a provision corresponding to cl. (2) of sec. 50 of the Tenancy Act. Under sec. 5, "Raiyats having rights of occupancy but not holding at fixed rates, as described in the two preceding sections" were to receive *pattas* at fair and equitable rates. Sec. 6 provided:—"Every raiyat who has cultivated or held land for a period of twelve years has a right of occupancy in the land so cultivated or held by him

so long as he pays the rent payable on account of the same." That includes raiyats of the class mentioned in sec. 3.

It was then found that in improving the condition of the *paikasht* raiyat some injustice had been done to the *khudkast* raiyat. Before Act X the latter would have had what I will call a permanent right of occupation in respect of all land held by him in his village irrespective of the period during which he had held any particular parcel. As sec. 6 was worded the right of occupancy could only be acquired in land which had been actually occupied for the period of twelve years [*Sarat Chandra Roy Choudhuri v. Asiman Bibi* (8)].

This grievance was remedied by secs. 20 and 21 of the Tenancy Act under which the raiyat has a right of occupancy in all lands in the village of which he is a settled raiyat and he is a settled raiyat of the village if for a period of twelve years he has continuously held as a raiyat land situate therein.

Now the Tenancy Act does in sec. 50 cl. (1) recognize that where a "raiyyat and his predecessors-in-interest have held at a rent or a rate of rent which has not been changed from the time of the permanent settlement" the rent cannot be increased

(8) 1 L. R. 31 Cal. 725 at pp. 720, 721; 31 C. S. O. W. N. 601 (1904).

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except on the ground of an alteration in the area of the tenure or holding. That corresponds to sec. 3 of Act X, while cl. (2) of sec. 50 corresponds, as I have said, to sec. 4 of Act X. A raiyat who proves that he holds at a rent unchanged since 1793 is under the Tenancy Act, as under Act, X, a raiyat holding at a fixed rate [See *Dulhin Golab Koeri v. Bulla Kurmi* (9)]. But he is not specially protected under sec. 160 of the former Act. If the correct view be that a raiyat at a fixed rate cannot acquire a right of occupancy under the Tenancy Act, the raiyat holding at a rent unchanged since 1793 is only protected because his right of occupancy was acquired under Act, X of 1859 and is preserved by sec. 19 of the Tenancy Act. Sec. 19 is a section of the kind which legislature inserts out of caution to preserve existing rights. I can see no reason for saying that though a raiyat holding at a rent unchanged since 1793 had a right of occupancy under Act X, nevertheless under the Tenancy Act, apart from sec. 19, he has no right of occupancy.

It is true that Act X put on the same footing all raiyats who did not hold their land at a rent unchanged from the time of the Permanent Settlement, treating them all (whether holding at a fixed rent or not), as occupancy raiyats after twelve years of possession, liable to pay a fair and equitable rent [See *Dinoobundho v. Ramdhone* (10)]. But it must be remembered that ever since Regulation V of 1812 Zamindars in permanently settled districts have been considered competent to grant leases to raiyats at a fixed rent for any term or in perpetuity, and that since then such leases have been binding upon the grantors, their heirs and assigns though not upon a purchaser under a sale

for arrears of revenue [*Isshur Ghose v. Hills* (11)]. Presumably while such a lease was in force the fair and equitable rent would have been the rent payable under the lease. The fact, therefore, that under the Tenancy Act raiyats who hold at fixed rates but not under tenancies dating from 1793 are included in the definition of raiyats holding at fixed rates seems to furnish no reason why such raiyats should be excluded from the benefit of secs. 20 and 21. Here again there are raiyati tenancies created after 1793 the holders of which are entitled to rights of occupancy acquired under Act, X and preserved by sec. 19 of the Tenancy Act [*Lakhi Charan Saha v. Hamid Ali* (5)].

Suppose this case: A raiyat holds land in a village as a settled raiyat with the right of occupancy. He surrenders the land and takes other land in exchange as a raiyat at a fixed rate. Is he to lose the right of occupancy which he would otherwise have in the land taken in exchange?

Having referred to the repealed Act, X of 1859, I should perhaps explain that I quite appreciate that the right of occupancy is a creature of statute and that at the present time the solution of any question as regards the scope or incidents of that right must be sought within the four corners of the Bengal Tenancy Act. But where that Act speaks with an uncertain or ambiguous voice, I apprehend that resort may be had to the previous history of the subject for light and guidance in construing its provisions.

If Act X of 1859 has been repealed, Act XI of that year (the Bengal Land Revenue Sales Act) is still in force and questions have arisen in regard to the meaning of the proviso to sec. 37. One at least of these questions is germane to the present discussion and some reference to the section

(9) I. L. R. 23 Cal. 744; s. c. 2 C. W. N. 560 (F. B.) (1898).

(10) 9 W. R. 522 (1868).

(5) 27 C. L. J. 284 (1917).

(11) W. R. B. Rulings 148, 153 (1864).

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must therefore be made. Under sec. 37 a purchaser of an estate sold for arrears of land-revenue acquires it free from all incumbrances with certain exceptions and subject to the proviso which protects from ejectment "any raiyat having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force." The proviso goes on to say that the purchaser is not "to enhance the rent of any such raiyat otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do."

The language of the proviso seems to reflect the provisions contained in secs. 3 to 6 of Act X of 1859. All raiyats having a right of occupancy under that Act were protected from ejectment. Where the rent of a holding had not been changed since 1793, it was protected from enhancement but the rent of occupancy raiyats including occupancy raiyats at a fixed rate holding under "engagements made since the time of settlement" became liable to enhancement under the laws in force irrespectively of those engagements. That result was also consistent with the state of things brought about by Reg. V of 1812 referred to above.

No difficulty occurred till Act X was repealed and the Bengal Tenancy Act was passed. The proviso had then to be construed with reference to the provisions of the latter Act.

It was held in *Saifuddin's case* (8) to which I have already referred, that the right of occupancy mentioned in the proviso must now be equated with the right of occupancy defined in the Tenancy Act. (See per Mitra, J., at page 731 and per Geidt, J., at page 736). There are not two

rights of occupancy, one created by Act X and a separate and different right created by the Bengal Tenancy Act. The Bengal Tenancy Act enlarges the mode of acquisition but it is in part a consolidating Act and the right when acquired is identical with the right of occupancy created by Act X. Mitra and Geidt, JJ., therefore held that the ordinary occupancy raiyat was entitled under the proviso to protection for all the lands held by him as a settled raiyat. The decision is an interpretation with reference to the Bengal Tenancy Act of the words "any raiyat having a right of occupancy at a rent assessable according to fixed rules under the laws in force" and is now accepted law.

The more difficult question remained as to the meaning with reference to the Bengal Tenancy Act of the words "any raiyat having a right of occupancy at a fixed rate."

As I said at the outset, personally I am tempted to hold that every raiyat at a fixed rate has a right of occupancy as an incident of his status, however, the status be acquired. But if that is inadmissible, the reasonable conclusion seems to me to be this, that the words now include every raiyat at a fixed rate who apart from his status as such possesses or has acquired a right of occupancy. That would include every settled raiyat of a village who in respect of the holding in connection with which the question arises is a raiyat at a fixed rate. Such a raiyat would be protected from ejectment but might be liable under the laws in force to enhancement of rent on the ground that he holds "under an engagement made since the time of settlement."

The concession to which I referred earlier in this judgment—that an occupancy raiyat who becomes a raiyat at a fixed rate has a right of occupancy pro-

(8) I. L. R. 31 Cal. 725: s. c. 3 O. W. N. 601 (1904).

SARBESWAR PATRA v. MAHARAJAH SIR BE. CHAND MOHATAP.

tected by cl. (d) of sec. 160 of the Bengal Tenancy Act—was probably made in view of the terms of the proviso to sec. 37. The argument is that an ordinary occupancy raiyat who acquires the status of a raiyat at a fixed rate does not lose his right of occupancy because there is no merger, and that his right of occupancy is therefore protected both by cl. (d) of sec. 160 and by the proviso to sec. 37. In my opinion, however, for the reason already stated, it is impossible to stop at any such half-way house.

The question whether a raiyat at a fixed rate whose tenancy began after the Bengal Tenancy Act came into force and has lasted for twelve years or more has or has not a right of occupancy which is protected by the proviso to sec. 37 is in substance much the same as the question which arises in the present case, whether such a raiyat has a right of occupancy protected by cl. (d) of sec. 160. Both questions depend on the further question whether such a raiyat can or cannot become a settled raiyat of the village within the meaning of secs. 20 and 21 of the Bengal Tenancy Act.

It will be apparent from what I have said that I am disposed to answer this last question in the affirmative. The cases have already been referred to by the learned Chief Justice and in my opinion there is no authority which precludes me from giving effect to the view which I have formed.

The principal difficulty is caused by the observations of Mookerjee, J., in *Bhut Nath Naskar v. Surendra Nath Dutt* (1). Those observations are entitled to great respect and naturally make me much more doubtful as to the correctness of my own view than I should otherwise have been. The case, however, was actually decided on another ground and for the present purpose therefore is not conclusive.

(1) 12 C. W. N. 1025 (1909).

Akhil Ch. Sen v. Tripura Ch. Chaudhury (3), turned on the proviso to sec. 37 of Act XI of 1859 and the case does not appear to have been presented in argument to the learned Judges on the lines on which the present case has been presented to us.

In the result I agree that the appeal should be allowed.

S. C. M. , Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 89 of 1918.

TEUNON, J.

CHAUDHURI, J.

1920,

1, June.

BINODINI HAZRANI,

Plaintiff, Appellant,

v.

SUSTHA HAZRANI,

Defendant, Respondent.

Hindu law—Right of succession of young widowed daughter in a caste where widow remarriage is permitted—Necessity of proof of custom entitling the widowed daughter to succeed equally with a married daughter.

A Hindu was succeeded by his widow, and on her death the contest for succession was between a childless widowed daughter aged 16 or 17 and a married daughter having a son. In the caste to which the parties belonged widow remarriage is permitted:

Held—That though widow remarriage is a custom in the caste, that does not by itself predicate the further custom that the widowed daughter, because it is open to her to remarry, is entitled to succeed equally with the married daughter. There must be clear proof of custom entitling the widowed daughter to succeed equally with the married daughter.

This was an appeal preferred on the 17th November 1917 against a decree, dated 19th July 1917, of the District Judge of Zillah Murshidabad (M. Yusuf, Esq.),

(3) S. A. No. 847 of 1918. Dated 26th May 1915. Unreported.

BINODINI HAZRANI v. SUSTHA HAZRANI.

modifying a decree, dated 14th June 1916, of the Munsif at Kandi (Babu Behary Lal Sarkar).

The facts of the case will appear from the judgment.

Babus Brojendra Nath Chatterjee and Shirendra Nath Bagchi for the Appellant.

Babu Mohsh Chandra Banerjee (for *Babu Guru Das Sinha*) for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The question involved in this case is, one of inheritance to a person of the name of Dwarika Nath Hazra who was the father of the Plaintiff and also of Defendant No. 1. On the death of Dwarika he was succeeded by his widow and on the death of the widow the contest is between the two daughters. One daughter, the Plaintiff, at the time when the succession opened out was married and had a son. The other daughter, Defendant No. 1, was childless widow. But it has been found and in fact it is not disputed that in the caste to which the parties belong widow remarriage is permitted. At the time when the succession opened out Defendant No. 1, the widowed daughter, was only 16 or 17 years of age. She being thus of child-bearing age and it being open to her at any time to marry, it has been held by the District Judge that she was a daughter likely to have male issue and therefore entitled to succeed along with the Plaintiff who is a married daughter having a son.

We think that in the absence of any proof of custom entitling this widowed daughter to succeed equally with the married daughter the learned District Judge has fallen into an error. Widow remarriage is a custom in the caste, but that does not by itself predicate the further custom that the widowed daughter, because it is open to her to remarry, is entitled to succeed equally with the married

daughter. So far from there being any proof of the existence of any such further custom the decision of the District Judge is in fact contrary to the pleadings in the case. The Plaintiff in her pleadings alleged that the Defendant No. 1 as a childless widow was not entitled to succeed. The Defendant No. 1 herself accepted this position and pleaded that the true heir was neither her sister nor she, but the only son of a third sister who had apparently predeceased her father.

In this view of the matter we set aside the decree of the District Judge, and restore the decree of the Munsif with costs in all Courts.

J. N. R.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 322 OF 1921.

CHATTERJEA, J.

CHOTZNER, J.

1921,

Heard, 1, August.

Judgment,

2, August

BATA KRISHNA
PRAMANIK, Petitioner,
v.

A. K. Roy,
Opposite Party.

Calcutta Improvement Tribunal—Power of President to execute order for costs.

The President of the Calcutta Improvement Tribunal is a Civil Court with power to make an order for costs and as such has an inherent power to execute an order for costs made by him.

This was a Rule granted on the 19th May 1921 against an order of the President of the Calcutta Improvement Tribunal (Mr. S. C. Banerjee), dated 15th April 1921.

The facts of the case will sufficiently appear from the judgment.

Babu S. Chandra Madhab Mallick for the Petitioner.

Babu T. N. Choudhuri for the Opposite Party.

BATA KRISHNA PRAMANIK v. A. K. ROY.

The JUDGMENT OF THE COURT was as follows :—

This Rule is directed against an order of the President of the Calcutta Improvement Tribunal refusing to execute an order for costs passed by him on the ground that he had no power to execute such an order.

The Petitioner applied to the President of the Tribunal under sec. 18 of the Rent Act for revision of an order of the Rent Controller fixing the standard rent of certain premises which the Opposite Party occupied as tenant. The President fixed the standard rent and awarded costs amounting to Rs. 89-8 annas to the Petitioner against the Opposite Party. The Petitioner thereupon applied to the President of the Tribunal for execution of the order awarding costs. The learned President held that he had no power to execute the order for costs awarded by him.

It appears that two contentions were raised by the Opposite Party namely, first, that the President had no jurisdiction to pass the order about the payment of costs and, secondly, that he had no jurisdiction to execute such an order.

So far as the first question is concerned, the learned President held, and we think rightly, that he is a Court and that the jurisdiction exercised by him under sec. 18 of the Rent Act is civil jurisdiction, so that in proceedings under that section the President is a Court of civil jurisdiction within the meaning of the Code of Civil Procedure and under sec. 141 of that Code, as well as under the specific provision of sec. 24 of the Rent Act the procedure laid down in the Code in regard to suits apply, as far as may be, to such proceedings.

Sec. 24 of the Calcutta Rent Act lays down that in revising the decisions of the Controller, the President of the Tribunal, or the principal Civil Court, all follow as nearly as may be, the procedure laid

down in the Code of Civil Procedure, 1908, for the regular trial of suits. R. 4 of the Rules framed by the Local Government also provides that in making enquiries under the Act, the Controller or the President of the Tribunal shall follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure, 1908, for the regular trial of suits, the substance only of the evidence being recorded as in unappealable cases: and r. 24 lays down that in all proceedings before them under the Act, the Controller and the President of the Tribunal shall have all the powers possessed by a Civil Court for the trials of suits.

Now the Tribunal being vested with all the powers of a Civil Court for the trial of suits has certainly power to award costs, as the power possessed by a Civil Court for the trial of suits also includes the power of awarding costs. So far as the power to award costs is concerned, it is not disputed before us that the President has such power. But the learned President was of opinion that he had no power to execute the order for costs and that is also the contention of the Opposite Party before us.

The learned President relied upon the provisions of sec. 4 of the Code of Civil Procedure. That section lays down that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit, or otherwise affect, any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.

But that section only means that the provisions of the Code would not apply if they are inconsistent with the provisions of such special or local law nor affect any special jurisdiction or special procedure prescribed by any other law.

DATA KRISHNA PRAMANIK v. A. K. ROY.

The learned President points out, that under sec. 77, sub-sec. (2) of the Calcutta Improvement Act, every award of the Tribunal, and every order made by the Tribunal for the payment of money shall be enforced by the Calcutta Small Cause Court as if it were a decree of that Court. That merely shows that the special Act, viz., the Calcutta Improvement Act, has made a special provision for execution of decrees of the Tribunal by some other Court, namely, the Calcutta Small Cause Court. It may be said that if the Tribunal is not to execute its order under the Improvement Act, it is not likely that the Legislature intended that it should execute its orders under the Rent Act. Possibly it was a case of omission but, in the absence of any provision that the orders of the President of the Tribunal under the Rent Act are to be enforced by the Calcutta Small Cause Court, we must hold that the President of the Tribunal has the power of enforcing his own order passed under that Act.

On behalf of the Opposite Party we are referred to the case of *Gobordhan Das Deora v. Doolae Chand Sethia* (1). We do not think, however, that that case has any bearing on the present case. In that case the question raised was whether r. 4 framed by the Local Government which makes the provisions of the Civil Procedure Code applicable to enquiries made under the Act by the President was *ultra vires* in so far as an enquiry into an offence under sec. 20 of the Rent Act is concerned. Here no such question arises as the Local Government has power to frame rules for regulating the procedure for the President of the Tribunal in matters like the present.

It is contended that sec. 24 of the Act, and r. 24 make some portions only of the Civil Procedure Code, viz., that relating to regular trial of suits applicable to proceed-

ings under the Act, and not those relating to execution. But r. 24 lays down that the President shall have all the powers of a Civil Court for the regular trial of suits. It is to be observed that under sec. 18 of the Calcutta Rent Act, the application for revising the order of the Rent Controller in respect of premises outside Calcutta is to be made to the principal Court of original jurisdiction in the district. R. 24 does not lay down the procedure to be adopted in such Civil Court because no provision is necessary to be made with respect to proceedings in a Civil Court. Such Court can surely execute its own orders and it would be anomalous that an order for costs under sec. 18 when passed in a case relating to premises outside Calcutta can be executed, whereas such an order with respect to a case relating to premises inside Calcutta cannot be executed.

In *Nilmongy Singh Deo v. Tara Nath Mukherjee* (2), the question arose whether a Collector under Act X of 1859 could transfer a decree for rent for execution to a Civil Court in another district, there being no provision in that Act for such a transfer. The Judicial Committee in deciding the question in the affirmative observed that the Rent Court was a "Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights" and being a Civil Court in that sense it falls within the provisions of the Civil Procedure Code, and further that "there is nothing in the Act X of 1859 which provides for any execution beyond his (Collector's) jurisdiction, and there is nothing to forbid the conclusion that such executions are left to the operation of Act XXXIII of 1852, or the corresponding portion of Act VIII of 1859." In *Chattopadhyay v. Manjima Behary* (3), the

BATA KRISHNA PRAMANIK v. A. K. ROY :

learned Judges referring to the above observations of the Judicial Committee in *Nilmony Singh's* case (2) observed: "this and the other reasons given for the decision seem to leave no room for doubt that their Lordships thought that except upon points expressly provided for by Act X 1859, the procedure of the Revenue Courts when trying questions arising under that Act must be governed by the Civil Procedure "

It may be said that Act X of 1859 laid down a procedure relating to execution although it did not provide for transfer of decrees to another district, whereas r. 24 under the Calcutta Rent Act merely provides for the procedure for trial of suits. It is unnecessary, however, to discuss the matter further, because even if no provision is made in the Act or in the rules for execution of orders, under the Rent Act, once it is held that the President is a Court of civil jurisdiction and has power to award costs, we think it must be held that the Court has inherent power to enforce the order for (costs) passed by it. In the case of *Jogendra Chandru Sen v. Wazidunnessa Khatun* (4), Sir Francis Maclean, C. J., observed as follows:— "But it is now urged that the Court has no jurisdiction to do this, which means in effect that the Court has no power to enforce its own orders. I hope that is not so, and I do not think that it is so. There is apparently no section in the Code of Civil Procedure which applies directly to the case. But the Code is not exhaustive and it seems to me that when the Court had jurisdiction, as it undoubtedly had, to make the order as to costs, there is an inherent power in the Court to have that order carried into effect; otherwise the order would be a farce."

We think the principle is above,

(3) I. L. R. 9 Cal. 111.

(4) I. L. R. 52 Cal. 111. C. W. N. 250 (1907).

viz., that a Court has inherent powers to execute its own orders is applicable to the present case.

We accordingly hold that the President of the Tribunal has power to execute the order for costs passed by him.

The Rule is accordingly made absolute.

We make no order as to costs.

S. C. M. Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD BUCKMASTER.
LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.

1921,
March.

MUKA VENKATADRI
APPA ROW BAHADUR
ZEMINDAR GARU and
ORS., Appellants,
v.
RAJA PANTHA-
SARATHY APPA ROW
BAHADUR ZEMINDAR
GARU, Respondent.

Del carrying interest— Payment without specific appropriation— Creditor's right to apply payment in discharge of interest first.

Where a debt is due which carries interest, and monies are received without a definite appropriation on the one side or on the other, the rule which is well established in all cases is that the money is first applied in payment of interest and then when that is satisfied in payment of the capital.

PARR'S BANKING COMPANY v. YATES (1) referred to.

This was an appeal from a decision of the High Court at Madras.

The facts of the case will sufficiently appear from their Lordships' judgment.

Mr. L. DeGruyther, K. C. (with Messrs. Bhugwandin Dubé, K. V. L. Narasimham and R. Palat) for the Appellants referred to Civil Procedure Code, sec. 144. Respondent had applied the money to various payments carrying high rates of

(1) [1893] 3 Q. B. D. 460 at p. 466.

MEKA VENKATADRI APPA ROW v. RAJA PARTHASARATHY APPA ROW.

interest, High Court gives 6 per cent. There has been no appropriation by Appellant of the moneys paid towards the capital, but only towards the interest due to him.

[LORD BUCKMASTER referred to *Parr's Banking Company v. Yates* (1) where Rigby, J., cites *Bamandoss v. Dinesh Chandra* (2) and *Maharaja of Benares v. Har Narain Singh* (3).]

Sir Earle Richards, K. C. (with *Mr. J. M. Parikh*) for the Respondents.—There is no rule one way or other as to appropriation of moneys paid by a debtor. Cases cited are all of contract. The debtor is not bound to appropriate towards interest. Each case to be decided on considerations of equity and justice: *Thompson v. Hudson* (4).

The matter is for the discretion of the Court. The cross-appeal is on two points:—

(1) Sub-Judge said interest was chargeable on the principal amount decreed and High Court, on the whole amount including interest.

(2) Interest must be at 4 per cent, the bank rate and not at 6 per cent, as the Defendant would only have got 4 per cent.

Appellants not called on to reply.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—Their Lordships do not desire to hear Counsel for the Appellants in reply, nor do they need further time to consider the advice that they will tender to His Majesty, for in their opinion this case is quite plain. It appears that in 1899 the Respondent instituted a suit the Defendants to which are represented by the present Appellants; he claimed partition of two estates, known as the

Nidadavole Estate and the Medur Estate, asserting that he was entitled to a one-third share in each. The District Judge, by whom the action was first heard, decreed in the Plaintiff's favour with regard to the first estate, but against him with regard to the other. An appeal was taken from that decree to the High Court who varied it by declaring that the Plaintiff was entitled to one-third of the second estate as well as of the first. A receiver having been appointed of the rents of both estates on the 14th February 1907, the Plaintiff obtained an order enabling the receiver to pay over to him his interest on the Medur Estate under the judgment of the High Court as it then stood. Unfortunately for him the uncertainties of litigation resulted in a decree of His Majesty in Council on the 19th December 1913, restoring the judgment of the District Judge and it consequently followed that the share of the property in the Medur Estate which he had received from the receiver was money which he was bound to restore. The representatives of the original Defendants accordingly appealed to the District Court for restitution, asking for repayment out of the moneys in the receiver's hands, representing the Plaintiff's share in the Nidadavole Estate and against him personally for the balance. The matter came before the District Judge, who decided that the Defendants were entitled to the relief they claimed and made an order on the 31st August 1915, directing that the interest at the rate of 9 per cent, with yearly rests was to be charged against the Plaintiff, and that so much of the amount due as represented principal should carry simple interest from the date of the order at the rate of 9 per cent.

On the 19th October 1916, the High Court varied their order by declaring that the amount so received should only bear simple interest at 6 per cent., and on the

(1) [1898] 2 Q. B. D. 460 at p. 466.

(2) 6 M. I. A. 289 (1856).

(3) 1 L. R. 28 All. 25 (1905).

(4) L. R. 10 Eq. 497 (1870).

MEKA VENKATADRI APPA ROW v. RAJA PARTHASARATHY APPA ROW.

15th December 1916, the matter being again before them they directed that the whole amount should carry interest from the date of the order, but that the moneys received should be treated as though they had been received in respect of the principal moneys and not of the interest. An order was accordingly drawn up embodying the decision of the 19th October 1916: that order has been accepted by the Appellant, but from the direction given on the 15th December as to appropriation this appeal has been brought. The reason given by the learned Judges for their judgment was that they regarded the payments already made as shown in an account filed by the Defendants in the District Court on the 25th August 1915, as payments that had in fact been appropriated by the Defendants as against principal and that from such appropriation there was no opportunity for them to recede. The account referred to is set out in the record in these proceedings and it shows that as each sum of money was received it was charged with interest at the rate of 9 per cent. and carried forward until the end of the year, when the total amount so found was credited as against the total amount which was due. At no time did the sums so credited do more than cover the claim for interest, and it therefore seems impossible to understand why it was that the money received was regarded as definitely appropriated in respect of the principal. Nothing has been pointed out to their Lordships to lead them to the conclusion that the High Court was right in the assumption that they then made in that respect.

The question then remains as to how, apart from any specific appropriation, these sums ought to be dealt with. There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or

on the other, and the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of the capital. That rule is referred to by Lord Justice Rigby in the case of *Parr's Banking Company v. Yates* (1) which is reported in these words :—

“The Defendant's Counsel relied on the old rule that does, no doubt, apply to many cases, namely, that, where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled under his contract.”

Their Lordships can find nothing in this case to take the question outside the general principle referred to by the learned Lord Justice. They therefore think that the money received must be applied in the ordinary way, first in the reduction of the the money received must be applied in the reduction of the principal. So far therefore as the Appellants' appeal is concerned this means that the High Court have been mistaken in the view that they took and that the appeal should be allowed, but there is before their Lordships a cross-appeal which first of all raises the contention that the interest ought not to be higher than the bank rate. Their Lordships are not prepared to accede to that contention. They think that the High Court were fully qualified to exercise the discretion which they did in the matter, and they will not lightly interfere with the exercise of such a power. Finally the Respondent contends that the District Judge was right in dividing the amount to be repaid under the order of the 31st August 1915, into the component parts of which it was originally

MEKA VENKATADEI APPA ROW & RAJA PARTHASARATHY APPA ROW.

made up, so much as to principal and so much as to interest, and to declare that the interest only runs on such part of the judgment debt as flowed from the principal sum. Their Lordships agree with the High Court in thinking that no such distinction can be made.

They will therefore humbly advise His Majesty that the appeal should be allowed with costs, that the cross-appeal should be dismissed with costs, and that in taking the account the moneys received should be applied first towards the payment of the interest and when that is satisfied towards the payment of the capital sum.

Solicitor: Mr. Douglas Grant for the Appellants.

Solicitor: Mr. G. Dalgado for the Respondents.

R. M. P.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 153 of 1919.

MOOKERJEE, J.
BUCKLAND, J.

1921,
14, June.

BEPIN KRISHNA ROY,
Defendant No. 8,
Appellant,

v.

PRIYA BRATA BOSE and
ors., Plaintiffs,
Respondents.

Specific Relief Act (I of 1877), sec. 31—Suit for rectification of mortgage deed after issue of sale proclamation in execution of mortgage decree—Grounds on which rectification justifiable—Passing of decree if bar to rectification—Notice, necessity of, when knowledge proved—Notice to purchaser by title papers, nature and effect of—Purchase of mortgaged property during pendency of execution proceedings—Lis pendens—Misdescription of property, if prevents its application.

After the sale proclamation was issued in execution of a mortgage decree a suit was brought for the rectification of the mortgage bond so far as the description of the property mortgaged was concerned. The mortgaged property, it appeared, had

been purchased by a third party during the pendency of the execution proceedings:

Held—That in order to justify rectification of a contract or other instrument in writing there must be proof of a common intention different from the expressed intention and a common mistaken supposition that the intention was rightly expressed in the instrument; it matters not by whom the actual oversight or error was made which caused the expression to be wrong.

The conception of notice was introduced into law and the rules concerning it were established from considerations of policy and expediency based upon the common experience of mankind. Notice even when actual is not necessarily equivalent to knowledge, but the same effect must be attributed to it which would naturally flow from knowledge. Notice being thus a representative of, or substitute for, actual knowledge, whenever a party has obtained a full knowledge, although not in accordance with the rules which define the nature of notice and regulate the mode of its being given and received, there is no longer any need of invoking the legal conception of notice.

Notice to a purchaser by his title papers in a transaction will not be notice to him in an independent subsequent transaction in which the instruments containing the recitals are not necessary to his title; but he is charged constructively with notice merely of that which affects the purchase of the property in the chain of title of which the paper forms a necessary link.

Held, further—That the fact that a decree had already been made on the mortgage bond was no bar to the rectification of the bond itself.

It may be held as a general rule that if there is a mutual mistake in a mortgage in the description of property and

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the same mistake is reproduced in the decree, equity may go back to the original transaction and reform both the mortgage and the decree so as to make them conform to the intention of the parties concerned, but in a case where the decree has been executed and title has passed to a purchaser, fresh considerations may arise.

The contesting Defendant having purchased the property during the pendency of the execution proceedings would be bound thereby, for in the case of a mortgage suit the lis pendens does not terminate till the security has been realised for the satisfaction of the judgment debt.

*The principle of the decision in **LOKE-NATH v. ACHITANANDA** (42), that misdescription of the property involved in a litigation is sufficient to render the doctrine of lis pendens inapplicable cannot be invoked by a person who has either knowledge or notice of the true state of things.*

This was an appeal against the decree of Babu Krishna Kumar Sen, Additional Subordinate Judge, of Zillah Hooghly, dated the 3rd of March 1919.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chakravarty and Kali Kinkar Chakrabutty for the Defendant-Appellant.

Babus Ram Chandra Mazumdar, Rupendra Kumar Mitter and Monmohan Bose for the Plaintiffs-Respondents.

THE JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—The subject-matter of the litigation which has culminated in this appeal is a share of an estate which bore Touzi No. 93 on the revenue roll of the Collector of Hooghly about the middle of the last century and was held by two proprietors Ram Sundar Bose and Hara

Chandra Bose. The amount of revenue originally payable was fixed at Rs. 2,998-1-0; this was subsequently reduced to Rs. 2,971-1-11 when part of the estate was acquired for public purposes under the Land Acquisition Act. On the 29th September 1864, upon an application made under sec. 10 of Act XI of 1859, the share of Hara Chandra Bose which amounted to 8 annas 16 gandas of the entire estate (treated as 16 annas) was formed into a separate account and was described in the books of the Collector as Touzi No. 93-A, with proportionate amount of revenue payable fixed at Rs. 1,648-15-5. Thenceforward Touzi No. 93 became what is termed the residuary share and included only a 7 annas share of the original estate which was vested in Ram Sunder Bose. To put the matter briefly, before the separate account had been opened under sec. 10 of the Revenue Sale Law, the expression Touzi No. 93 would be the fitting description of the entire estate, but since the opening of the separate account was sanctioned by the Collector, the term Touzi No. 93 could be appropriately used to specify only the residuary share 7 annas 4 gandas of Ram Sunder Bose, while the term Touzi No. 93-A could be properly used to designate only the separated share 8 annas 16 gandas of Hara Chandra Bose. It is necessary to mention at this stage that Hara Chandra Bose left four sons, Kailas Chandra, Makhan Lal, Beni Lal and Braja Lal, each of whom inherited one-fourth of his properties, that is, each took a 2 annas 4 gandas share out of the 8 annas 16 gandas share which belonged to their father. It also transpires that these four brothers acquired from the representatives of Ram Sunder Bose, 1 anna 13 gandas 1 kara 1 krant share (out of the 7 annas 4 gandas share), namely, 1 anna 1 ganda 1 kara 1 krant share by a conveyance, dated

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19th September 1862, and 8 gandas share by another conveyance, dated 9th September 1873 and a 4 gandas share at an execution sale. Each of the four sons of Hara Chandra Bose thus acquired, in addition to his ancestral share, 2 annas 4 gandas in Touzi No. 93-A, one-fourth of 1 anna 13 gandas 1 kara 1 krant share that is, an 8 gandas 1 kara 1 krant share in Touzi No. 93. The shares thus vested in Beni Lal Bose (the third son of Hara Chandra Bose) in the two Touzis mentioned passed on his death to his son Ram Chandra Bose, the predecessor-in-interest of the first seven Defendants in the present litigation. We now come to three transfers effected by Ram Chandra Bose, which are of vital importance in the determination of the questions in controversy in this suit.

On the 7th February 1903, Ram Chandra Bose executed in favour of Jagadiswar Roy the predecessor-in-interest of the Plaintiffs in the present litigation, a mortgage bond to secure a loan of Rs. 5,999; the property hypothecated was described as his own share of 2 annas 4 gandas, which his father had possessed in "Touzi No. 93." It will be observed that although the share inherited by the mortgagor from his father was originally included in Touzi No. 93 (which comprised the whole estate), at the date of the mortgage that Touzi had been broken up into two fragments, namely, Touzi No. 93-A (which was the separate account and included the ancestral share of the mortgagor) and Touzi No. 93 (the residuary estate which included only the share of Ram Chandra Bose) consequently, if what was intended to be mortgaged was the ancestral 2 annas 4 gandas share of the mortgagor, the description that it was a share of "Touzi No. 93" (which at the date of the transaction, had not the same connotation as it had prior to the opening of the separate account) might well lead to confusion;

indeed, as will presently appear, this has been the root of the present litigation.

The next document executed by Ram Chandra Bose which deserves attention is a conveyance, dated the 11th April 1911 in favour of Bepin Krishna Roy the eighth Defendant in the present litigation. This deed of absolute sale recites in full the history of the estate No. 93 and explains how the separate account Touzi No. 93-A was carved thereout and the residuary estate Touzi No. 93 was brought into existence. The document not only sets out the successive steps whereby the vendor had acquired an interest in both the Touzis—in the former by right of inheritance and in the latter by right of purchase, but further mentions that on the 20th April 1868 a *patni* settlement was taken by Beni Lal Bose (one of the representatives of Hara Chandra Bose, the holder of the separate account Touzi No. 93-A) in respect of 1 anna 1 ganda 1 kara 1 krant share out of the 7 annas 4 gandas share which constituted the residuary estate; this lease, though taken in the name of Beni Lal Bose, was apparently for the benefit of himself and his three brothers. The deed finally recites two incumbrances created by the vendor, namely, first, a simple mortgage to Jagadiswar Roy of the 2 annas 4 gandas share inherited by him from his father and comprised in Touzi No. 93-A, and, secondly, a conditional mortgage, dated 14th November 1909 in favour of J. F. Duncan of Calcutta, with respect to an 8 gandas 1 kara 1 krant share of his zemindary interest and 5 gandas 1 kara 1 krant share of his *patni* interest: these, as we have seen were comprised in the residuary estate Touzi No. 93. The conveyance after these recitals, proceeds finally to transfer to the purchaser, for a consideration of Rs. 1,000, the zemindari right in 8 gandas 1 kara 1 krant share of the original Touzi No. 93,

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deducting the 2 gandas share out of the 8 annas 16 gandas share of Touzi No. 93-A, and the *patni* right in the 5 gandas 1 kara 1 kranj share, together with a 2 annas 17 gandas 2 karas 2 krants share in certain resumed *chaukidar chakran* (service lands). It is plain from the elaborate recital in this document that the vendor did not keep back from the purchaser any relevant information relating to the history of the title to the estate conveyed by him, and the purchaser was apprised how the original Touzi No. 93 had been broken up into the separate account, Touzi No. 93-A, (which was subject to the mortgage in favour of Jagadiswar Roy) and the residuary estate Touzi No. 93 which was transferred in part to the purchaser, subject to the *patni* lease in favour of Beni Lal Bose and the mortgage in favour of Duncan.

The third document executed by Ram Chandra Bose which requires examination is a conveyance, dated 19th September 1911, in favour of Bepin Krishna Roy the eighth Defendant in this suit and the transferee under the conveyance, dated 11th April 1911 whose provisions we have just analysed. This second conveyance purported to transfer the 2 annas 4 gandas share inherited by the vendor from his father and included in the separate account recorded as Touzi No. 93-A comprising the 8 annas 16 gandas share originally held by Hara Chandra Bose (the grandfather of the vendor). The consideration was stated to be Rs. 5,000 and the vendor declared that he had not encumbered the subject-matter of the sale by mortgage or otherwise. This is remarkable in view of the statement in the previous conveyance of the 11th April 1911 that this ancestral share of 2 annas 4 gandas had been mortgaged with Jagadiswar Roy. We shall now proceed to describe the succession of

events which have brought the contesting parties into Court.

On the 13th August 1909, the executors to the estate of Jagadiswar Roy (who had taken the mortgage of the 7th February 1903) instituted a suit against the mortgagor Ram Chandra Bose to enforce the security. The original mortgage bond was filed along with the plaint and in a schedule thereto the properties hypothecated were described as appertaining to lot Srerampore "bearing Touzi No. 93; of the 16 annas share thereof Defendant's own share is 2 annas 4 gandas and the proportionate annual revenue Rs. 412, for the said 2 annas 4 gandas share is payable into the Collectorate," as the annual revenue of the said Mahal is Rs. 2,972-1-10 payable into the collectorate of Hooghly. The suit was not defended, and on the 16th December 1909 the usual mortgage decree was made, directing the sale of the mortgaged properties; the description copied from the mortgage deed and inserted in the schedule to the plaint was reproduced in the schedule to the decree. The decree-holders applied in due course for execution of the mortgage decree, the sale proclamation was issued and the bid of Rs. 5,000 offered by the decree-holders was accepted on the 18th September 1911. At that stage, the decree-holders appear to have discovered that the property sold had been described in the sale proclamation as Touzi No. 93 and they seem to have apprehended that this might lead to future dispute as to what had actually been sold. They did not accordingly deposit the poundage fee and applied to the Court to resell the mortgage property after a fresh sale proclamation had been duly published. The petition embodied the following prayer.

"Be it declared that the property which had been mortgaged by the judgment-debtor was a 2 annas 4 gan-

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the share of Touzi No. 93 of the Collectorate of this District and the judgment-debtor having opened a separate account, the said 2 annas 4 gandas share is now included within Touzi No. 93-A. For this, the above 2 annas 4 gandas share of Touzi No. 93-A belonging to the judgment-debtor is liable to be sold by auction for the mortgage debt. The decree-holders pray that the sale proclamation to that effect may be published. On the 27th October 1911, the judgment-debtor lodged his objection against the issue of a fresh sale proclamation in an amended form and urged that as Touzi No. 93-A had been formed not after but before the mortgage, the proposed amendment would be contrary to the terms of the mortgage decree which was in exact conformity with the mortgage deed, whereby the mortgagor had hypothecated, not his interest in Touzi No. 93-A, but only such interest as he possessed at the time of the transaction in the residuary estate Touzi No. 93. On the 3rd February 1912, the matter came up for consideration before the execution Court. Meanwhile, the mortgagor had, as we have already seen, executed in favour of Bepin Krishna Roy the conveyance of 19th September 1911, which purported to transfer to him the 2 annas 4 gandas share of the vendor in Touzi No. 93-A described as free from encumbrance. Bepin Krishna Roy accordingly intervened in the execution proceedings; he contended that his position could not be prejudiced by a summary order for amendment of the decree and the sale proclamation, and claimed the protection accorded to a *bona fide* purchaser for value without notice. The execution Court held that the remedy of the decree-holders was to obtain a rectification of the mortgage instrument and of the mortgage decree and that an amended sale proclamation could not be issued

until such rectification had been made. The result was that on the 3rd February 1912, the Subordinate Judge dismissed the application for sale of 2 annas 4 gandas share in Touzi No. 93-A on the basis of an amended sale proclamation. On the 27th February 1914 the executors to the estate of the mortgagee instituted the present suit for rectification of the mortgage, dated 7th February 1903, and for incidental reliefs. The first seven Defendants were the representatives of the mortgagor Ram Chandra Rose who had died in the interval in the early part of the year 1913, and the eighth Defendant was Bepin Krishna Roy who had taken a conveyance from the mortgagor on the 19th September 1911. The representatives of the mortgagor did not enter appearance and the claim was contested by the eighth Defendant alone. The nature of the objections raised by him is indicated in the issues which were framed in the following terms:—

1. Is the suit maintainable in its present form and have the Plaintiffs any cause of action for the suit?
2. Is the suit within time?
3. Is the suit bad for misjoinder of parties and causes of action as well as non-joinder of necessary party?
4. Are the Plaintiffs estopped from asserting any lien of Touzi No. 93-A?
5. Was the purchase by Defendant No. 8 *bona fide* and for valuable consideration and are the Plaintiffs estopped from questioning the validity of his purchase?
6. Was the mortgage of the 24th Magh 1309 legally executed and for valuable consideration and was Touzi No. 93-A mortgaged or intended to be mortgaged by the said deed? and was the Defendant No. 8 aware of the said mortgage?
7. Has the Plaintiffs' lien been merged in the mortgage deed and has the lien been

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extinguished by the sale in execution of that decree?

8. Can the Plaintiff get a decree for rectification as prayed for?

9. What relief, if any, are the Plaintiffs entitled to?

The Subordinate Judge who tried the case in the first instance dismissed the suit as barred by limitation and did not express an opinion upon the merits. Upon appeal to this Court, Fletcher and Huda, JJ., held that as the question of limitation was not apparent on the face of the record, the case should go to trial on all the issues that had been framed in the suit between the parties. The appeal was accordingly allowed and the case was remanded for reconsideration. The Subordinate Judge has now held that the 2 annas 4 gandas share of Ram Chandra Bose which at the date of the mortgage transaction was comprised in Touzi No. 93-A was really intended to be mortgaged; and that the contesting Defendant was not a *bonâ fide* purchaser of that share for value without notice. In this view, the Subordinate Judge has decreed the claim in the following terms:—

“It is declared that the 2 annas 4 gandas share in the Mouzahs Nij Serampur, Gangarambati and Habra in lot Serampore comprised in Touzi No. 93-A of the Hooghly Collectorate owned by the deceased Ram Chandra Bose was charged with the principal and interest on the mortgage bond, dated 24th Magh 1309 and that the description of the property in the bond was erroneous and the property really intended to be mortgaged by it was the said share in Touzi No. 93-A; the mortgage bond and the decree in Suit No. 103 of 1909 be rectified accordingly.”

The contesting Defendant has on the present appeal assailed the decision of the Subordinate Judge as erroneous both on the facts and the law. On his behalf, we

have been pressed to hold that there is no satisfactory evidence to show that what was intended to be hypothecated by the mortgagor and to be accepted as security by the mortgagee was the 2 annas 4 gandas share held by the borrower Ram Chandra Bose in the separate account Touzi No. 93-A. It has further been urged in support of the appeal that even if the alleged contract be established, the mortgage instrument cannot be rectified at this stage, after the security had merged in the decree and the property had passed into the hands of a stranger who claimed to hold it as a *bonâ fide* purchaser for value without notice. The principles to be borne in mind in the determination of the question thus raised are set out in sec. 31 of the Specific Relief Act.

“When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court clearly find that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith for value.

The first point for consideration is whether through a mutual mistake of the parties, the mortgage instrument in this case does not truly express their intention; in other words, the Plaintiffs who seek the assistance of the Court for the rectification of the written instrument must clearly prove that there was a prior complete agreement which according to the common intention was embodied in writing, but by reason of mistake in framing the writing, this did not express

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or give effect to the agreement. As James, V. C., tersely expressed the substance of the matter in *Mackenzie v. Culson* (1), "Courts of Equity do not rectify contracts, they may and do rectify instruments purporting to have been made in pursuance of the terms of contract." To the same effect are the observations of Chelmsford, L. C., in *Fowler v. Fowler* (2): "The power which the Court possesses of reforming written agreements where there has been an omission of insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon the evidence of a different intention of the clearest and most satisfactory description. Lord, Thurlow's language is very strong on the subject; he says, 'the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence.' [*Lady Shelburne v. Lord Inchiquin* (3)]. And this expression of Lord Thurlow is mentioned by Lord Eldon in *Marquis of Townshend v. Stangroom* (4) without disapprobation. If, however, Lord Thurlow used the word 'irrefragable' in its ordinary meaning, to describe evidence which cannot be refuted or overthrown, his language would require some qualification; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability, and that it must be such as to leave no fair and reasonable

doubt upon the mind that the deed does not embody the final intention of the parties. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement." The true position then is that in every case where rectification is sought, it must clearly and satisfactorily appear that the precise terms of the contract had been orally agreed upon and that the writing afterwards signed failed to be as it was intended, an execution of such previous agreement, but on the contrary expressed a different contract. Tested from this point of view, the case for the Plaintiffs is abundantly made out. In the first place, there is reliable oral evidence of the negotiations antecedent to the execution of the mortgage instrument, which shows that what was intended to be offered and accepted as security was the 2 annas 4 gandas ancestral share of the mortgagor in the original Estate Touzi No. 93 which at the time of the mortgage was part of the separate account Touzi No. 93—A; oral evidence was plainly admissible for this purpose; *Balkishan v. Legge* (5) and *Jioraj v. Norwich Assurance Co.* (6). In the second place, we have the admission of the

(1) L. R. 8 Eq. 308 (1869).

(2) 4 DeG. & J. 250, 264 (1859).

(3) 11 Br. Ch. Ca. 341.

(4) 6 Ves. 334.

(5) L. R. 27 I. A. 58, s. c. I. L. R. 22 All. 149, 158; 4 C. W. N. 153 (1899).

(6) 5 Bom. L. R. 353 (1903).

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mortgagor in the conveyance executed by him on the 11th April 1911, that he had mortgaged to Jagadishwar Roy the 2 annas 4 gandas share obtained by him from his father in Touzi No. 93-A. In the third place the surrounding circumstances point to the same conclusion. At the date of the mortgage, the mortgagor did not possess a 2 annas 4 gandas share in what was then Tauzi No. 93, that is, the residuary estate. To hold that notwithstanding this circumstance, he professed to hypothecate a share in excess of what he owned in fact, would be to attribute to him a design to defraud the mortgagee; there is no indication that he harboured such intention; on the other hand the subsequent admission contained in the conveyance of the 11th April 1911, militates against a possible theory of fraud. Consequently, if we look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, the subject-matter of the contract, the provisions and expressions of the instrument, and if further, we call in aid the acts done under the instrument and contemporaneous writing made between the parties near or subsequent to the time when the deed was executed, we cannot but come to the conclusion that the evidence is clear and convincing that the mortgage instrument does not correctly describe the property which the mortgagor and mortgagee agreed should be given and accepted as security. Here then is an instance, not of mistake as to the identity of the property itself, but of a misdescription of it in the written instrument. This precisely is the class of cases where reformation is decreed provided the mistake was mutual, *Walden v. Skinner* (7) and *Adams v. Henderson* (8), and examples are by no means rare where correction has been made in the description of the premises in deeds,

(7) 101 U. S. 577.

(8) 168 U. S. 573.

mortgages, conveyances, particularly mistakes in the number of the township, section, lot, block, boundary, line, or street. That the mistake was mutual in this case cannot we think be seriously disputed. Both parties as is amply clear on the evidence, had the common intention that the 2 annas 4 gandas share of the mortgage inherited by him from his father should be hypothecated. That share, at the time of the transaction, was included in Tauzi No. 93-A and not in Tauzi No. 93. The writer of the deed, however, described it as included in Tauzi No. 93. There is no direct evidence to show how this error was brought about, nor is it necessary to indulge in speculation on that point. The only question is, whether, the mistake was mutual, that is, a mistake reciprocal and common to both parties, in other words, whether each alike laboured under the same misconception in respect to the terms of the written instrument. To put the matter concisely, was there a common intention different from the expressed intention and a common mistaken supposition that it was rightly expressed. The answer must be in the affirmative; for this, it is not necessary to hold that a mutual mistake of the agents of the parties is always necessarily a mistake of the parties; but undoubtedly it would be in the case where the error was committed by a writer who acted as common agent of both parties in drafting the instrument. The essence of the matter is that mutuality of mistake might arise from the fact that the mistake was made by a writer who acted as mutual agent of both parties in reducing the contract to the form of a written instrument. Where there is unilateral mistake, rectification is refused on the ground that if the Court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it,

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as it was written by mistake, when it exactly expressed the agreement as understood by the other party the writing when so altered would be just as far from expressing the agreement of the parties as it was before, and the Court would have engaged in what would be a singular task for a Court of Equity to undertake, namely, doing right to one party at the expense of a precisely equal wrong to the other. No such consideration obviously arises in the cases of the type now before us for it cannot be urged here that in granting relief to the Plaintiff on the ground of his mistake, the Court would be imposing upon the other party the erroneous conception of his opponent. It may further be added that if the theory be adopted that the mistake was brought about deliberately by the mortgagor his conduct might be deemed fraudulent, so that on establishment of fraud the mortgagee might claim rectification, mistake or no mistake. Consequently where the Defendant is shown to have been aware not only that the instrument did not express the real agreement but also that the Plaintiff was ignorant of the discrepancy between the instrument and the agreement, the case is clearly one for reformation, *Clark v. Girwood* (9), *Lorsey v. Smith* (10), *Coreley v. Stafford* (11), *Tucker v. Bennett* (12). There is thus no escape from the conclusion that the circumstances of the case before us attract the operation of the rule that in order to justify rectification there must be proof of a common intention different from the expressed intention and a common mistaken supposition that the intention is rightly expressed in the instrument; it matters not by whom the actual oversight or error

was made which caused the expression to be wrong.

We have next to consider, whether the Court should refuse to rectify the mortgage instrument on the ground that, such rectification will prejudice the rights acquired by a third person in good faith and for value. The Subordinate Judge has answered this question against the eighth Defendant. In his view, the purchase of the mortgage property by the contesting Defendant was made neither in good faith nor for value. The evidence as to the payment of consideration has been placed before us and the judgment of the Subordinate Judge has been criticised on the ground that he has rejected positive testimony on mere suspicion, a course emphatically disapproved by the Judicial Committee on more than one occasion; as was observed by Sir Lawrence Jenkins in *Mina Kumari v. Bejoy Singh* (13) and by Lord Shaw in *Mohammed Mahbub Ali v. Bharat Indu* (14), the decision of the Court should rest, not upon suspicion but upon legal grounds established by legal testimony; this follows the earlier dicta of Lord Westbury in *Sriman v. Gopal* (15) and Lord Hobhouse in *Uman v. Gandharp* (16). There is considerable force in this contention. The evidence of payment of consideration by cheque on the Chartered Bank cannot be brushed aside, and there is no solid foundation laid in the evidence to support the hypothesis that the purchaser received back the money from the vendor. If that theory had been satisfactorily made out, there would be no real transfer at all; the transaction could then have been branded

(9) L. R. 7 Ch. Div. 9 (1877).

(10) L. R. 15 Ch. Div. 655 (1880).

(11) 1 DeG. & J. 238 (1857).

(12) L. R. 38 Ch. Div. 1 (1887).

(13) L. R. 44 I. A. 72; s. c. I. L. R. 44 Cal. 662; 21 C. W. N. 585 (1916).

(14) 28 C. W. N. 321 (P. C.) (1918).

(15) 11 M. T. A. 28 (1866).

(16) L. R. 14 I. A. 127; s. c. I. L. R. 15 Cal. 20 (1887).

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as fictitious, brought about by conspiracy between the vendor and the purchaser with a view to throw an effective obstacle in the way of the mortgagee. But the evidence does not prove conclusively that the sale was colourable, although the genuineness of the transfer is undoubtedly open to grave suspicion. It is needless, however, to discuss further, whether the transfer was for value, because there is no room for serious controversy that the purchase cannot be deemed to have been made in good faith. There is no satisfactory evidence that the eighth Defendant made the usual enquiries at the time of his alleged purchase. We have further the significant fact that the conveyance which he had taken five months earlier, on the 11th April 1911, actually contained a recital that this ancestral share of Ram Chandra Bose have been mortgaged to Jagadishwar Roy. Direct evidence is not available to prove that he remembered this recital when he took the second conveyance on the 19th September 1911. If there had been such evidence, the proof of knowledge would have been at least as effective as notice and would thus have been completely destructive of the plea of purchase in good faith. The conception of notice was introduced into law and the rules concerning it were established, from considerations of policy and expediency based upon the common experience of mankind. Notice, even when actual is not necessarily equivalent to knowledge; but the same effect must be attributed to it which would naturally flow from knowledge. It is treated as a representative of, or substitute for, actual knowledge, and is therefore in its essential nature inferior to knowledge. It necessarily follows that whenever a party has obtained a full knowledge, although not in accordance with the rules which define the nature of notice and regulate the mode of its being

given and received, there is no longer any need of invoking the legal conception of notice; the rules concerning it no longer apply; the very fact for which it is intended as substitute has been more accurately accomplished in another manner. To sum up in one statement, if the party has in any way obtained the full knowledge, those same results must necessarily and even in a higher degree, be attributed to it—the very substance itself—which are, from motives of general policy, attributed to notice as its representative and substitute. But it is not necessary in the present case to establish that the contesting Defendant had actual knowledge of the existence of the mortgage, for it is plain that the recital in the conveyance accepted by him on the 11th April 1911 did in law constitute constructive notice. I am not unmindful that the conveyance of the 11th April 1911 related to a share of Touzi No. 93 whereas the conveyance of the 19th September 1911 was in respect of a share of Touzi No. 93-A. The two Touzis, however, were not essentially distinct properties within the meaning of the well-known principle enunciated by Lord Redesdale in *Hamilton v. Royce* (17) and quoted with approval by Smith M. R. in *Tressilian v. Carriffe* (18). "If a man purchases an estate under a deed, which happens to relate also to other lands not comprised in that purchase and afterwards purchases the other lands to which an apparent title is made, independent of that deed; the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase." The principle in essence is

(17) [1804] 2 Sch. & Lef. 315.

(18) [1855] 4 Ir. Ch. Rep. 399.

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that notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction, in which the instruments containing the recitals are not necessary to his title; but that he is charged constructively with notice, merely of that which affects the purchase of the property in the chain of title of which the paper forms a necessary link. Consequently, where one is purchasing a particular piece of real estate, and his title deeds recite a charge upon, or equitable interest in, another piece in favour of a third party, such recitals would not affect him with notice of such charge or interest, in the event of his subsequent purchase from the holder of the legal title to the other property. He is not presumed to carry the knowledge thus imputed to him in the first transaction in his memory until the second purchase has been effected. The reason and limits of this rule were lucidly put by Rogers, J., in *Boggs v. Varner* (19), when he was asked to receive in evidence recitals in the title papers to a different piece of property from that in suit with a view to charge a purchaser with notice of an antecedent unregistered instrument or an equitable interest: "The evidence would lead to dangerous consequences, for it is impossible for any one to recollect the recitals in deeds under which he may claim. Let this be held to be admissible and competent to affect a subsequent purchaser with notice, it would follow that no man can safely purchase until a most careful examination and inspection of every deed to which he may be a party and under which he claims." The case before us is obviously distinguishable and is not affected by these considerations. Under the Revenue Sale Law, notwithstanding that a separate account has been opened, the separate account and the residuary

estate continue ultimately liable to the State for the entire revenue, and in certain specified contingencies the entire estate is liable to be exposed for sale by the revenue authorities for the realisation of arrears. Consequently, in order to trace the history of either fragment of the estate, an examination of the antecedent dealings in respect of both would be undertaken by the prudent investor. Thus, under ordinary circumstances, knowledge acquired in course of transactions with regard to either fragment of the estate may well be deemed as acquired "in course of transaction with regard to the same property" or "in the investigation of the same chain of title." The conclusion thus appears inevitable that the contesting Defendant is not entitled to the protection extended to a purchaser in good faith and for value.

Finally, it has been urged as a last resort on behalf of the contesting Defendant that even though it should be clearly established that through the mutual mistake of the parties to the mortgage contract, the instrument in writing did not truly express their real intention, the Court cannot at any rate, the Court should not, in its discretion, rectify the mortgage deed, inasmuch as a decree has already been made thereon by a competent Court. Such decree, it has been argued, has extinguished the mortgage security, and reformation at this stage would in essence be a rectification of the decree of one Court by another, contrary to well-established principles. In support of this argument, reference has been made to the decisions of the Judicial Committee in *Hetram v. Shadilal* (20) and *Mathu Mal v. Durga Kunwar* (21), and of this Court in *Sadho*

(20) L. R. 45 I. A. 130: s. c. 22 C. W. N. 1033 (1918).

(21) L. R. 47 I. A. 71: s. c. 25 C. W. N. 397 (1919).

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Misser v. Golab Singh (22), *Jogeswar v. Ganga Bishnu* (23), *Chandmia v. Asimabanu* (24), *Bhandi Singh v. Daulat Roy* (25) and *Kusodhaj v. Braja Mohan* (26). Not one of these decisions, it has been conceded, is directly in point, and the events which led up to the litigation in each of these cases bear no analogy to those antecedent to the present suit; but an attempt has been made to invoke the aid of the general principles which, it is said, may fairly be extracted from the cases mentioned. In *Hetram v. Shagilal* (20), Viscount Maiddane observed that the effect of a decree made under sec. 89 of the Transfer of Property Act for the sale of mortgage property is to substitute the right of sale thereby conferred upon the mortgagee for his rights under the mortgage which are thereupon extinguished. This principle which was also recognised in *Mathu Mal v. Durga Kunwar* (21), clearly does not touch the question before us, namely, the competence of a Court to direct rectification of a mortgage instrument when the elements specified in sec. 31 of the Specific Relief Act have been established. No doubt, when such rectification has been made by order of Court, what the effect thereof may be on the decree previously made is a question which we shall presently have to consider. In *Sadho Misser v. Golab Singh* (22), it was ruled that the only ways in which a decree may be set aside by a party thereto are by appeal, by proceedings under sec. 108, C.

(20) L. R. 45 I. A. 120 : s. c. 22 C. W. N. 1033 (1918).

(21) L. R. 47 I. A. 71 : s. c. 25 C. W. N. 397 (1919).

(22) 3 C. W. N. 375 (1897).

(23) 8 C. W. N. 473 (1904).

(24) 10 C. W. N. 1024 (1906).

(25) 17 C. W. N. 82 : s. c. 15 C. L. J. 675 (1912).

(26) L. R. 43 Cal. 217 : s. c. 19 C. W. N. 1228 (1915).

P. C. (1882) and similar sections, and by application for review; if the decree is not tainted by fraud, no suit lies to set it aside. In that case, an amendment had been made in the pleadings without notice to a party who had not entered appearance in the suit, and a decree was ultimately made in accordance with the amended pleading. The absent Defendant thereupon instituted a suit to set aside the decree on the ground that as he had not been served with notice of the application for amendment of the plaint, he was not bound by the decree and was entitled to treat it as not affecting his rights. Trevelyan and Beverley, J.J., held that as no attempt had been made to set aside the decree as provided by law, the suit could not be maintained. In *Jogeswar v. Ganga Bishnu* (23), it was held that a suit lies in a Civil Court to rectify a mistake in a decree. It appears that in a previous mortgage suit, a property which was correctly described in the plaint as property No. 4 was by mistake described as property No. 3 in the written statement. This property was ultimately released as not liable to be foreclosed, but was described as property No. 3 in the judgment, and the error was reproduced in the decree. A suit was thereupon instituted for rectification of the error. The Subordinate Judge dismissed the suit. On appeal to this Court, Mitra, J., was pressed to follow the rule recognised in *Ainsworth v. Wilding* (27), and to hold that the suit could be maintained for rectification of the error. This contention was overruled. On appeal under the Letters Patent, Maclean, C. J. (Pargiter, J., concurring) reversed this decision and held that the suit lay to rectify the mistake in the decree. The Chief Justice pointed out that the suit was of a civil nature within the meaning

(23) 8 C. W. N. 473 (1904).

(27) [1893] 1 Ch. 673.

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of sec. 11, C. P. C. (1882) and was cognizable by a Civil Court, as there was no enactment in force to bar the suit. In *Chand Mia v. Asimabonu* (24), Ghose and Pargiter, JJ., referred to the decisions in *Sadho v. Golap* (22) and *Jogeswar v. Ganga Bishnu* (23) and held that it could not be broadly laid down that any error in a decree may be challenged by a separate suit. There a decree for ejectment had been made in a suit for rent, though there was no prayer for ejectment in the plaint. The Defendant applied for review of judgment, but was unsuccessful. He then instituted a suit to set aside the decree. The Court held that, in these circumstances, a separate suit was not maintainable to set aside a decree not tainted by fraud, obtained in the presence of both parties and apparently conclusive between them. In *Bhandi Singh v. Daulat Roy* (25), Brett and Carnduff, JJ., referred to the earlier cases just analysed and held that a suit was not maintainable in a Civil Court for amending the judgment and decree, previously passed in a suit between the same parties by another Civil Court of competent jurisdiction, on the ground that a mistake had been made by the Judge in his judgment and decree. It was observed that as the Court had jurisdiction and authority to make the decree actually passed, another suit could not be instituted to set aside or modify that decree on the ground that the Judge had committed an error; in support of this view, reference was made to the remarks of the Judicial Committee in *Srigopal v. Prithi Singh* (28). In *Kusodhaj v. Braja*

Mohan (26), Jenkins, C. J., held that though a decree can be set aside by suit on proof of fraud of the required character, a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree had made a mistake. The decision in *Jogeswar v. Ganga Bishnu* (23) was distinguished; it was also explained that the case of *Ainsworth v. Willing* (27), was an instance of a consent decree and consequently belonged to the class of decisions typified by *Huddersfield Banking Co. v. Lister* (29) *Willing v. Sanderson* (30). These cases show that an order made in an action by consent and based upon and intended to carry out an agreement come to between the parties, can be set aside on the ground (such as mistake) on which an agreement in the terms of the order could be set aside. But these cases do not show that a decree after contest can be set aside or rectified in a fresh suit on the ground that the Judge was mistaken though his decree accurately expressed his intention [*Preston Banking Co. v. Allsup* (31)]. Jenkins, C. J., added that if the alleged mistake of a Judge is to furnish a disappointed litigant with a fresh starting point for keeping his opponent in Court, then his misfortune would be gravely increased to the public detriment. These principles are clearly inapplicable to cases of the type now before us. Here the question of fundamental importance, stripped of all technicalities is, whether the mutual mistake of the parties to the mortgage transaction manifested in the mortgage deed, which has extended into Judicial proceedings, automatically as it were, without mistake on the part of

(22) 8 C. W. N. 375 (1897).

(23) 8 C. W. N. 473 (1904).

(24) 10 C. W. N. 1024 (1900).

(25) 17 C. W. N. 82; s. c. 15 C. L. J. 675 (1912).

(26) 6 C. W. N. 889, 896 (P. C.) (1902).

(23) 8 C. W. N. 473 (1904).

(26) I. L. R. 43 Cal. 217; s. c. 19 C. W. N. 1228 (1915).

(27) [1896] 1 Ch. 673.

(29) [1895] 2 Ch. 273.

(30) [1897] 2 Ch. 534.

(31) [1895] 1 Ch. 141.

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the Judge, is still capable of rectification. On principle, the answer should clearly be in the affirmative for as Neville, J., observed in *Thompson v. Hickman* (32), to grant relief by way of rectification where the error has crept into one document and refuse it where it is embodied in two, is inconsistent with equitable principles, for equity regards the substance rather than the form of a transaction. There is no substantial reason, for instance, why we should not hold that where the same mutual mistake has been repeated in each one of a chain of conveyances, under such circumstances as to entitle any one of the purchasers to a reformation as against his immediate vendor, equity may work back through all, and entitle the last purchaser to a reformation against the original grantor. Similarly, it may be held as a general rule that if there is a mutual mistake in a mortgage in the description of property and the same mistake is reproduced in the decree, equity may go back to the original transaction and reform both the mortgage and the decree so as to make them conform to the intention of the parties concerned; and this view was actually adopted in *Bala Prosad v. Kanoo* (33). We do not overlook, however, that if the decree has been executed and title has passed to a purchaser, fresh considerations may arise, and questions of some nicety which require examination from a new standpoint may present themselves for solution. It may be contended, for instance, in such a case where the purchaser did not intend to buy land other than that described erroneously in the mortgage, that it would not be fair to rectify the sale certificate. In such a contingency, comprehensive relief by reformation of the description running through all the papers in the judicial pro-

ceeding may well have to be refused; the proper course for the party aggrieved may be to obtain reformation of the mortgage and to institute new proceedings for the enforcement of the rectified instrument. Cases of this description may give rise to questions of great complexity and have led to a marked divergence of judicial opinion in the Courts of the United States, as is amply indicated by the notes to the decisions in *Stewart v. Wilson* (34), *Dillart v. Jones* (35) and *Fisher v. Villamil* (36). It is not necessary, however, for our present purpose to attempt an exhaustive formulation of the principles which may have to be invoked when the mutual mistake has been reproduced from the mortgage deed into the mortgage decree and thereafter into the certificate granted on the consequent public sale. The case before us is fairly simple. The parties have not yet reached beyond the state of the mortgage decree and the commencement of execution proceedings thereon. We are thus not called upon to rectify the sale certificate granted to a purchaser; and it cannot be urged that a decree granting such drastic relief as rectification of the sale certificate would invest the purchaser with title to property which was never advertised, offered for sale, or sold to him and which might have been purchased by others at a higher figure, had it been correctly described in the sale proclamation. We are consequently of opinion that the mortgage instrument should be rectified and that on the basis thereof similar rectification should be made in the pleadings in the mortgage suit, in the mortgage decree and in the proceedings for execution thereof which were suspended as a result of the order of the 3rd

(34) [1904] 141 Ala. 405; 109 Am. St. Rep. 3

(35) [1902] 11 Ann. Cas. 832; 229 Ill. 119.

(36) [1911] 62 Fla. 472; 29 Ann. Cas. 1003

18 L. R. A. (N. S.) 90.

(32) [1907] 1 Ch. 550 (552).

(33) [1911] 8 Nagpur L. R. 13.

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February 1912 and will now stand revived and after amendment will be continued in accordance with law. [Cf. *Kamardin v. Jawahir Lal* (37) and *Rameshwar Singh, Maharaja of Darbhanga v. Homeswar Singh* (38)]. As the contesting Defendant has purchased the mortgaged property during the pendency of the execution proceedings, he will be bound thereby, for in the case of a mortgage suit the *lis pendens* does not terminate till the security has been realised for the satisfaction of the judgment debt. [*Surjiram v. Barhamdeo* (39), *Purshottam v. Chedlal* (40), *Faiyaz Hossein v. Pragnarain* (41) and *Lokenath v. Achitananda* (42)]. The Appellant cannot have any legitimate grievance against the application of the doctrine of *lis pendens*, because the principle of the decision in *Lokenath v. Achitananda* (42), namely, that misdescription of the property involved in a litigation is sufficient to render the doctrine of *lis pendens* inapplicable cannot be invoked by a person who has either knowledge or notice of the true state of things (Bennett on *Lis Pendens*, pp. 154-159).

The conclusion follows that the decree made by the Subordinate Judge is substantially correct and this appeal must be dismissed with costs.

BUCKLAND, J.—I agree and have nothing to add.

S. C. M.

(37) L. R. 32 I. A. 102; s. c. I. L. R. 27 All. 334; 9 C. W. N. 601 (1905).

(38) L. R. 48 I. A. 17; s. c. 25 C. W. N. 337 (1920).

(39) 2 C. L. J. 288 (1905).

(40) I. L. R. 29 All. 76 (1906).

(41) L. R. 34 I. A. 102; s. c. I. L. R. 29 All. 339; 11 C. W. N. 561 (1907).

(42) 15 C. L. J. 391 (1909).

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 839 OF 1920.

SANDERSON, C. J.	MAHABIR PRASAD SINGH, Petitioner,
RICHARDSON, J.	v.
1921,	JOGENDRA NATH MONDAL and anr.,
18, July.	Opposite Parties.

Civil Procedure Code (Act V of 1908), Or. XXI, r. 58—Mortgage decree, for sale—Claim to mortgaged property, if lies—Claim once allowed but disallowed upon fresh application for execution—Revision—Civil Procedure Code (Act V of 1908), sec. 115.

A claim is not entertainable under Or. XXI, r. 58 of the Civil Procedure Code to property which has been ordered to be sold under a mortgage decree; and where such a claim was once allowed, but subsequently the decree-holder having again applied for execution of the decree by sale of the property, a further claim to the property by the successful claimant was disallowed by the executing Court:

Held, on an application for revision under sec. 115 of the Civil Procedure Code, that in view of the authority of the case, *DEEFHOLTS v. PETERS* (2), the High Court could not interfere.

This was a rule granted against the order of the Subordinate Judge of Howrah, dated the 27th November 1920, disallowing a claim preferred under Or. XXI, r. 58 of the Civil Procedure Code.

The facts appear sufficiently from the judgment.

Babu Bejin Behari Ghose (with *Babu Baranashibashi Mukerjee*) for the Petitioner submitted that the previous order upholding the claim could not be ignored by the lower Court which acted without jurisdiction or at any rate illegally in the exercise of its jurisdiction in disallowing the claim.

(2) I. L. R. 14 Cpl. 831 (1887).

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Babu Rani Chandra Majumdar (with *Babu Nagendra Nath Ghose*) for the Opposite Party, submitted that the argument at most amounted to saying that the Court should have held that the previous order was *res judicata*. That is no ground for interference in revision, *Amir Hassan v. Sheo Buksh* (3). There was and can be no attachment in execution of a mortgage decree and a claim under Or. XXI, r. 58, C. P. C., is not entertainable, *Joy Prokash Singh v. Abhoy Kumar Chund* (1) and *Deefholts v. Peters* (2). The previous order was itself without jurisdiction and made without notice to the decree-holder.

Babu Bepin Behari Ghose in reply.

THE JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is a Rule granted by my learned brother and myself calling upon the Opposite Party to show cause why a certain order should not be set aside. The order in question is an order of the 27th of November 1920 made by the learned Subordinate Judge. The facts of this case which it is necessary for me to state are as follows: It is alleged in the petition that the Petitioner purchased the property in question on the 30th of November 1915 at a sale in execution of a decree for rent and obtained possession through the Court. It is then alleged that the judgment-debtor borrowed money from the decree-holder, and, it now appears that the money was borrowed before the sale of 1915 on a promissory note; and it is also stated that there was an equitable mortgage; the decree-holder obtained his decree on the 17th of January 1917 for the sale of the above-mentioned property and for the realization of the money. There

was an application for execution in March 1918 and the sale was fixed for the 18th of July 1918. Then a claim was put in by the Petitioner, a claim to the properties in question. In the order-sheet of that case appears this passage.

“18-6-18—One Mahabir Prasad Singh prefers claim of the entire properties attached. Register it. Put up on 22nd June next for orders.” I need not go through all the orders in the case but the decree-holder appears to have taken no steps, and the result was that the execution case was dismissed for default. It is not clear whether the properties had in fact been attached. I should infer from the previous orders in that execution case that the properties had not been attached, because I find on the 8th of May, there was an order directing proclamation of sale to issue. However, in my judgment, it is not material to come to any final decision upon that point in this case. The first execution case having been dismissed, a second execution case was instituted in 1920, and a sale proclamation was issued fixing the sale for the 13th of December 1920. But prior to that the Petitioner lodged a petition on the 17th of November 1920. We are informed by the learned Vakil that the petition was lodged under the provisions of Or. XXI, r. 58 of the Civil Procedure Code. When the application was heard by the learned Subordinate Judge he declined to entertain the claim and to register it; and, his judgment which is very short is as follows: “The execution is of a mortgage decree, and no attachment has been effected; and so no claim is competent: That there was a claim before, which was allowed, does not I think stand in the way; for, there might have been attachment in the other execution, treating it as a money decree: *Joy Prokash Singh v. Abhoy Kumar Chund* (1) may be

(1) 1 C. W. N. 701 (1897).

(2) 1 L. R. 14 Cal. 631 (1887).

(3) L. R. 14 A. 237 (1884).

(1) 1 C. W. N. 701 (1897).

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cited in support of this view, and so I decline to entertain this claim and decline to register it." The strongest way, it seems to me, the case could be put up for the Petitioner is that the learned Subordinate Judge had jurisdiction to adjudicate upon this matter, and he declined to exercise his jurisdiction: and, consequently we should have power to interfere under sec. 115 of the Civil Procedure Code. The circumstances of this case, I admit, do seem to lead to a curious result, looking at them from one point of view: In the first execution case the claimant lodged a claim to this property protesting against the execution of this decree, and upon such claim being considered by the Court the claimant succeeded and the first execution case was dismissed. Now the decree-holder has again applied for execution of the decree and the Court has declined to entertain the petition of the Petitioner. In my judgment, however, we are bound to discharge this Rule on the authority of the case *Deefholts v. Peters* (2). There the proceedings by way of claim were taken under sec. 278 of the Code of Civil Procedure which was then in force and which corresponded to Or. XXI, r. 58 of the present Code of Civil Procedure. There the learned Judges distinctly held that the procedure under that section was not applicable to a mortgage decree which contained a provision that the property in question should be sold. In this case there is no doubt that the decree was what is called a mortgage decree, and contained a provision that this property should be sold. Consequently it was not open to the execution Court to entertain and adjudicate upon a claim, which was presented by the Petitioner under Or. XXI, r. 58. The learned Judges in that case said as follows: "We think that proceedings by way of claim are not applicable to a case of

this kind. Proceedings by way of claim are applicable only in cases of money decrees where property of the judgment-debtor has been attached; that is, where some property of the judgment-debtor is attached for the purpose of satisfying any general money claim. In that kind of claim it is clear that there should be some speedy remedy for the purpose of ascertaining whether the property claimed is the property of the judgment-debtor at all; but in a case like this where the property has been dealt with in a solemn way by the decree of the Court, and has been declared liable to sale under the mortgage, that remedy would not be applicable." Then they proceeded to point out that the Petitioner would have other remedies. On the authority of that case, which, to my mind, covers this case, we have no option but to direct that this Rule should be discharged, with costs—hearing-fee, one gold mohur.

RICHARDSON, J. — I agree.

N. G.

Rule discharged.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 401 OF 1921.

CHATTERJEA, J.

PEARSON, J.

1921,

Heard, 18, July.

Judgment,

25, July.

KALI DAS, Petitioner,
v.

KANAI LAL DE and ors.,
Opposite Party.

Calcutta Rent Act (III, B. C., of 1920), sec. 15—Application for standardisation of rent—Locus standi of applicant—Application in revision against Rent Controller's decision if lies on the Appellate Side of the Court.

The Petitioner, a woman of the town, applied to the Rent Controller under sec. 15 of the Act for standardisation of the rent of the premises occupied by her. This application was dismissed on the ground that the Petitioner had no locus standi. It appeared, however, that the landlord Opposite

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Party did not set up the invalidity of the tenancy but invited the Court to fix the standard rent at a certain amount :

Held—That in the circumstances of the case the Rent Controller should have entered the application.

That an application in revision against the order of the Rent Controller made under sec. 15 lies on the Appellate Side of the High Court.

This was a Rule granted on the 20th June 1921 against an order of the Controller of Rents, Calcutta (Babu Bangshidhar Banerjee), dated the 9th May 1921.

The facts of the case will appear from the judgment.

Babu Bepin Chandra Mullick for the Petitioner.

The Advocate-General for the Government.

Dr. D. N. Miller and Babu Narain Chandra Kar for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a Rule calling upon the Opposite Party as well as upon the Controller of Rents, Calcutta, to show cause why the order dismissing an application under sec. 15 of the Calcutta Rent Act (for fixing the standard rent), on the ground that the Petitioner had no *locus standi* to make the application, should not be set aside.

The order of the Rent Controller was as follows :—“ From the evidence on the record it appears evident that the applicant is a woman of the town and that the sub-tenants to whom she has sublet the different rooms comprised in the premises are also women of the town. The applicant has therefore no *locus standi* to make this application and I dismiss it.”

It is unnecessary, to consider the contention that the rent of a house let out to a prostitute cannot be standardized under the Rent Act, because the contract of ten-

any is void, as in the present case the Opposite Parties, who are the landlords, did not set up the question of invalidity of the tenancy. They admitted the Petitioner to be their tenant in their written statement in the case. They stated that they had sued her in the Calcutta Small Cause Court for ejectment; and that she was allowed to reside in the house on payment of rent at the rate of Rs. 85 per month under the decree of that Court, provided she paid the rent regularly. They went further and invited the Rent Controller to fix the standard rent of the premises at Rs. 150 per month.

It is also stated in the petition before us, and not denied by the Opposite Party, that they had sued the Petitioner for rent and obtained decrees several times, and that at the time when this Rule was granted, a suit for rent against the Petitioner was pending in the Calcutta Small Cause Court, and we are informed that the suit has since been decreed, which must have been on the footing that there was relationship of landlord and tenant between the parties. The Opposite Party are not estopped from pleading that the contract of tenancy is void, but they have not set up the invalidity of the tenancy. There is no doubt upon the authorities that the rent of a house knowingly let out to a prostitute where she carries on her trade is not recoverable. That is because the object of the agreement being unlawful the contract is void. But in the supplementary written statement the Opposite Party merely said that the Petitioner is a public woman and nothing else was stated. It is true that the Petitioner admitted that she was a public woman, and her sub-tenants were the same. The latter fact has no bearing upon the present question. Her admission about herself might perhaps have been sufficient, but having regard to the fact that the Opposite Party

The complainant Mon Mohan Mandal was a member of a firm of general dealers and had known the Appellant for a long time. The Appellant came to him one day and asked him whether he would like to buy a motor car which the owner was anxious to dispose of cheaply. After some discussion Mon Mohan finally made up his mind that he would like to see the car and took Rs. 1,600 with him in case he decided to buy. The Appellant took him to a house in Lansdowne Road which was about 15 minutes' walk from Mon Mohan's house. As the car was not there the Appellant suggested that they might wait till it returned. It was then about half past four and they spent sometime in watching a cricket match close by. When it was getting dark Mon Mohan said, as the car had not come he would have a look at it next day. The Appellant asked him to wait and returned saying that the car had arrived.

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Mon Mohan returned to the house but saw no car. The Appellant said the car had gone out again but would be back shortly. Mon Mohan waited a little longer and then decided to go home. Instead, however, of going down the Lansdowne Road the Appellant suggested that they should take a short cut and go by the new road, which was a lonely road, and passed over a field. Mon Mohan consented and after they had gone a little way they met an up-country man whom the Appellant hailed as the owner of the car. The up-country man said that he was tired of dealing with the penniless people whereupon the Appellant indignantly protested that it was not so in Mon Mohan's case and Mon Mohan supported him by pulling out Rs. 1,200 in notes from his pocket. The Appellant took the notes and handed them to the up-country man. Then all of a sudden a man appeared with his face covered, struck the Appellant with his umbrella and then he, the Appellant, and the up-country man all took to their heels leaving Mon Mohan standing there dumbfounded. He ran after the Appellant but could not find him. He then went home and told his brothers what had happened. They decided that the best chance of getting the money back was to get hold of the Appellant as soon as possible and make him give it up. So they did not inform the police. The same night they found the Appellant at the house of his mistress and took him to their house. He told them that if they did not beat him he would tell them where the money was and eventually said that one Dukhi Goala had Rs. 400 and one Bishnui of Jorasanko had the rest. Early in the morning Mon Mohan and others took the accused in a car to Jorasanko to look for Bishnui but he could not be found. On the way back the Appellant said that he wanted to have some tea and would come back shortly. He

however did not return. Mon Mohan then informed the police at 11 o'clock. They searched Dukhi's house and found Rs. 370. Bishnui however had disappeared.

• *Mr. J. C. Hazra and Babus Probodha Ch. Chatterjee and Promada Kumar Ghose for the Petitioner.*

• The JUDGMENT OF THE COURT was as follows :— •

This Rule is directed against an order of the Magistrate of Alipore convicting the Petitioner Ashutosh Dutt under sec. 379, I. P. C.

The point in this Rule is whether a certain statement made by the Appellant was admissible in evidence having regard to the provisions of sec. 24 of the Evidence Act. The complainant's story is that after the theft he went home and told his brother what had happened and they decided that the best chance to get back the money was to get hold of the Appellant soon and make him give it up, so that they did not inform the Police. When they found the Appellant he told them that if they did not beat him he would tell them where the money was and eventually gave them certain information. The learned Sessions Judge held that sec. 24 was not admissible because the persons to whom the statement was made had no authority over the Appellant. But it is settled law that the words "person in authority" in sec. 24 include the prosecutor.

As regards the question whether the making of the confession was caused by any inducement the evidence on the record does not clearly show exactly what was said. But in the case of *Queen v. Thompson* (1), the Court of Crown Cases Reserved held that it was the duty of the prosecution to prove in a case of doubt that the prisoner's statement was free and voluntary

(1) L. R. [1898] 2 Q. B. 12.

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and the following dictum in the case of *R. v. Warringham* (2) was cited with approval; that the Judge will require the prosecutor to show affirmatively to his satisfaction that the statement was not made under the influence of improper inducement and in the event of any doubt subsisting on this head will reject the confession. On this authority we hold that if in the circumstances of the case it appears to the Court that there is reason to suspect that the confession was obtained by inducement so as to bring it under the provisions of sec. 24, the prosecution must show that the confession was freely made. In this case having regard to the admission of the complainant that he was willing to drop the Police proceedings if he got his money back we are bound to suspect that some such offer was made to the accused and that it was this that induced him to confess. We also find that in the cross-examination the complainant said, "we spoke to him, that is, the Appellant in flattering terms, so he said he would realize the money after dawn." Having regard to the state of the evidence we think that the admission made by the Appellant ought not to be proved as it was inadmissible under sec. 24 of the Evidence Act. The case against the Appellant depends mainly on the evidence of the complainant. Whether his evidence should be believed without strong corroboration, or whether there is other evidence sufficient to corroborate him apart from this admission, we express no opinion.

We set aside the conviction and sentence passed on the Petitioner and direct that he be retried.

S. C. M.

Retrial ordered.

(3) 2 Den. C. C. 447.

CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 516 of 1921.

NEWBOULD, J.

SUBRAWARDY, J.

1921,

15, July.

HEMANTA KUMAR SEN,

Petitioner,

v.

THE KING-EMPEROR,

Opposite Party.

Police Act, Calcutta Suburban (II, B. C., of 1866), sec. 18—Place of public resort, stall where aerated water is sold not for consumption on the premises, if.

A stall where soda water is sold not for consumption on the premises is not a place of public resort within the meaning of sec. 18.

This was a Rule granted against an order of the Sub-Deputy Magistrate of Alipur (K. C. Mukherjee, Esq.), dated the 17th February 1921, convicting the Petitioner under sec. 18, Act II of 1866, and sentencing him to pay a fine of Rs. 5, in default to suffer simple imprisonment for two days, an appeal from which order was dismissed by the Additional District Magistrate of the 24-Parganahs on 19th April 1921.

The facts of the case sufficiently appear from the judgment.

Babu Bir Bhusan Dutt for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner has been convicted under sec. 18 of the Calcutta Suburban Police Act, II (B. C.) of 1866, and sentenced to pay a fine Rs. 5. The Petitioner has a stall on the Kalighat Road wherefrom he sells soda water and other aerated water and non-intoxicating beverages. The only question that arises in this Rule is whether that place is a "place of public resort and entertainment" within the meaning of sec. 18 of Act II (B. C.) of 1866. In sec. 51 of the Act, "a place of public entertainment" is defined as "a place whether enclosed or open to which the public are

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admitted and where any kind of food, drink or drug is supplied for consumption on the premises for the profit or gain of any person owning or having an interest in or managing such place and shall include a refreshment room, eating-house, coffee-house, tea-shop, liquor-house, boarding-house, lodging-house, hotel, restaurant, tavern, wine-shop, beer-shop, spirit-shop, arrak-shop, toddy-shop, ganja-shop, bhang-shop and opium-shop." The shop kept by the Petitioner does not come within this definition because there is no place to which the public are admitted nor are the drinks supplied to the public supplied to them for consumption on the premises. We do not think that, if it is not a place of public entertainment, it can be held to be a place of public resort within the meaning of sec. 18 of the Act. The words used in that section are "or other place of public resort and entertainment" and they followed the words "keeps any coffee-house, boarding-house, eating-house, lodging-house." Applying the principle of *ejusdem generis* to these words, we hold that a stall on which soda water is sold not for consumption on the premises cannot be held to be a place of public resort within the meaning of sec. 18 of Act II (B. C.) of 1866. Taking this view it follows that the Petitioner committed no offence in selling these articles without a license for the sale thereof. We accordingly make this Rule absolute, set aside the conviction of the Petitioner and direct that the fine, if paid, be refunded.

S. C. M. *Rule made absolute.*

[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

VISCOUNT HALDANE.] MURUGA GOUNDAN,
LORD DUNEDIN. Appellant,
SIR JOHN EDGE. v.
1921, THE KING-EMPEROR,
9, March. Respondent.

Privy Council—Criminal appeal, when entertained.

The King, in Council is not a Court of Criminal Appeal and the power in the Sovereign to entertain appeals of this character is only to be exercised when there has been such a gross denial of the principles of natural justice as has been defined in numerous cases.

This was an appeal by special leave from a judgment, dated the 7th January 1920, of the High Court of Judicature at Madras, which confirmed the conviction of the Appellant for the offence of abetment of murder, under sec. 302 read with sec. 109 of the Indian Penal Code, and the sentence of death passed upon the Appellant therefor by the Court of Sessions of the Coimbatore Division, on the 14th November 1919.

The Appellant was tried by the said Sessions Judge with the aid of two Assessors, both of whom found the Appellant guilty of having abetted the murder of one Mondianan on the 27th July 1919.

The case for the prosecution was that the Appellant carried on an intrigue with the wife, Rangammal, of the murdered man, and that the Appellant hired two men of bad character belonging to a registered criminal tribe, namely, Palani Koravan and Koona Koravan, to kill the deceased Mondianan, promising to pay to each of them a sum of Rs. 50. The said Palani Koravan and Rangammal were also tried along with the Appellant, and the said Koona Koravan gave King's evidence. The Court of Sessions found the accused Palani Koravan guilty of the offence of

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murder, and sentenced him to death, and Rangammal was found guilty of abetment of murder, and was sentenced to transportation for life. The High Court confirmed the conviction and sentence of Palani Koravan, but reversed the conviction and sentence of Rangammal and acquitted her.

The criminal proceedings started in the following manner : On the 28th July 1919, the village Magistrate of Kalikulam—a village situate in the District of Coimbatore in Madras—sent the following report to the Subordinate Magistrate and to the Police Sub-Inspector of Satyamangalam :

“Hearing through rumour that the unidentifiable dead body of a murdered person was lying to the east of the road between the Reserve and Patta land, I went about 1 p.m. and saw. The throat has been cut with knife. The two eyes and the forehead have been stabbed with knife. There are five or six injuries. The two ears have been slightly cut off and there is nothing in them. The dead body cannot be identified and there are no claimants.”

On receipt of the above information the Sub-Inspector of Police went on the following morning to the place where the dead body was lying and as the body was in an advanced state of decomposition a photograph of the body was taken, and impressions from the fingers of both hands of the body were also taken. On the afternoon of the 29th July the body was examined by the Sub-Assistant Surgeon of Satyamangalam who made his report on the 30th July. It was to the effect that the lungs, heart, stomach, intestines, liver, spleen, kidneys, urinary bladder and brain substance were all decomposed, and that the body was swollen and offensive, and that the cuticle was peeled off from almost the whole body, and that the lips were ab-

sent, and the bones of the right side of the face and nose were devoid of flesh, and that the eyes were decomposed, and the skin of the head peeled off, and the lobes of both ears were cut, and all the blood vessels on both sides of the neck were cut, and the vertical column was visible. The opinion as to cause of death was “probably shock and hæmorrhage result of wound in front of neck.”

From the 28th July to the 3rd August 1919 no clue was discovered, but on the 3rd August the said Koonal Koravan was alleged to have furnished some information to the Police Sub-Inspector of Satyamangalam. It was admitted that throughout the period from the 27th July 1919 (the date of the alleged murder) up to the 3rd August 1919 the said Koonal Koravan slept at the Police Station of Satyamangalam.

On the 11th August 1919 the Superintendent of Police made a request that a pardon might be tendered to the said Koonal Koravan, and by an order dated the 14th August 1919 of the District Magistrate of Coimbatore the Sub-Magistrate of Satyamangalam was directed to tender a pardon to the said Koonal Koravan under the provisions of sec. 337 of the Code of Criminal Procedure 1898. On the 19th August following a pardon was tendered to the said Koonal Koravan and he made a statement on solemn affirmation on the same date before the said Sub-Magistrate.

The preliminary enquiry into the alleged offence was conducted by the Second-class Magistrate of Satyamangalam who committed the three accused above named, including the Appellant, for trial to the said Court of Sessions. As already stated, the said Palani Koravan (accused No. 1) was charged with murder under sec. 302 of the Indian Penal Code and Appellant (accused No. 2) and Rangammal (accused No. 3) were charged with abetment of murder, under sec. 302 read with sec. 109

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of the Indian Penal Code. All the accused persons pleaded not guilty.

The chief witness for the prosecution was the accomplice Koonā Koravan who gave evidence on solemn affirmation on the 11th November 1919. The substance of his evidence was that on the 27th July 1919 which was a Sunday, the said Palani Koravan instigated him to follow the deceased Mondianan and his wife Rangammal who were going on a journey from the village of Satyamangalam by road to Ukkaram; that when they reached within a few yards of the Perur toddy shop, Palani Koravan gave Rs. 10 to him; that each drank toddy worth 8 annas at the shop and that after drinking toddy they resumed their pursuit of Mondianan and his wife. He added that on leaving the toddy shop "I asked accused 1 why he was taking me so far. He said that accused 3 was being kept by accused 2 who had promised to pay Rs. 100 if accused 3's husband were murdered. He added that we should each have Rs. 50 to-morrow. I said nothing. We reached the grazing ground, accused 2 sat under a tree saying that accused 3's husband would run away if he saw him. He told us to go on and cut him and return."

The said approver further narrated how he and Palani Koravan murdered Mondianan, and how they were ferried over on their return journey by a boatman who asked them why they had blood on their body, and who was told in reply that they had been killing a hare that evening.

The prosecution also examined two witnesses to prove that a report of the existence of an immoral intimacy between the Appellant and Rangammal had been made to the caste fellows of Mondianan two or three months before the date of the murder.

The prosecution also examined the following—Palaniandy (witness No. 7),

Kali Mooppan (witness No. 8), Sinna Naicken (witness No. 9), Kuppa Koravan (witness No. 10), and Kali (witness No. 11). The substance of the evidence of these witnesses will appear from the following observations made by the learned Sessions Judge in his judgment :—

"P. W. 7 is Pujari in a Temple close to the toddy shop. He says that on the day of the occurrence, he saw 3rd accused and a man going along the road, 2nd accused close to the toddy shop and accused No. 1 and P. W. 1 in the toddy shop. He states that no one else was in the toddy shop, whereas the seller (P. W. 8) swears that there were 10 other persons. I am not satisfied that the evidence of either of them is true."

"P. W. 9 states that he met P. W. 1, accused Nos. 1, 3 and another man on the day of the occurrence south of the temple. Shortly afterwards he saw 3rd accused running back and 1st accused and P. W. 1 running to the west. I venture to doubt whether 1st accused would have committed the murder so soon after meeting and talking to him."

"The story told by P. W.s 10 and 11, I altogether decline to believe. 1st accused must have had plenty of opportunities in the jungle of getting rid of the blood of his victim, and I cannot believe that he would have gone back to his village in daylight with his face, body and cloth covered with blood."

On the 11th November 1919 the Assessors delivered their opinion. The first Assessor found Palani Koravan (Accused No. 1) guilty of murder and the Appellant (Accused No. 2) guilty of abetment of murder, and found the third accused not guilty. The second Assessor found all the three accused guilty of the charge laid against them. The Sessions Judge delivered judgment on the 14th November 1919, agreeing with the opinion of the

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second Assessor. He rejected as untrue all the material evidence directed to proving the commission of the offence except the evidence of the said accomplice. He concluded his judgment in the following terms :—

“ Although I am not satisfied as to the truth of the corroborative evidence, I am, like the Assessors, prepared to accept the uncorroborated story of P. W. 1. No doubt, he admits that 1st accused's brother once gave evidence against him, but that was many years ago and I see no reason to suppose that he has any motive to implicate any of the accused falsely. Stress is laid on the fact that he did not go to the second accused to claim his reward but I attach no significance to the omission. Probably he discussed the matter with his father and came to the conclusion that it was safer to confess.”

“ In the result, I convict the accused of the offences with which they have been charged. Accused Nos. 1 and 2 I sentence to death, subject to the confirmation of the High Court, to which they should appeal in seven days. Third accused was doubtless acting under the influence of second accused. For that reason and on account of her sex I sentence her to transportation for life.”

Against the said conviction appeals were filed in the High Court of Judicature at Madras, which delivered judgment on the 7th January 1920. The learned Judges of the High Court acquitted Rangammal and dismissed the appeal of the Appellant and the other accused. They observed as follows :—

“ We cannot fail to attach considerable weight to the impression made by the demeanour of the witness on the minds of the Judge and Assessors and in spite of the approver's futile attempt to deny his prior knowledge of what was to happen and represent himself as acting under coercion,

we are not prepared to take a different view of his evidence as a whole. We are, however, glad to fortify our conclusion by the corroborative evidence above referred to which seems to us to have been rejected by the Sessions Judge on altogether inadequate grounds. These are entirely unconnected with the demeanour of the witnesses and consist of supposed improbabilities and inconsistencies, which impress us very little.”

The Appellant appealed to His Majesty in Council by special leave.

Mt. DeGruyther, K. C. (with *Messrs. Bhugwandin Dubé* and *R. M. Palat*) for the Appellant.—There is no evidence as to the identity of the second accused (the Appellant). He is condemned on the sole evidence of the approver and the approver is a member of a criminal tribe.

[*SIR JOHN EDGE*.—I was on the Board when this appeal was admitted and I can tell you that if I were trying this case in India, I would not have convicted the accused.]

[*LORD HALDANE*.—We are going on the footing whether we have jurisdiction or not.]

Sir Earle Richards, K. C. and *Kenworthy Brown* for the Respondent were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—Their Lordships have made it plain during the argument what the ground is on which they are compelled to advise His Majesty to reject this appeal. The rule which has prevailed in recent years is that the King in Council is not a Court of criminal appeal and that the power in the Sovereign to entertain appeals of this character is only to be exercised when there has been such a gross denial of the principles of natural justice as has been defined in numerous cases. Looking at

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the evidence in this case it is obvious that the appeal cannot be brought within those limits. Therefore, on the simple ground that it would be outside the jurisdiction of the Crown to entertain it, this appeal must be dismissed, and their Lordships will humbly advise His Majesty accordingly.

Solicitors : Messrs. T. L. Wilson & Co. for the Appellant.

Solicitor : Solicitor for the India Office for the Respondent.

R. M. P.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 98 of 1920.

PRAM RAM MOOKERJEE,
Defendant, Appellant,

MOOKERJEE, J.

BUCKLAND, J.

1921,

22, April.

MOHARAJ KUMAR

(Maharaja in Vakalat-

namah) JAGADISH NATH

Roy, Plaintiff,

Respondent.

Suit for accounts against a rent collector—Limitation Act (IX of 1908), Arts. 89, 115 and 116, applicability of—Omission to render accounts, when amounts to a refusal.

A rent-collector, employed under a registered agreement, was called upon to render accounts up to 12th April on or before the 13th May 1914. No accounts were rendered as demanded, and on 11th October 1915 the said rent-collector was dismissed and ordered to render accounts up to date. Subsequently a suit for accounts was instituted on the 27th August 1918:

Held—That Arts. 115 and 116 of the Limitation Act did not apply to the case. In order to make them applicable it must be shown that the suit was not specifically provided for in the schedule. Art. 89 applied to the case, as the term "moveable property" includes money, and con-

sequently excludes the operation of Arts. 115 and 116.

That there having been a demand for accounts, non-compliance with the demand amounted to a refusal and the suit in so far as it claimed accounts up to 12th April 1914 must be deemed barred by limitation as it was instituted after the lapse of three years from the date of refusal, i.e., 13th May 1914.

MADHUSUDAN v. RAKHAL (1), NABIN v. CHANDRA (4) and BHABATARINI v. SHEIK BAHADUR (8) and other cases referred to.

That the agency having been terminated by the dismissal on the 11th October 1915, and the suit having been brought within three years from that date, the Plaintiff was entitled to accounts from the Defendant other than the accounts demanded in April 1914. The suit was thus in time for the accounts from 13th April 1914 to 11th October 1915.

AGAPPA v. CHIDAMBARAM (10) and MUTHIA v. ALAGAPPA (11) and other cases referred to.

This was an appeal against the decree of Babu Surendra Krishna Ghose, Subordinate Judge of Zillah Dinajpur, dated the 30th of April 1920.

The material facts will appear from the judgment.

Babus Bepin Behari Ghose and Rupendra Kumar Mitra for the Appellant.

Babus Dwarka Nath Chakraborty and Tarakeswar Pal Choudhuri for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This is an appeal by

(1) I. L. R. 43 Cal. 248 : s. c. 19 C. W. N. 1070; 22 C. L. J. 552 (1915).

(4) I. L. R. 44 Cal. 1 : s. c. 21 C. W. N. 97 (P. O.) (1916).

(8) 30 C. L. J. 90 (1919).

(10) 31 Mad. L. J. 688 (1916).

(11) I. L. R. 41 Mad. 1 (1917).

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the Defendant in a suit for accounts. The case for the Plaintiff was that the Defendant was employed as his rent-collector from the 12th December 1907 to the 11th October 1915, although no written agreement was executed and registered till the 5th October 1909. He prayed that a preliminary decree might be passed directing the Defendant to submit a correct account during his term of office and that a final decree might be passed for the amount found due from the Defendant on examination of the accounts. The substantial defence was two-fold, namely, first, that the claim was barred by limitation and, secondly, that in so far as the claim might be found to be not barred by limitation, the accounts had been duly rendered. The Subordinate Judge has decreed the suit and has directed the Defendant to render accounts for the period between the date of his appointment and the date of his dismissal. He has further directed that a commissioner be appointed to determine, on the examination of the accounts, for what amount the Defendant would be liable to the Plaintiff. On the present appeal, the Defendant, has contended that the claim is barred by limitation, and that in any event, the Subordinate Judge should have held that accounts had been duly rendered.

Art. 89 of the schedule to the Indian Limitation Act provides that a suit by a principal against his agent for moveable property received by the latter and not accounted for must be instituted within three years from the date when the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates. Art. 11 provides that a suit for compensation for the breach of any contract, express or implied, and not in writing registered and not herein specially provided for, must be instituted within

three years from the date when the contract is broken or (where there are successive breaches) from the date when the breach in respect of which the suit is instituted occurred or, where the breach is continuing from the date when it ceases. Art. 116 provides that a suit for compensation for the breach of a contract in writing registered must be instituted within six years from the date when the period of limitation begins to run in respect of a suit brought on a similar contract not registered. It was argued at one stage that inasmuch as the contract of agency in the present case was in writing registered, Art. 116 was applicable. But there is no foundation for this contention. To make Art. 116 applicable, it must be shown as provided in Art. 115, that the suit is of a nature not specifically provided for in the schedule. Art. 89, however, plainly applies to a suit of this description, as the term "moveable property" includes money [*Madhusudan v. Rakhal Chandra* (1), *Venkatachalam v. Narayanan* (2) and *Bishu v. Secretary of State* (3)] and consequently excludes the operation of both Arts. 115 and 116. This view is supported by the decision of the Judicial Committee in *Nobin Chandra Barua v. Chandra Madhub Barua* (4) which reversed the decision of this Court in *Chandra Madhub Barua v. Nobin Chandra Barua* (5). A similar view had been taken in the cases of *Shib Chandra v. Chunder Mohan* (6), *Hafizuddin v. Jadunath* (7), *Madhusudan v. Rakhal* (1) and *Venkatachalam Chetty*

(1) I. L. R. 43 Cal. 248; s. c. 19 C. W. N. 1070; 22 O. L. J. 552 (1915).

(2) I. L. R. 39 Mad. 376 (1914).

(3) 21 Mad. L. T. 71 (1916).

(4) I. L. R. 44 Cal. 1; s. c. 21 C. W. N. 97 (P. C.) (1916).

(5) I. L. R. 40 Cal. 108 (1912).

(6) I. L. R. 32 Cal. 719 (1905).

(7) I. L. R. 35 Cal. 298; s. c. 12 C. W. N. 820 (1908).

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v. A. N. Narayanan Chetty (2). This principle is applicable as appears from the decision of the Judicial Committee in *Nobin v. Chandra* (4), as also from that of this Court in *Bhabatarini v. Sheikh Bahadur* (8), even though the contract provides that the accounts are to be rendered from year to year. No doubt, where immoveable property is hypothecated to secure the performance of an obligation undertaken by an agent, a suit by the principal may in essence be regarded as a suit to enforce a charge on immoveable property within the meaning of Art. 132 of the schedule to the Indian Limitation Act and may consequently be governed by the period of 12 years provided by that article. The present case, however, is not of that description, and the question of limitation must be answered with reference to the terms of Art. 89, which contemplates two distinct starting points, namely, first, when the account is during the continuance of the agency, demanded and refused, time runs from the date of refusal, and secondly where no such demand is made, time runs from the date of termination of agency. It is plain that there may be cases where only one of these contingencies has happened. On the other hand, there may be cases where both the contingencies may have happened. It is plain from the evidence that both the contingencies have happened here; there has been a demand and refusal and there also has been a termination of the agency. The results which may be reached in such a case by the application of the two tests would not necessarily be identical. In the case before us, it is clear that on the 21st April 1914 the Plaintiff demanded accounts from the Defendant. The demand was embodied

in a letter addressed by the officer of the Plaintiff to the Defendant in the following terms: "You will clear your account by submitting to the Sadar Office the account papers relating to your works up to 1320 B. S. within 30th Baisack. In default take notice that fine will be imposed from the 1st Jhishtha." The demand in essence was for accounts to be submitted up to the 12th April 1914 on or before the 13th May 1914. The evidence makes it abundantly plain that the accounts were not rendered as demanded. Consequently there was a refusal, because as was pointed out in *Madhusudan v. Rakhal Chandra* (1) which was followed in *Bhabatarini v. Sheikh Bahadur* (8) an omission to render account where the account is demanded may operate as refusal. It need not be disputed that as pointed out in *Madhusudan v. Rakhal* (1) and *Bhabatarini v. Sheikh Bahadur* (8), where the agent in answer to the demand promises to submit the accounts later, his conduct cannot be deemed to amount to refusal. But in the case before us, there was a demand made by the Plaintiff on the Defendant to render accounts, and the Defendant did not comply with the demand; his conduct consequently amounted to refusal. The first contingency mentioned in the third column of Art. 89 consequently happened and the suit in so far as it claims accounts from the Defendant up to the 12th April 1914 must be deemed barred by limitation as it has been instituted after the lapse of three years from the date of refusal, that is, the 13th May 1914.

The second contingency mentioned in the third column has also happened, because the agency has been terminated. This is a question of fact, as explained in

(2) I. L. B. 39 Mad. 376 (1914).

(4) I. L. R. 44 Cal. 1: s. c. 21 C. W. N. 97 (P. C.) (1916).

(8) 30 C. L. J. 90 (1919).

(1) I. L. R. 43 Cal. 248: s. c. 19 C. W. N. 1070; 22 C. L. J. 552 (1915).

(8) 30 C. L. J. 90 (1919).

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Nagappa v. Chidambaram (9), *Muthiah v. Chidambaram* (10), *Venkata v. Narayanan* (2), *Muthiah v. Alagappa* (11) and *Kuppa-swami v. Verappa* (12) and is proved beyond doubt by the letter of the 11th October 1915 which was addressed by an officer of the Plaintiff to the Defendant and was in the following terms: "You are dismissed from the post of Tahsildar of Purganas Pustail and Savraha and Dakhina Ranjan Basu is transferred from the post of Tahsildar of Kushi-danga and is placed in charge of your office, and you are hereby ordered to make over the charge of the original papers, etc., in your custody to the said Basu, to submit the charge sheet signed by both of you and the cash found at your disposal to the Sadar Katchery at head quarters Kumartalah and to render your accounts up to date. Remember that you do not fail in this." The suit was instituted on the 27th August 1918, that is, within three years from the date of dismissal, consequently the Plaintiff is entitled to accounts from the Defendant other than the accounts demanded on the 21st April 1914. The suit is thus in time for the accounts from the 13th April 1914 to the 11th October 1915. In this connection we have to consider whether the Defendant can be called upon to pay to the Plaintiff money which might have been found due if accounts could have been ordered up to the 12th April 1914. In our opinion, the answer must be in the negative. No doubt as was pointed by this Court in the case of *Sures Kanta v. Nawab-ali Sikdar* (13) when a suit for accounts is decreed the accounts are not necessarily

restricted to the three years preceding the institution of the suit or three years preceding the termination of the agency. But in the present case we have already held that by reason of events which have happened the claim for accounts up to the 12th April 1914 had become barred by limitation at the date of the institution of the suit. Consequently the Defendant can be called upon to render accounts only in relation to transactions which took place after the 12th April 1914 up to the 11th October 1915 when he was dismissed from service.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge varied. The decree will direct that the Defendant do render accounts from the 13th April 1914 to the 11th October 1915. We may add that in this view it is not necessary to discuss the question whether the accounts had been rendered for the period antecedent to the 12th April 1914. But the Respondent admitted that accounts had been rendered and adjusted up to the 13th April 1909. So that in any event the claim for accounts from the 12th December 1907 to the 13th April 1909 was bound to fail. The Appellant is entitled to his costs in this Court, but the order for costs made by the Court below will stand, such costs as may be incurred after remand will abide the result.

BUCKLAND, J.—I agree.

J. N. R. *Appeal allowed in part.*

(2) I. L. R. 39 Mad. 376 (1914).

(9) 31 Mad. L. J. 687 (1916).

(10) 31 Mad. L. J. 688 (1916).

(11) I. L. R. 41 Mad. 1 (1917).

(12) 5 Mad. L. W. 875.

(13) 21 O. L. J. 462 (1915).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 16 of 1920.

MOOKERJEE, J.
BUCKLAND, J.
1921,
21, June.

JAGANNATH MARWARI
and ors., Defendants
Nos. 1 to 3, Appellants,
v.
SM. CHANDNI BIBI and
anr., Plaintiffs,
Respondents.

Adverse possession by co-owner—Evidence necessary to establish such adverse possession—Co-owner not precluded from showing his possession adverse—Special evidence necessary in such cases—Conditions to be fulfilled where no notice given—Presumption that co-owner's user not adverse—Substantial building by co-owner, if adverse user—Equity in his favour, on partition—Unregistered deed of gift of property of value exceeding Rs. 100 executed before passing of Transfer of Property Act, effect of—Indian Registration Act (XV of 1877), secs. 17, 49—Adoption, proof of—Hindu law.

An unregistered deed of gift affecting property of value exceeding Rs. 100 executed before the passing of the Transfer of Property Act could not under sec. 49 of the Registration Act affect any immovable property comprised therein or be received in evidence of any transaction affecting such property, though it would be admissible in evidence for a collateral purpose, and might also, if accompanied by delivery of possession, have been validated under the Hindu law which was then in force.

It is not necessary to produce direct evidence of the fact of adoption; where it has taken place long since and where the adopted son has been treated as such by the members of the family and in public transactions, every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist.

In order to establish adverse possession as between co-sharers there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the

others; mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive.

If possession may be either lawful or unlawful, it must, in the absence of evidence be assumed to be the former, and until something occurs of which the other co-tenants must take notice and which indicates the contrary, the possession taken and held by one co-tenant is the possession in law of all the co-tenants and not adverse to any of them.

Although the possession of one co-tenant is not deemed adverse to the other co-tenants the existence of the relation of co-tenants does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants and though the co-tenant enters in the first instance without claiming adversely his possession afterwards may become adverse.

The evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct. But the ouster of the other co-tenants in order to render the possession adverse need not be by violence or intimidating expulsion or repulsion; nor need notice of the adverse holding be actually brought home to the other co-tenants by personal or formal communication; it is sufficient if the contrary is not proved that the circumstances show that such knowledge may reasonably be presumed.

If no notice is given to the co-sharer of the denial of his right the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co-owner sought to be ousted and of laches if he fails to discover and assert his rights.

The erection of a substantial building on joint property by one co-owner cannot be regarded as conclusive evidence of ouster.

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If a joint tenant has in good faith effected valuable improvements upon the common property at his own expense, equity takes that fact into consideration upon a partition and in some suitable way makes an allowance to him therefor, in addition to his rateable share of the property.

This was an appeal against the decree of Babu Bijoy Gopal Chatterjee, Subordinate Judge of Zillah Burdwan at Asansole, dated the 17th of December 1919.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chakraverty and Jyolish Chandra Sarkar for the Appellants.

Sir Asutosh Chaudhuri and Babus Bankim Chandra Mookerjee and Ramaprosad Mukerjee for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—The subject-matter of the litigation which has resulted in this appeal consists of two parcels of land situated in the town of Raniganj. The Plaintiffs claim an one-fourth share of a lease-hold interest in the land created by the Bengal Coal Company, the admitted landlords. The contesting Defendants deny the alleged title of the Plaintiffs and claim an independent right in themselves in the entire property. The Subordinate Judge has found in favour of the Plaintiffs on the question of title: he has also held that such title was in subsistence at the date of the commencement of the suit and had not been extinguished by adverse possession on the part of the Defendants. In this view, the trial Court has made a decree for possession upon declaration of title and has further directed partition by metes and bounds. On the present appeal, the decree of the Subordinate Judge has been assailed substantially on two grounds, namely, first, that the Plaintiffs have failed to prove the

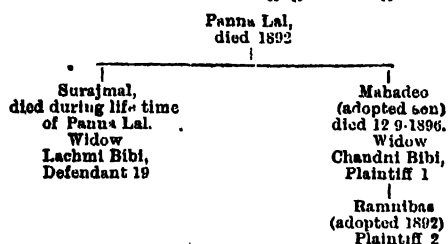
existence at any time of the specific title set up by them; and, secondly, that even if the Plaintiffs had such title at some remote period of time, it had been extinguished long before the date of the suit by adverse possession on the part of the Defendants. For the determination of the questions in controversy which are closely connected and may be conveniently discussed together a brief recital of the history of the devolution of the title to the disputed property is essential.

On the 14th August 1855, the Bengal Coal Company granted a permanent building lease in respect of two plots of land in the town of Raniganj, at an annual rent of Rs. 24, to one Ram Singh Chaudhury. There was some controversy in the Court below upon the question, whether the two plots covered by this lease are identical with the two parcels now in dispute. The schedule attached to the lease sets out the boundaries of the two plots, but, as might have been anticipated, the Subordinate Judge found it difficult to identify all the boundaries after the lapse of sixty years; there can, however, be little room for reasonable doubt as to the identity of the land. Ram Singh Chaudhury continued in possession upon payment of rent to the Bengal Coal Co., till 1864 when he transferred his lease-hold interest to Mungal Chand Baldeodas, who took a half share, Jainarain, who took an one-fourth share, and Panna Lal, who took the remaining one-fourth share. These persons continued in occupation, upon payment of rent to the superior landlords at the rate of Rs. 24 annually for at least a quarter of a century. As there is no indication whatever that they held other lands under the Bengal Coal Co., at the same rate, the Subordinate Judge has, in our opinion, correctly held notwithstanding the difficulty in the identification of boundaries that the land now in dispute is precisely the same.

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land as is covered by the lease of the 14th August 1855 granted by the Company.

We have next to consider the history of the share of Panna Lal which form the subject-matter of this litigation. The relationship of the members of his family is set out in the following genealogical table.



The evidence leaves no room for doubt that Mangal Chand Baldeodas, Jainarain and Panna Lal were jointly in enjoyment of the lease-hold property from 1865 till 1882. In the later year, Panna Lal who had lost his son Surajmul and had taken Mahadeo in adoption, retired to Benares. With a view to make provision for the maintenance of his widowed daughter-in-law, Lachmi Bibi, he executed on the 25th June 1882, a deed of gift whereby he gave her a life interest in his share of the disputed property, he further directed that his adopted son Mahadeo would become full owner upon the death of Lachmi Bibi. The document was not registered though it transferred interest in immoveable property of value exceeding Rs. 100. The transaction took place, it will be observed, shortly before the Transfer of Property Act came into force on the 1st July 1882, and was consequently not affected by the operation of sec. 123 which provides that for the purpose of making a gift of immoveable property, the transfer must be affected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. The deed of gift was, however, compulsory registrable under sec. 17 of the Indian Registration Act, 1877, and consequently could not under sec. 49

affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property. It was however admissible in evidence for a collateral purpose, namely, to explain the reason why Lachmi Bibi received the income as if she were a joint owner in possession of the property; *Lalla Gopee Chand v. Liakhat Hossain* (1), *Thakore v. Bamanji* (2), *Venkatachari v. Rangasam* (3) and *Varada v. Jeevratnammal* (4). It may also be added that if there had been evidence of delivery of possession, the intended gift might have been validated under the Hindu law which was then in force. *Kali Das v. Kanaiyahalal* (5), *Dharamadas v. Nistarini* (6), *Lakshimoni v. Nityananda* (7) and *Ramchandra v. Ranjit* (8). The true position then was that the intended gift by Panna Lal in favour of his widowed daughter-in-law Lachmi Bibi did not take effect in law. But the evidence makes it abundantly clear that the first Defendant Jagannath (the son of Mangal Chand), who managed the property on behalf of the joint owners, regularly, paid to Lachmi Bibi the surplus income in the one-fourth share of Panna Lal. This continued unquestionably during the life-time of Panna Lal who died as we have seen, in 1892. It is, we think, also indisputable that, as the Subordinate Judge finds, Lachmi Bibi continued to receive the income also during the life-time of Mahadeo who might, before his death on the 12th September 1896, have repudiated the unregistered deed of gift

(1) 25 W. R. 211 (1876).

(2) I. L. R. 27 Bom. 515 (1903).

(3) 6 Mad. L. T. 192.

(4) L. R. 46 I. A. 285; s. c. I. L. R. 43 Mad. 244; 24 C. W. N. 346 (1919).

(5) L. R. 11 I. A. 218; s. c. I. L. R. 11 Cal. 121 (1884).

(6) I. L. R. 14 Cal. 446 (1887).

(7) I. L. R. 20 Cal. 464 (1892).

(8) I. L. R. 27 Cal. 242, 249 (1899).

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but there is no indication that he took such a step, on the other hand, he apparently acquiesced in the arrangement which his father had made for the maintenance of his sister-in-law. In this connection, we may add that the Subordinate Judge had before him ample materials to justify the conclusion that Mahadeo had been duly adopted by Panna Lal and that Ramnibas had in his turn been validly adopted by Mahadeo. As has been repeatedly ruled, it is not necessary to produce direct evidence of the fact of adoption; where it has taken place long since and where the adopted son has been treated as such by the members of the family and in the public transactions, every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist: *Rajendra Nath v. Jogendra Nath* (9), *Lal Achhal Ram v. Kazim Hosain* (10), *Rup Narain v. Gopal Dhur* (11), *Sabo Bewa v. Nubodhun* (12), *Hurdwal v. Raj Kristo* (13) and *Vyas v. Vyas* (14). The Subordinate Judge has further found that Lachmi Bibi continued to receive from Jagannath one-fourth share of the surplus income for several years after the death of Mahadeo, down to 1901. He has, however, held that there is no satisfactory proof that thereafter Lachmi Bibi received the income, but under what circumstances, payment came to be discontinued has not been explained by Jagannath, who is the first Defendant in this suit. We next find that dispute broke out between Lachmi Bibi and Ghandni Bibi, that is, the

widows of Surajmul and Mahadeo, and the daughters-in-law of Panna Lal. Matters in difference were referred to arbitration on the 14th July 1909, and the arbitrators made their award on the 12th June 1912. The substance of the award was that Chandni Bibi and Ramnibas would pay to Lachmi Bibi for her life Rs. 12 per month and Lachmi Bibi would, for a consideration of Rs. 1,000, release whatever right or claim she might have to the Ranigunj property under the deed of gift of the 25th June 1882. This award was confirmed and embodied in a formal memorandum, which was executed by all parties concerned on the 31st March 1913, and was registered on the following day. The present suit was then instituted on the 13th October 1917 by Chandni Bibi and Ramnibas against the representatives of Mangalchand, Baldeodas and Jainarain, the three co-sharers of Panna Lal. Upon the question of title, there can, in our opinion, be no vestige of doubt that the claim is well-founded. The only question which requires consideration is, whether the title of the Plaintiffs as joint owners with the contesting Defendants had been extinguished by adverse possession on their part for the statutory period before commencement of the suit. The Subordinate Judge has pronounced in favour of the Plaintiffs, and after careful examination of the evidence, we have arrived at the conclusion that his view is correct.

It is plain that Panna Lal was originally a joint-owner of the disputed property along with his three co-sharers, the predecessors of the Defendants. Even before his retirement to Benares, he did not usually reside at Ranigunj. From 1865 to 1882 the property was looked after by Baldeodas, one of the co-sharers, from whom Panna Lal regularly received his proportionate share of the surplus income, after payment of rent to the superior landlord,

(9) 14 M. L. A. 67 (1867).

(10) L. R. 32 I. A. 113, 121; s. c. I. L. R. 27 All. 271; 9 C. W. N. 477 (1905).

(11) L. R. 36 I. A. 103; s. c. I. L. R. 36 Cal. 780 (1908).

(12) 11 W. R. 380; 2 B. L. R. App. 51 (1869).

(13) 24 W. R. 107 (1875).

(14) I. L. R. 24 Bom. 473 (1899).

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the cost of repairs and other incidental charges. The evidence establishes clearly that there was great intimacy between Panna Lal, Baldeodas, Mangul Chand, and his son Jagannath, the first Defendant, and that the wives of Panna Lal and Mangul Chand treated each other as if they were sisters. The management by Baldeodas during this period was plainly on behalf and for the benefit of all the joint-owners, and Panna Lal must be deemed to have been in possession. At the end of the period just mentioned, Panna Lal retired to Benares. At that time, his family consisted of his wife, his widowed daughter-in-law Lachmi Bibi, and his adopted son Mahadeo. He was naturally anxious to make suitable provision for Lachmi Bibi, and on the 25th June 1882, he executed in her favour the deed of gift under which she was to take a life interest in his share of the Ranigunj property and Mahadeo was to take a vested remainder. The deed was neither registered nor accompanied by delivery of possession with the consequence that it did not take effect in law. But it has been proved beyond doubt that the parties acted on the assumption that a valid gift had been made. Panna Lal, at the time of his retirement to Benares, requested the first Defendant Jagannath, the son of his intimate friend Mangul Chand, to look after the property to realise rent from the tenants, to make necessary repairs, to pay rent to the superior landlord and then to give Lachmi Bibi her proportionate share of the profits. Jagannath appears to have faithfully carried out the trust reposed on him and to have regularly paid to Lachmi Bibi her dues down to 1901. Here it may be stated that down to 1890, the property had stood in the books of the landlord in the names of the four persons who had got themselves substituted on their purchase from the original tenant Ram Singh Chaudhury. But in 1891, Jagan-

nath managed to have the names of Panna Lal and Joynarain removed from the books of the landlord. It seems probable that this was done in pursuance of a design to appropriate the entire property on a convenient opportunity. But even if he did entertain such a dishonest purpose at the time, he did not venture to carry it into immediate execution and continued to pay the surplus profits to Lachmi Bibi down to 1901. The Subordinate Judge has held that the evidence of payment during the period subsequent to 1901 is not reliable. It is a matter for comment that the account books produced by Jagannath for this period could not be scrutinised in the trial Court, as they were written in the peculiar script used by marwari merchants. We are thus left with the finding of the Subordinate Judge that receipt of surplus income by Lachmi Bibi has not been proved for the period subsequent to 1901. On these facts, the contesting Defendants have argued that the title of the Plaintiffs has been extinguished by adverse possession for the statutory period. We are of opinion that this contention is not well-founded. The evidence clearly establishes that Jagannath was not only a joint-owner, but that he undertook to look after the share of Panna Lal at his express request. The burden lies upon him to establish when he became faithless to the trust imposed upon him and asserted a hostile title in himself to the knowledge of the rightful owner. He has not ventured upon an explanation of his conduct; on the other hand, he has repudiated the title set up by the Plaintiffs as altogether unfounded and has falsely denied that he had ever paid a proportionate share of the usufruct to Lachmi Bibi as claiming title through Panna Lal. The two circumstances relied upon by the Defendants in proof of assertion of hostile title to the knowledge of the rightful owner are by no means conclusive. The fact that

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a substantial building has been erected on one of the plots by the Defendants, is clearly not conclusive proof of ouster. As was pointed out in *Dwijendra Narain v. Purnendunarayan* (15) the erection of a substantial building on joint property by one co-owner cannot be regarded as conclusive evidence of ouster, and this accords with the view indicated in *Ananda v. Parbati* (16) and *Upendra v. Umesh* (17). The fact that the surplus profits, if any, have not been received by Lachmi Bibi since 1901 is equally inconclusive, in view of principles settled beyond controversy by recent decisions of the Judicial Committee [*Corea v. Appuhami* (18), *Muttu v. Brito* (19), *Hurdit v. Gurmuk* (20) and *Varada v. Jeevarathnammal* (4)]. Reference may also be made in this connection to the observations of Lord Denman in *Culley v. Taylerson* (21), which were quoted with approval in the judgment of the Judicial Committee in the case last mentioned.

"Generally speaking one tenant in common cannot maintain an ejectment against another tenant in common, because the possession of one tenant in common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant and tenant in common, has not been in the participation of the rents and profits for a considerable length of time and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an

ouster; as to which see the cases of *Doc Dem Fisher v. Prosser* (22), *Doc Dem Hollings v. Birds* (23) and *Doc Dem White v. Cuff* (24)."

Among the cases in this Court, reference may be made to the decisions in *Jogendra Nath Rai v. Baladco Das* (25), *Ayenenussa Bibi v. Shaikh Isuf* (26), *Loke Nath Singh v. Dhakeswar Prosad Narain Singh* (27), *Narcendra Bhusan Roy v. Jogendra Nath Roy* (28) and *Balaram v. Shyama Charan* (29).

The fundamental rule is that in order to establish adverse possession as between co-sharers, there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the others; mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive. Apart from this, we have the important circumstance that in this case the rightful owner, the second Plaintiff Ramnibas, who, when a child a few months old was taken in adoption in 1892, was a minor till at least 1910; it is thus difficult to appreciate how the contesting Defendants began to hold adversely to the knowledge of the infant in 1901. Indeed, before this action was brought, there was no attempt on the part of the Defendants to rely on adverse possession, their pretence was that they were the rightful owners, and one of them, the first Defendant, has pledged his oath in support of that untrue allegation in the witness box in this suit; they cannot consistently urge that from 1901 the first Defendant began to

(22) [1774] 1 Cowper 211.

(23) [1809] 11 East 49.

(24) [1808] 1 Camp. 173.

(25) I. L. R. 35 Cal. 961: s. c. 12 C. W. N. 127 (1907).

(26) 16 C. W. N. 849 (1912).

(27) 20 C. W. N. 51: s. c. 21 C. L. J. 258 (1914).

(28) 20 C. W. N. 1258 (1916).

(29) 24 C. W. N. 1057: s. c. 33 C. L. J. 344 (1920).

(4) L. R. 46 I. A. 285: s. c. I. L. R. 43 Mad. 244; 24 C. W. N. 346 (1919).

(15) 11 C. L. J. 189 (1910).

(16) 4 C. L. J. 198 (1908).

(17) 12 C. L. J. 25 (1910).

(18) [1912] A. C. 280.

(19) [1918] A. C. 895.

(20) 28 C. L. J. 437 (P. C.) (1918).

(21) 11 A. & E. 1008 (1814) (1840).

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hold adversely to the knowledge of the rightful owner. [See the observations of Lord Macnaghten in *Corea v. Appuhami* (18)]. Reliance may further be placed on the judgments of Lord Buckmaster in *Hardit v. Gurmuk* (20), of Lord Dunedin in *Mutter Nayagam v. Brito* (19) and of Viscount Cave in *Varada v. Jivaratnamal* (4), which emphasise the principle that if possession may either be lawful or unlawful, in the absence of evidence, it must be assumed to be the former or in the language of Wood, V. C. in *Thomas v. Thomas* (30) possession is never considered adverse, if it can be referred to a lawful title, reference may also be made to the decision of this Court in *Loke Nath v. Dhakeswar* (27), where the cases on the subject were reviewed and the doctrine deducible therefrom formulated. Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow-tenants or otherwise deny to them some right to which they are entitled as co-tenants; and they on their part, may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co-tenant, and is in law the possession of all the co-tenants, and not adverse to any of them. It cannot be questioned, however, that one co-tenant may oust the others and set up an exclusive right of ownership in himself; and an open, notorious and hostile possession of this character for the statutory period will ripen into title as against the co-tenants

who were ousted. Thus, although as a general rule, the possession of one co-tenant is not deemed adverse to the other co-tenants, the existence of the relation of co-tenants does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants and though the co-tenant enters in the first instance without claiming adversely, his possession afterwards may become adverse. In order to render the possession of one co-tenant adverse to the others, not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants' knowledge of the denial of their rights. The same principle is involved in the familiar statement that to enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive, and hostile character as to amount to an ouster of the other co-tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants. No comprehensive formula can be framed to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenants. But it has been stated that evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct. It is indisputable that acts which might properly be held to show adverse possession as between strangers do not necessarily have such effect as between tenants in common; acts of ownership by one co-tenant may not in themselves amount to the disseizin of the other co-tenants, and

(4) L. R. 40 I. A. 285; s. c. I. L. R. 43 Mad. 244, 24 C. W. N. 346 (1919).

(18) [1912] A. C. 230, 287.

(19) [1918] A. C. 895.

(20) 28 C. L. J. 437 (P. C.) (1918).

(27) 20 C. W. N. 51; s. c. 21 C. L. J. 253 (1914).

(30) [1855] 2 K. & J. 79 (53).

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may, indeed, be so explained as to show a consistency with the joint title. But the ouster of the other co-tenants in order to render the possession adverse, need not be violent or intimidating expulsion or repulsion; nor need notice of the adverse holding be actually brought home to the other co-tenants by personal or formal communication; it is sufficient, if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. From this point of view, it has been maintained that sole possession by a co-tenant becomes adverse to his fellow-tenants by his repudiation or disavowal of the relation of co-tenancy between them; and any act or conduct signifying his intention to hold, occupy and enjoy the premises exclusively and of which the tenant out of possession has knowledge or of which he has sufficient information to put him upon enquiry, amounts to an ouster of the co-tenants; but what is essential is that the overt acts which constitute a definite and continuous assertion of an adverse right must be of an unequivocal character, clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other co-tenants. Tested in the light of these principles, the contention of the Defendants must be deemed unsubstantial. In 1882, the first Defendant undertook, at the request of his co-sharer Panna Lal when he left for Benares, to manage his share of the property and carried out his obligations for a period of twenty-years. He has never explained why, when, and how he cast off his character as co-sharer, manager and asserted a hostile title in himself to the knowledge of the rightful owner. If he renounced the trust in 1901, he is met by the difficulty that the rightful owner at the time was an infant who continued to be a minor for at least nine years thereafter. He may be pertinently asked,

when did his repudiation take place, when was his hostile intent manifested by such overt and notorious acts of an unequivocal character, to the denial and exclusion of the right of his co-sharer, as could not be misunderstood by the latter? It may be conceded that a co-sharer cannot close his eyes and ears, nor by wilful inattention obtain an advantage from his lack of diligence. For this reason, it has been held sufficient that the acts of adverse possession are such in their character and attendant circumstances that a man reasonably attentive cannot but realise that an adverse right is asserted against him. But if no notice is given to the co-sharer of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co-owner sought to be ousted and of laches if he fails to discover and assert his rights. Tested from the point of view thus indicated, the defence of adverse possession for the statutory period to the knowledge of the rightful owner cannot possibly be deemed to have been established in this case and it has been rightly negated by the Subordinate Judge.

We may add finally that much stress was laid by the Appellants on the fact that they have built a costly structure on the parcel known as the *marwaripati* property. This however, does not create any real difficulty. The Subordinate Judge has not overlooked the equitable considerations which have been held applicable in such circumstances, as was explained in the cases of *Upendra v. Umesh* (17) and *Narain Lal v. Chulhan Lal* (31), where the rule recognised in *Leigh v. Dickeson* (32)

(17) 12 C. L. J. 25 (1910).

(31) 15 C. L. J. 376 (1911).

(32) 15 Q. B. D. 60 (1884).

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and *Brickwood v. Young* (33) was applied. In such cases, if a joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity takes that fact into consideration upon a partition and in some suitable way makes an allowance to him therefor, in addition to his rateable share of his property. The Subordinate Judge has given directions in this behalf which will adequately protect the Defendants when the partition is actually effected.

The result is that the decree made by the Subordinate Judge must be affirmed and this appeal dismissed with costs. The cross-objection has not been pressed and is dismissed. Hearing fee Rs. 200.

BUCKLAND, J.—I agree and have nothing to add.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 798 OF 1919.

CHATTERJEA, J. GYANENDRA NATH
NEWBOULD, J. CHAKRAYORTI, Defend-
1921, ant, Appellant,
Heard, 24, 25 and v.
26, May. PARESH NATH PAL and
Judgment, anr., Plaintiffs,
31, May. Respondents.

Civil Procedure Code (Act V of 1908), Or. VI, r. 17—Amendment of plaint, when permissible—Limitation Act (IX of 1908), Arts. 39 and 120.

Courts will allow amendment of pleadings subject to three general conditions, viz., (1) when there is *bonâ fides* on the part of the applicant, (2) where the amendment does not cause such prejudice to the other party as cannot be compensated by costs, (3) where it does not convert a suit of one character to a suit of another character.

Where the Plaintiffs originally sued for damages and injunction against the De-
(33) [1905] 2 Com. L. R. 387.

endant and then by an amendment prayed for declaration of title and then further by another amendment prayed for recovery of possession if in the opinion of the Court he was out of possession, and it was found that the dispossession of the Plaintiffs was more than six years before the institution of the suit:

Held—That the limitation applicable to the claim for damages being three years and that for declaration of title six years the second amendment ought not to have been allowed as its effect was to enlarge the period of limitation to 12 years from the date of the dispossession and to take away from the Defendant his right to defeat the suit as originally framed on the ground of limitation.

That the amendment altered the nature of the suit, and upon the evidence it appeared that there was no *bonâ fides* on the part of the Plaintiffs.

This was an appeal against the decree of Babu Aparajit Prosad Mukherjee, Subordinate Judge, 3rd Court of Zillah 24-Parganahs, dated the 4th of February 1919, affirming the decree of Babu Narendra Nath Lahari, Munsif 1st Court at Alipore, dated the 8th of February 1918.

On the 29th November 1913 the Plaintiff filed a suit against the Defendant for damages and for permanent injunction. The allegations made in the plaint were that the Defendant having no right or possession in the lands in suit had wrongfully excavated two wells. The plaint contained no prayer for declaration of title. The Defendants filed a written statement on the 12th January 1914 questioning the maintainability of the suit and averred that he was in possession. On the 11th July 1914 the Plaintiff made an application for amendment of the plaint by adding a prayer for declaration of title. That application was refused

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and the suit was dismissed on the 22nd January 1915 on the ground that it was not maintainable. On appeal this judgment was set aside and the first Court was directed to proceed with trial after amending the plaint in accordance with the Plaintiff's application of the 4th July 1914. After the plaint was so amended another application was filed by the Plaintiff for further amendment. The application prayed for the insertion of the following prayer "if in the opinion of the Court the Plaintiffs are declared to have been dispossessed from the disputed property then the Court may be pleased to pass a decree in favour of the Plaintiff for recovery of possession of the said property." This application was allowed after amendment, an additional issue was framed and parties gave evidence. The Court found that the title was in the Plaintiff and that he was dispossessed by the Defendants within "six, seven or eight years" prior to the institution of the suit and not more. In that view the suit was decreed. The Defendant appealed to the High Court.

Babu Amarendra Nath Bose (for *Babu Probodh Chandra Chatterjee*) for the Appellant.—The second amendment was not authorised by law. It had the effect of changing the nature of the case. After the first amendment the suit was not maintainable as a Plaintiff out of possession cannot get declaration of title and damages without seeking to recover possession, *Jahar Lal Banduri v. Nanda Lal Chaudhuri* (4). The Plaintiff came with the allegation that he was in possession. The second amendment proceeded on the allegation that he was out of possession. The different amendments also affected the periods of limitation. The suit as framed was governed by the three years' limitation, after the first amendment it was governed by six years' limitation

after the second amendment Plaintiff had 12 years to institute the suit. This is the prejudice from which Defendant suffered. Referred to *Doyle v. Kaufman* (5), *Weldon v. Neal* (6), *Steward v. North Metropolitan Tramways Co.* (7), *Rebati Raman Basak v. Harish Chandra Basak* (3) and *Buzloor Ruheem v. Shamsounnissa* (8).

Babu Rupendra Kumar Mitter (with *Hemendra Nath Chatterji*) for the Respondents.—Principles on which amendment is allowed are two in number (i) to avoid multiplicity of suits, [see *Saral Chand v. Mohun Bibi* (9)] and (ii) to have the real controversy between the parties tried at one. Referred to *Tildesley v. Harper* (10), *Cropper v. Smith* (11) and *Hunooman v. Minraj* (12).

Here there was no prejudice owing to the amendments. At the time of each of the amendments the suit was not barred. The Defendants cannot reopen the first amendment as no appeal was preferred from the remand order. The second amendment was no doubt not based on the remand order, but the first Court could allow amendment if it thought proper and if not against the settled practice.

With regard to the contention that the second amendment ought not to have been allowed as it changed the character of the suit, my submission is that this rule is not of general application. To be precise the rule is that no amendment will be allowed which changes the nature of the suit, if the application is made at a late

(3) 24 O. W. N. 749 (1919).

(5) 3 Q. B. D. 7 (1877).

(6) 19 Q. B. D. 394 (1887).

(7) 16 Q. B. D. 178 (1885).

(8) 11 M. I. A. 551 (603) (1867).

(9) I. L. R. 25 Cal. 371 at p. 390; s. c. 2 O. W. N. 201 (1898).

(10) 10 Ch. D. 393 at p. 396 (1878).

(11) 26 Ch. Div. 700 at p. 710 (1884).

(12) 6 M. I. A. 390, 411 (1856).

(4) 18 O. W. N. 545 (1913).

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stage. One of the objects of pleadings is to prevent the other party from being taken by surprise. See Bullen and Leake, p. 1. Hence when such amendment was applied for before hearing, it ought to be allowed.

Bullen and Leake, pp. 920, 921 and 923, where the distinction is drawn between the cases where amendment is sought to be made before hearing and at the hearing. See Or. XXXVIII, r. 1 of the Supreme Court Rules and notes thereunder. Here after amendment the parties were allowed to and did adduce evidence.

Again the rule that no amendment will be allowed which alters the nature of the case has no application where an alternative case is set up. See *Saral Chand v. Mohun Bibi* (9), wherein the action was originally brought on a contract, but the Court allowed an amendment which had the effect of making an alternative case for the Plaintiff based on tort.

There is also an additional reason here why the order allowing amendment should be upheld. If it is reversed now the Plaintiff would be prejudiced as he would be met by the plea of limitation if a fresh suit be brought. See *Zahoor Ali v. Rutta Koer* (13).

Babu Amarendra Nath Bose in reply.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit instituted on the 29th November 1913, which was originally framed as one for damages and permanent injunction. It was alleged that the Plaintiffs had title to and possession of the land in suit, and that the Defendants had trespassed upon the land. The Defendants on the 12th January 1914 filed a written statement in which they pleaded that the

Plaintiffs having no right to or possession of the land, the suit for damages in the form laid could not proceed according to law. On the 11th July 1914 the Plaintiffs by a petition prayed for amendment of the plaint with a prayer for declaration of their title and, it was alleged that the Plaintiffs had been holding *khas* possession of the land, and had acquired title by adverse possession.

The case came on for hearing on the 22nd January 1915, and the Court of first instance found that the Plaintiffs were out of possession of the disputed land before the institution of the suit, and that the suit for injunction and damages could not, under the circumstances be maintained although it came to the conclusion that Plaintiffs' title was proved, and Defendants had failed to prove adverse possession for 12 years.

Against that decree the Plaintiffs appealed and the lower Appellate Court was of opinion that the order of the Court of first instance disallowing the prayer for amendment of the plaint by addition of a prayer for declaration of the Plaintiff's title to the land was not a proper one, as none of the parties could have been prejudiced by the grant of the prayer at that stage, and as the question of title was material for the proper decision of the suit. That Court accordingly remanded the case to the lower Court for an amendment of the plaint in terms of the Plaintiffs' petition and for a retrial of the suit after such amendment. After the case went back on remand, the plaint was amended with a prayer for declaration of Plaintiffs' title. Then on the 16th January 1917, the Plaintiffs put in another petition for further amendment of the plaint with a prayer for *recovery of possession*, and the prayer which they wanted to add by way of amendment was as follows :—“Or if in the opinion of the Court the Plaintiffs are

(9) I. L. R. 25 Cal. 371 at p. 390, s. c. 2 C. W. N. 201 (1898).

(13) 11 M. L.A. 468, 485 (1897).

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declared to have been dispossessed, then the Court may be pleased to pass a decree in favour of the Plaintiffs for recovery of possession of the said property." This was objected to on behalf of the Defendants on the ground that the amendment was illegal, and altered the character of the suit. This objection was however disallowed, and the case was tried out with the result that the Plaintiffs' suit was decreed by the Court of first instance, and that decree was confirmed on appeal by the lower Appellate Court. The Defendants have appealed to this Court.

The main question for consideration is whether the amendment of the plaint in so far as the prayer for recovery of possession was concerned, ought to have been allowed. There is no doubt that the Code gives ample power to the Court for amendment. Or. VI, r. 17 lays down that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such a manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The general conditions on which amendments should be granted have been summarised by Mr. Justice Woodroffe, in the case of *Upendra Narain Roy v. Rai Janaki Nath Roy* (1). The learned Judge observed:—"The Court being desirous of getting at the true facts will allow an amendment subject to three general conditions: *bona fides* on the part of the applicant, possibility of amendment without such prejudice to the other party as cannot be compensated by costs (such as prejudice to rights accrued) and subject to this, that the amendment is not such as to turn a suit of one character into a suit of another character. This statement is not made as being exhaustive, but as embodying what are per-

haps the three chief conditions on which amendment may be allowed." See also *Kali Das v. Draupadi* (2) and *Rebati Raman v. Harish Chandra* (3).

Now what are the facts of the present case? As stated above, the Plaintiffs in their plaint asserted that they were in possession, and on that footing claimed damages and injunction; the Defendants denied the Plaintiffs' title, and pointed out that the suit could not be maintained as framed, as they were out of possession. Then the Plaintiffs applied for an amendment of the plaint. The only amendment which they wanted was that there should be a prayer for *declaration of their title*. That was disallowed by the Court of first instance. The Appellate Court by a remand order directed an amendment *in terms of the petition* and that order was carried out.

It was not until the 16th January 1917 that the Plaintiffs put in a petition for further amendment, namely, for recovery of possession. It is to be observed that the Plaintiffs adduced evidence to show that they were actually in possession of the property and more than three years after the institution of the suit, and in spite of the fact that the Defendants pleaded that the Plaintiffs were out of possession, they persisted in proceeding with the suit without any prayer for recovery of possession. In these circumstances, it is difficult to hold that there was *bona fides* on the part of the Plaintiffs as the omission to claim a prayer for recovery of possession appears to have been deliberate.

In the next place there is no doubt that the Defendants have been prejudiced by the second amendment. It is found that the dispossession of the Plaintiffs took place more than six years before the institution of the suit. The suit as originally

(1) 22 C. W. N. 104 (1917).

(2) 24 C. W. N. 749 (1919).

(3) 22 C. W. N. 611 at p. 617 (1917).

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framed was one for damages and injunction and the prayer for declaration of title was added by the first amendment. No injunction was granted as it was thought unnecessary. The limitation applicable to the claim for damages is three years under Art. 39 of the Limitation Act, and the claim for declaration of title added by the first amendment is governed by Art. 120. The Court gave a decree for declaration of the Plaintiff's title, and mesne profits as damages. If the plaint had not been amended, for the second time, by adding a prayer for recovery of possession, the Defendants could have, upon the findings, succeeded in defeating the Plaintiffs' suit as originally framed or even as it stood after the first amendment, on the ground that it was barred by limitation. By the second amendment of the plaint, they were deprived of such a right. It is true that the Defendants not having appealed against the order of remand directing amendment, were debarred by the provisions of sec. 105, sub-sec. 2 of the Code from disputing the correctness of the order. But the remand order directed an amendment only so far as the prayer for declaration of title was concerned, and conceding that the Court of first instance had power to order further amendment under the order for retrial, the Defendants are not precluded by the provisions of sec. 105 from showing that they had been prejudiced by the further amendment made in the course of the retrial. They might not have objection to the order of remand directing amendment so far as declaration of title was concerned, nor to a retrial, and might not have therefore appealed against the said order. But they could not have anticipated that the Court would allow further amendment by adding a prayer for recovery of possession which was contrary to the case made in the plaint and we do not think that they are precluded by sec.

105 from raising the question of prejudice caused by the further amendment. The question whether an amendment should be allowed is a matter within the discretion of the Court, but the order for amendment appears to have been made without considering whether the Defendants would be prejudiced thereby. There is no doubt that they have been prejudiced.

It is to be observed that in the present case it was not a *bona fide* mistake on the part of the Plaintiffs; they were perfectly aware that they were out of possession, especially so, as it appears from the judgment of the Court of first instance that in a criminal case brought by the Plaintiffs against the Defendants some time before the institution of this suit which resulted in the dismissal of the case, the Criminal Court referred the Plaintiffs to the Civil Court. Instead of bringing a suit for recovery of possession they alleged that they were in possession and claimed damages and injunction against the Defendants, and adduced evidence to show that they were in possession and when the Court found that they were not in possession, it was then, as stated above, more than three years after the institution of the suit, that they prayed for amendment claiming recovery of possession which altered the nature of the suit. Even then they stated that "if in the opinion of the Court it be declared, that they were out of possession," then an amendment might be granted. Under Or. VII r. 1, cl. (e) the Plaintiffs shall state the facts constituting the cause of action and when it arose. The Plaintiffs were, therefore, bound to state when they were dispossessed and how, in order that the Defendants might meet such a case. There was thus, in fact no proper application for amendment, nor was the cause of action (for recovery of possession) properly stated as required by law.

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It is to be observed that the Plaintiffs, having been found to be out of possession before the institution of the suit, were bound to show that they were in possession within 12 years of the suit, the burden of proof being upon them. But the Courts below have discussed the question whether the Defendants have shown that they had been in adverse possession for 12 years, and although there is a finding that the Plaintiffs were in possession within 12 years, the Courts below have really proceeded upon the ground that the Defendants' adverse possession for 12 years had not been proved, and the finding upon the question of limitation appears to be based upon the decision of the question of adverse possession by the Defendants.

In all the circumstances of the case we think that the Court ought not to have allowed the amendment. We are accordingly of opinion that the decrees of the lower Courts should be set aside and the Plaintiffs' suit dismissed. But as the question of title was found in favour of the Plaintiff, we direct that each party do bear its own costs throughout.

S. C. C. *Appeal allowed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 522 OF 1921.

CHATTERJEA, J.	
CUMING, J.	H. D. CHATTERJEE,
1921,	Petitioner,
Heard, 12 and	v.
17, August.	L. B. TRIBEDI,
Judgment;	Opposite Party.
22, August	

Rent Controller, order of, if may be revised by the High Court—Rent Controller, if may fix standard rent during currency of lease—President of Improvement Trust Tribunal, power of, to revise Rent Controller's order which did not fix standard rent—Act, III, B. C., of 1930, secs. 15 (1), 18—Government of India Act of 1915, sec. 107.

The Rent Controller's Court is a Court of Civil Jurisdiction.

The High Court has the power of revising the Rent Controller's orders under its general powers of superintendence under sec. 107 of the Government of India Act.

There is nothing to prevent the Rent Controller from fixing the standard rent during the currency of a lease.

The President of the Improvement Trust Tribunal had no jurisdiction to revise the Rent Controller's order when the latter did not fix a standard rent.

This was a Rule granted on the 1st August 1921 against an order of the Rent Controller (Mr. B. D. Banerjee), dated 11th July 1921, an application for revision of which order was rejected by the President of the Improvement Trust Tribunal (Mr. S. C. Banerjee), on the 25th July 1921.

The facts of the case will appear from the judgment.

Babu Surendra Madhab Mullick for the Petitioner.

Babus Charu Chandra Biswas and Manindra Kumar Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling upon the Opposite Party to show cause why the application (made by the Petitioner) under sec. 18 of the Rent Act for revision of the order of the Rent Controller should not be heard by the President of the Improvement Tribunal: or, in the alternative, why the order of the Rent Controller should not be set aside and such other order passed as to this Court may seem proper.

It appears that the Petitioner applied to the Rent Controller for fixing the standard rent of certain premises occupied by the Opposite Party as tenant.

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The Rent Controller discussed certain matters in his judgment and was of opinion that the rent paid by the tenant was fair, but he did not fix the standard rent and dismissed the application. The Petitioner then applied to the President of the Tribunal under sec. 18 of the Rent Act. The learned President held that the order of the Controller could not be regarded as a decision fixing the standard rent of the premises concerned, and that sec. 18 of the Act did not confer any jurisdiction upon him to revise such an order. The Petitioner thereupon obtained this Rule.

As there was no decision by the Rent Controller fixing the standard rent the learned President was right in holding that he had no jurisdiction under sec. 18 of the Rent Act to revise the order.

The next question is whether the order of the Rent Controller should be set aside by us and he should be directed to fix the standard rent.

A preliminary objection has been taken by the Opposite Party to the hearing of this Rule on the ground that the Rent Controller is not a Court of Civil Jurisdiction, and that even if he is, the High Court has no power of revising his orders.

Now, r. 24 of the Rules framed by the Local Government under sec. 23 of the Calcutta Rent Act, lays down that in all proceedings before them under the Act, the Controller and the President of the Tribunal shall have all the powers possessed by a Civil Court for the trial of suits. See also r. 4 which says that in making inquiries under the Act, the Controller or President of the Tribunal shall follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure, 1908, for the regular trial of suits, the substance only of the evidence being recorded as in appealable cases.

It is clear, therefore, that the Rent Controller is a Court of Civil Jurisdiction.

The same view has been taken in Civil Revision Case No. 322 of 1921 [*Bata Krishna Pramanik v. A. K. Roy* (1)].

Then the question is whether the High Court has the power of revising the order of the Rent Controller under sec. 107 of the Government of India Act.

There is no doubt that under sec. 15 of the Charter Act (now sec. 107 of the Government of India Act), the High Court has powers of superintendence over all Courts subject to its Appellate Jurisdiction.

The question whether the High Court has the power of revising the orders of Courts (other than Civil Courts) exercising civil jurisdiction, under its general powers of Superintendence under sec. 15 of the Charter has been considered in several cases in connection with orders of the Collector's Court under Rent Act X of 1859, and under the Land Acquisition Act. One of the earliest cases on the point is *Govind Coomar Chowdhuri v. Kristo Coomar Chowdhuri* (2), where it was held by the Full Bench that the High Court has the power of revising an order of the Deputy Collector under Act X of 1859. In the case of *Nilmoney Singh Deo v. Taranath Mukherjee* (3), it was held by the Judicial Committee that the High Court has power to interfere with the orders of the Collector under Act X of 1859. See also the case of *Chaitan Patjosi Mahapatra v. Kunja Behary Patnaik* (4). Then, again, in proceedings under the Land Acquisition Act, it has been held that the order of the Collector when acting judicially is subject to revision by the High Court. See *The Administrator-General of Bengal v. Land Acquisition Collector, 24-Pergunnahs* (5)

(1) 20 C. W. N. 30 (1921).

(2) 7 W. R. 520; B. L. R. Sup. 714 (1887).

(3) I. L. R. 9 Cal. 295 (1882).

(4) I. L. R. 38 Cal. 832; s. c. 15 C. W. N. 863 (1911).

(5) 12 C. W. N. 241 (1905).

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and *Krishna Das Roy v. Land Acquisition Collector of Putna* (6).

Under the Calcutta Rent Act in the recent Civil Revision Case No. 401 of 1921 [*Kali Das v. Kanai Lal De* (7)], the High Court, Appellate Side, revised in order of the Rent Controller and in Civil Revision Case No. 322 of 1921 [*Bata Krishna Pramanik v. A. K. Roy* (1)], it revised an order of the President of the Tribunal.

It is to be observed that under sec. 18 of the Rent Act an application against the decision of the Controller fixing the standard rent is to be made to the President of the Tribunal appointed under sec. 72 of the Calcutta Improvement Act in respect of premises in Calcutta, and such an application in respect of premises outside Calcutta is to be made to the principal Civil Court of Original Jurisdiction in the District. Such principal Civil Court is certainly within the Appellate Jurisdiction of the High Court. As stated above, the President of the Tribunal is also within the Appellate (Revisional) Jurisdiction of this Court.

We are accordingly of opinion that this Court has the power of revision under its general powers of superintendence over the Rent Controller's Court under sec. 107 of the Government of India Act.

The next question is whether in the present case the order of the Rent Controller should be revised.

Now, sec. 15, sub-sec. (1) lays down that the Controller shall, on application made to him by any landlord or tenant, grant a certificate certifying the standard rent of any premises leased or rented by such landlord or tenant, as the case may be.

The Rent Controller has in the present case gone into the question of rent, and has expressed his opinion that the existing rent is fair, and even in one place of his judgment he has stated that the present rent may be the standard rent of the premises under sec. 2 (f) (ii) but he has not fixed the standard rent. If he had fixed the standard rent, the Petitioner might have asked the President of the Tribunal to revise the order under sec. 18 of the Act.

It is contended on behalf of the Opposite Party that the Petitioner applied for fixing the standard rent and not for certifying the standard rent. But the standard rent cannot be certified unless it is first fixed.

The Rent Controller says that the application does not lie because it was made before the expiry of the lease. We do not see, however, anything to prevent an application being made before the expiry of the lease for fixing the standard rent.

We are of opinion that the Rent Controller was asked to fix the standard rent and certify it under the provisions of sec. 15 of the Act.

We do not express any opinion on any question as to the merits of the case which must be dealt with by the Rent Controller.

We accordingly set aside the order of the Rent Controller and direct him to fix the standard rent according to law. Costs two gold mohurs, to abide the result.

We trust the case will be taken up by the Rent Controller as early as possible.

N. G. Rule made absolute.

(6) 16 C. W. N. 327 (1911).

(7) 26 C. W. N. 52 (1921).

(1) 26 C. W. N. 30 (1921).

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

MR. AMER ALI.

1921,

Heard, 31, January, CHOWDBURY and ors.,

1 and 4, February.

Judgment, 9, March.

SYED HABIBUR

RAHMAN CHOWDBURY

and anr., Appellants,

v.

SYED ALTAZ ALI

CHOWDBURY and ors.,

Respondents.

Mahomedan Law—Acknowledgment as son, what is necessary to its validity—Valid acknowledgment, operates as declaration of legitimacy and not as legitimation—Presumption of fact, rebuttable by proof of impossibility of marriage or no marriage—Concurrent findings of fact.

In Mohammedan law, the acknowledgment by one person of another as his legitimate son is of no avail, in the face of a finding that there was no marriage.

In Mohammedan law, such an acknowledgment is a declaration of legitimacy and not a legitimation—a declaration which, though it cannot be withdrawn, may be contradicted.

By the Mohammedan law, a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of zina; that is, illicit connection, and cannot be legitimate. The term "wife" necessarily connotes marriage, but, as marriage may be constituted without any ceremonial, the existence of marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. One of the ways of direct proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledgor meant to accept the other not only as his son but as his legitimate son. It must not be impossible upon the face of it, i.e., it must not be made when the

ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant, or a son-claimant. Being, however, a presumption of fact, and not juris et de jure, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant-son who has in his favour a good acknowledgment of legitimacy is in this position; the marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact.

MUHAMMAD ALLAHADAD KHAN v. MUHAMMAD ISMAIL KHAN (1) and SADIK HUSAIN KHAN v. HASHIM ALI KHAN (2) followed.

Where the majority of the Judges in the Appellate Court affirmed the Trial Court's finding that the marriage was disproved, the finding was a concurrent finding which bound the Board.

To constitute such a finding, the fact or facts found must be such as are necessary for the foundation of the proposition of law to be subsequently applied to them.

This was an appeal from a judgment and decree, dated the 1st August 1913, of the

(1) I. L. R. 10 All. 289 (1888).

(2) L. R. 43 I. A. 212; s. c. 21 C. W. N. 180 (1910).

SYED HABIBUR RAHMAN CHOWDHURY v. SYED ALTAF ALI CHOWDHURY.

High Court of Judicature at Fort William in Bengal in its Civil Appellate Jurisdiction, affirming a judgment and decree, dated 14th May 1917, of Mr. Justice Greaves of the said High Court, in its Ordinary Original Civil Jurisdiction.

The main question for determination in the appeal, was as to whether the Courts below were right in refusing to grant the Plaintiffs-Appellants a declaration that the first Plaintiff-Appellant, Syed Habibur Rahman Chowdhury, was the legitimate son and sole heir of the late Nawab Syed Abdus Sobhan Chowdhury.

The facts connected with this litigation may be shortly stated. The said Nawab Sobhan was a Mohomedan zemindar governed by the Sunni School of Mohomedan law. He was known as the Nawab of Bogra and had also a place of residence in Calcutta at 21 Weston Street. He was married only once and the name of his wife was Syedani Tahurunessa Chowdhurani, a lady possessed of considerable properties. The only issue of this union was a daughter named Syedani Altafunnessa Chowdhurani, who was married to Syed Nawab Ali Chowdhury. She had two children by him, one a son, the first Respondent, and the other a daughter called Zohara.

In 1890 Nawab Sobhan's wife, Tahurunnessa, was dying, and before her death on the 8th March of that year she executed a *waqfnama* dedicating to God all her properties. Under that deed she appointed herself *Matwali* for her life-time, after her, her husband Nawab Sobhan, and then their daughter Altafunnessa and her descendants. Tahurunnessa died on the 28th March 1890, and her daughter Altafunnessa died on or about the 24th April 1897.

On the 19th February 1902, Nawab Sobhan executed four deeds whereby he gave up in favour of his daughter's son,

the first Respondent, all but a bare life interest in practically the entirety of the properties possessed by him, both those which had come to him from his father, and also those which came to him from his wife. The properties which he owned not covered by the said deeds were few and insignificant in value. In one of these deeds there was a recital that Nawab Sobhan "has had born to him an 'only child being a daughter named Syedani Altafunnessa Bibi,'" and that her son the first Respondent was the only male descendant of the said Nawab Sobhan.

On the 2nd July 1915 Nawab Sobhan died leaving the small amount of property above referred to, which was not included either in the *waqfnama* of 1890 or the settlement of 1902. This led to a dispute between the first Respondent and Respondents Nos. 2, 3 and 4, who were the sons of a predeceased brother of Nawab Sobhan and as such, therefore, also his legal heirs. The first Respondent claimed that such properties were accretions to the *waqf* properties and the said other Respondents contended that they were the properties of the deceased Nawab. Respondents, however, settled their differences, and on the 28th July 1915 obtained a consent decree in the terms of the settlement. As a result of the settlement each of the Respondents obtained possession of some portion of such properties.

On the 26th August 1915 the present suit was instituted in the High Court of Judicature at Fort William in Bengal, in the Ordinary Original Civil Jurisdiction, by the first Appellant against the first four Respondents. In his plaint the Plaintiff alleged, *inter alia*, that Nawab Sobhan had two wives, who predeceased him, the first being the said Tahurunnessa and the second "one Mozelle, a Jewess converted to the Mohomedan faith," that by his second wife Nawab Sobhan "had issue

SYED HABIBUR RAHMAN CHOWDHURY v. SYED ALTAF ALI CHOWDHURY.

one son the Plaintiff Syed Habibur Rahman Chowdhury and one daughter named Sakina Khatun *alias* Hanna, who died in the life-time of her father" the said Nawab Sobhan; that the said Syed Nawab Ali Chowdhury, after the death of his wife Nawab Sobhan's daughter Altafunnessa, married Sakina Khatun, that he, the Plaintiff, was the only heir of the late Nawab Sobhan according to the Sunni school of Mohomedan law and was solely entitled to the possession of the estate and properties left by him, and that the Defendants were wrongfully in possession of the same and denied the right and title of the Plaintiff Habib thereto. He therefore claimed a declaration that he was the sole heir of Nawab Sobhan and as such was and had since his death been entitled to the possession and enjoyment of the estates and properties left by him and the rents and profits thereof. He also claimed other consequential reliefs.

In October 1915 the Plaintiff sold one-half of his alleged right in the properties claimed to the second Respondent Mrs. Hyam who was joined as a party Plaintiff in the suit in February 1916, and the prayer for relief as claimed was amended. The Plaintiffs prayed for a declaration that the Plaintiff Habib is the sole heir of Nawab Sobhan and that Habib as such from the date of Nawab Sobhan's death, *viz.*, 2nd July 1915, up to the 11th October 1915, was entitled to the possession and enjoyment of the estates and properties left by Nawab Sobhan, and that Habib and the Plaintiff Mrs. Hyam were each entitled to a moiety of such estate.

Two written statements were filed, one by the first Respondent and the other by Respondents Nos. 2, 3 and 4. At the trial the Defendants admitted that Sakina and Habib were the children of Mozelle and Nawab Sobhan. Their defence, so far as now material, was that Nawab Sobhan

was never married to Mozelle Cohen, that she was his mistress, and that Sakina and Habib were illegitimate. The Defendants stated that the name of Mozelle Cohen's daughter was Hanna until conversion to the Mohomedan faith on the 1st August 1903, when she was named Sakina Khatun and that she was thereafter married to Syed Nawab Ali Chowdhury.

After the hearing had commenced the plaint was again amended by adding para. (7A) stating that Nawab Sobhan had acknowledged Habib as his legitimate son, and that in case Habib failed to prove the marriage between his father and mother he relied on legitimation by acknowledgement.

Issues were framed as raised by the parties at the trial and the following alone are material for this report.

(1) Was Mozelle Cohen married to Sobhan?

(2) If so, was Habib the legitimate son of Sobhan and Mozelle Cohen?

(6) Was there any acknowledgment as pleaded in paragraph 7 (A) of the plaint, and if so what is its legal effect?

Interrogatories were administered to the Plaintiff Habib and in answer to Interrogatory 4 he stated that his mother was married twice first to his father the late Nawab Sobhan that he did not know the date or place of the marriage, that he was informed that she was married again to Aga Mohiuddin Khan and that this later marriage took place in or about the year 1899 and that he did not know where it took place.

In answer to Interrogatory 7 he stated that Mozelle Cohen was converted to the Mohomedan faith at the time of her marriage with his father but that he did not know the date on which she changed her religion or the place.

In answer to Interrogatory 10 he stated that he was informed that before Nawab

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Sobhan married Mozelle Cohen he was living in the upper floor of No. 161, Lower Chitpur Road in Calcutta and that Habib's mother and her family were living in the ground floor of the same premises, that an acquaintance was there formed and ended in their marriage according to Mohomedan rites sometime in 1884 in Calcutta.

In answer to further Interrogatories the Plaintiff Habib stated that the full name of his mother was "Mozelle Benjamin Cohen" and her father's name was Benjamin Cohen.

At the trial a mass of evidence both oral and documentary was adduced by the parties on both sides. No evidence whatever was adduced by the Plaintiff to prove the alleged marriage of his mother to the said Nawab Sobhan. Abundant evidence both oral and documentary was adduced by the Respondents which established the fact found by the concurrent judgments of both the lower Courts that Habib's mother was Nawab Sobhan's mistress and not his wife.

On the 14th May 1917 Mr. Justice Greaves delivered judgment in favour of the Defendants and passed a decree dismissing the suit with costs. The learned Judge summarised as follows the evidence relating to the history of Mozelle:—

"She appears first in 1884 living on the bottom floor of a house in Lower Chitpur Road where Sobhan occupies the upper floor, she is then between 11 and 13 years of age and living with her parents and is visited by Sobhan. In 1885 (see the recital in the lease of 1st August 1886) she goes with her sister, said to be in the keeping of some man, to 13 Radha Bazar Lane and in January and February of 1887 she is in receipt of a salary or allowance from Sobhan, and sometime in that year (in September) she marries one Ger and is said to have been divorced soon after marriage, namely, in January 1888; in February 1888 she is engaged by Sobhan (see the diary), and dismissed and paid in full on the 31st

December 1890; in March 1891 she is described as a Jewess and a widow in the Bogra Savings Bank account, in June 1891 she is re-engaged by Sobhan as from January (see the diary), and in this year Sakina is born. In January 1893 she is described as the wife of Ezekiel Benjamin Cohen in the lease of 13 Radha Bazar Lane, from April to July 1893 she is still being paid salary and allowance by Sobhan, and in June of that year Habib is born. From 1891 to 1896 she is attending *nautch* parties with Sobhan where she meets the mistresses of other men, she is during the period, and before and after, visiting Sobhan at Weston Street and is taken to Bogra where she lives in a house in the Bazar. In June 1899 in the sale agreement she is described as Bibi Mozli Cohen, daughter of Benjamin Cohen, and in December of that year in the Radha Bazar lease she is described as Mozli B. Cohen, daughter of Benjamin B. Cohen, Mussalman; in March 1903 she is attended by Harinath Kabiraj who describes her as a prostitute, and in that year she dies in the Campbell Hospital, and there is some evidence that at this time she was living with one Aga Mohiuddin either as his mistress or wife. The whole of this story seems to me to irresistibly establish that she was a woman of loose morals and a mistress of Sobhan and the story seems to me quite inconsistent with the suggestion that she at any time became his wife, and to entirely negative any idea of marriage."

The learned Judge held that the following points were established in favour of the Defendants:—

(1) That Mozelle never lived in Nawab Sobhan's house, either at Calcutta or Bogra, and was never a member of his household or treated in any way to suggest that she was his wife;

(2) That Habib was never introduced to Nawab Sobhan's friends as his legitimate son and successor;

(3) That Nawab Sobhan made no provision for Habib, and in his life-time so dealt with his properties as to leave only a small portion available for his heirs whoever they might be;

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(4) That Nawab Sobhan in writing to Mozelle neither addressed her as one would expect a wife to be addressed nor treated her as one;

(5) That the diaries "Exhibits 07 and 08" contain entries which one might expect in the case of a mistress but not in that of a wife;

(6) That the entries in the directories, "Exhibits 24-30," from materials supplied on Nawab Sobhan's directions, make no mention of Mozelle as his wife or of Sakina and Habib as his children, and

(7) That property was conveyed to Mozelle under Nawab Sobhan's directions in the name of Mrs. Cohen.

The learned Judge also summarised the points in favour of the Plaintiffs as follows:—

(1) That Habib was admittedly the son of Nawab Sobhan by Mozelle;

(2) That Habib was entered at the Calcutta Madrassa as Nawab Sobhan's son;

(3) That Habib was sent to Aligarh as Nawab Sobhan's Son;

(4) That Habib was designated by Nawab Sobhan in his letters to the Collector of Chittagong as his son, and was described as belonging to a family of position and antiquity;

(5) That Habib was similarly designated and described by Nawab Sobhan at his interview with Miss Sorabji; and

(6) That Habib was brought up in Nawab Sobhan's house-hold after his mother's death.

After discussing the law bearing on the case the learned Judge recorded his findings on the issues now material in the concluding portion of his judgment as follows:—

"With regard to the first issue, I hold that upon the evidence the long connection of Sobhan and Mozelle was inconsistent with the relation of husband and wife, and that Mozelle is, upon the evidence, proved

to be merely his concubine, and that Mozelle Cohen was not married to the deceased Nawab. As to the second issue, I hold that the Plaintiff Habib was not the legitimate son of the Nawab and Mozelle Cohen. . . . With regard to the sixth issue, I find upon the evidence that there was no general acknowledgment by Sobhan of Habib as his son, but that he acknowledged him as his son for the purposes of his entry in the Calcutta Madrassa and to Aligarh, and that he acknowledged him as his son to Miss Sorabji and to the Collector of Chittagong for the purposes of inducing a marriage between Habib and the daughter of Salamat Ali Khan, but having regard to the other evidence in the case, I do not find that these acknowledgments were made by Sobhan with the intention of conferring upon Habib the status of legitimacy."

"This concludes the case, but I desire to add that I think that it is possible from Sobhan's acknowledgments of Habib as his son taken by themselves to infer an intention to confer by them the status of legitimacy, but even so, I do not think I am thereby bound, even, provided as here marriage was possible, to infer marriage; but I think I am entitled to consider the evidence of marriage and if I come to the conclusion that marriage has not in fact taken place, I think I am entitled to consider the acknowledgments in light of this evidence, and assuming I am satisfied as here that there was in fact no marriage, I do not think these acknowledgments confer the status of legitimacy, and I think I am acting in accordance with the decisions of the Judicial Committee and certainly in accordance with their last reported decision, in so deciding. The suit accordingly fails and must be dismissed with costs."

Against the said judgment and decree of Greaves, J., the Plaintiffs appealed to the said High Court in its Civil Appellate Jurisdiction. While the appeal was pending Plaintiff Habib was adjudicated an insolvent upon his own petition, and the Official Assignee, having refused to prosecute the appeal, was made a Respondent *pro forma*.

The appeal was heard by Sanderson, C.

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J. and Woodroffe and Chitty, JJ., who on the 1st August 1918 delivered separate judgments in favour of the Defendants dismissing the appeal with costs. The learned Chief Justice held that it had been proved that Mozelle was never married to the late Nawab Sobhan, that at the time the Nawab had relations with Mozelle she was no more than his kept mistress and that the Plaintiff Habib was in fact the illegitimate son of the late Nawab Sobhan. As to the alleged acknowledgments he came to the conclusion that having regard to all the facts of the case it must be held that the late Nawab Sobhan did not intend thereby to acknowledge Habib as his son, so as to confer upon him the status of legitimacy for all purposes and in all respects. He also held that having regard to the findings that Mozelle was not married to the Nawab Sobhan and that Habib was not his legitimate son, the alleged acknowledgments (assuming though not deciding that they were acknowledgments within the real meaning of the Mohomedan law) could not and did not make Habib legitimate.

Woodroffe, J., held that the Plaintiffs had not established an acknowledgment in the sense of a clear intention to confer legitimacy on Habib, that what was relied on as an acknowledgment was not intended to confer legitimacy on the Plaintiff Habib, the natural son of the late Nawab Sobhan, that the onus was on the Plaintiffs to show that Habib was legitimate, that, on the evidence, including the alleged admissions, the statements made to Miss Sorabji and the Collector, the Plaintiffs had not succeeded in showing that.

Mr. Justice Chitty held that the alleged marriage of Mozelle and the Nawab Sobhan was disproved and as a consequence Habib had been proved to be illegitimate and could not be rendered legitimate by any acknowledgment or recognition of

legitimacy on the part of his natural father Nawab Sobhan. He also held that the Plaintiffs had failed to prove any acknowledgment under Mohomedan law, that is, a recognition of the Plaintiff Habib's legitimacy by the late Nawab Sobhan.

In the result a decree, dated the 1st August 1918, dismissing the appeal with costs was passed.

Against the said judgment and decree of the Appellate Court the Plaintiffs appealed to His Majesty in Council.

Sir John Simon, K. C. (with Mr. L. DeGruyther, K. C. and Mr. S. Hyam) for the Appellants.—Here the Appellant is admitted to be the natural son. The question is, is he legitimate? My case is that where there are acknowledgments as recognised by Muhamadan law by the father, as there are here, there is "legitimation." There is no direct evidence of marriage. The acknowledgment was real. Refers to *Oomda Bibi v. Jonab Ali* (3), *Nujeeboonissa v. Zumeeran* (4) and *Musst. Zaiban v. Bibee Nujeeboonissa* (5).

Baillie's Digest of Muhammedan Law, p. 408, Ch. 2, sec. 2. *Bibee Wuhudun v. Syed Wusee Hossain* (6). *Wilson's Digest*, sec. 85.

Muhammad Allahadad Khan v. Muhammad Ismail Khan (1) and *Azmat Ali v. Lalli Begum* (7).

[*Mr. Upjohn, K. C.*—*Ashrufoddowlak Ahmad v. Hyder Hossain* (8), referred to in *Azmat Ali v. Lalli Begum* (7).]

Sadik Husain Khan v. Hashim Ali Khan (2).

(1) I. L. R. 10 All. 289 (1888).

(2) L. R. 43 I. A. 212; s. c. 21 C. W. N. 130 (1916).

(3) 5 W. R. 132 (1865).

(4) 11 W. R. 426 (1869).

(5) 12 W. R. 497; 4 B. L. R. App. 55 (1869).

(6) 15 W. R. 408, 406 (1871).

(7) L. R. 9 I. A. 8, 18; s. c. I. L. R. 8 Cal. 432, 433 (1881).

(8) 11 M. I. A. 94 (1868).

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Once there is a clear acknowledgment of legitimacy one cannot go behind that acknowledgment and enquire as to whether there was a proper marriage or not.

Mr. L. DeGruyther, following, cited *Irshad Ali v. Musammat Kariman* (9).

[Mr. A. M. Dunne, K. C., *Imambandi v. Mutsaddi* (10).]

No evidence can be permitted to shew that there was no marriage, once the son is acknowledged.

In *Sadakat Husain v. Mahomed Yusuf* (11), it was suggested that although there was acknowledgment of the child, the mother was at that time the wife of another.

Muhammad Allahadad Khan v. Muhammad Ismail Khan (1) does not upset the proposition that a man could acknowledge even a stranger provided it cannot be proved that he had another father.

[LORD BUCKMASTER.—I am anxious to know in which cases acknowledgment and marriage are not possible. You say that a Mohammedan can have relations with a woman other than his wife or his slave.]

[MR. AMEER ALI.—There are cases where the marriage might be invalid, but the children might be legitimate.]

[LORD BUCKMASTER.—In Mohammedan law is not fornication one of the cases which makes it impossible to legitimatise the child?]

The three provisions given in the text are exhaustive on this point and they do not mention this. Wilson's Mohammedan Law, sec. 85.

Mr. Upjohn, K. C. (with Messrs. A. M. Dunne, K. C. and J. M. Parikh) for the Respondents.—There are two propositions,

one of law and the other of fact: 1st under the established facts of the case supported by concurrent findings against legitimacy there cannot be a valid *bona fide* acknowledgment; 2nd if I am wrong in the above, there is no sufficient or binding acknowledgment of Plaintiff as legitimate. *Sadik Husain Khan v. Hashim Ali Khan* (2), *Oomda Bibi v. Jonab Ali* (3), *Nujeeboonnissa v. Zumceran* (4) and *Musatt. Zaibun v. Bibee Nujeeboonnissa* (5) are all against the other side. *Ashrufooddowlak Ahmad v. Hyder Hossein* (8), too is against him.

The paternity alleged of the Plaintiff is established. There was no marriage between the Nawab and Plaintiff and the Plaintiff was not legitimate. Again Mozelle was a prostitute throughout the period of her connection with the Nawab. She never lived with the Nawab. She married one man first and afterwards another. The marriage of the daughter was not arranged by the Nawab. Mozelle marries again after the birth of the Plaintiff. Nawab treats the Plaintiff in an entirely different way from Altaf, the grandson. I say that she was not even solely his mistress, she was visited by other men as well.

[SIR JOHN EDGE.—Is there any evidence that she carried on with other men after he had bought a house for her?]

She married another after this. "Incest," "fornication," etc., are not specially defined. The term in Mohammedan law is *zina* which means an unlawful union. There are only two cases in which a man can make a lawful marriage. If the woman was neither his slave nor wife, the union is not merely unlawful but punish-

(1) I. L. R. 10 All. 299, 298, 302, 309, 321, 324, 336, 335 (1888).

(9) 22 C. W. N. 580 (P. C.) (1917).

(10) L. R. 45 I. A. 73: s. c. 23 C. W. N. 50 (1918).

(11) L. R. 11 I. A. 81: s. c. I. L. R. 10 Cal. 663 (1883).

(2) L. R. 43 I. A. 212: s. c. 21 C. W. N. 130 (1916).

(3) 5 W. R. 132 (1865).

(4) 11 W. R. 426 (1869).

(5) 12 W. R. 497; 4 B. L. R. App. 55 (1869).

(8) 11 M. I. A. 94 (1866).

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able. If a child was a result of "~~zina~~" the child was incapacitated from inheriting. Ameer Ali's Mohammedan Law, 4th Edn., 1917, p. 316. *Zina* is punishable. I dispute that the child can be legitimatised.

[LORD BUCKMASTER.—It comes to this that only the child of a slave could be legitimatised.]

The doctrine of acknowledgment was made to apply where no clear proof of the marriage of the parents was forthcoming. Wilson's Mohammedan Law (1912), para. 85 at pp. 170 and 171. *

[LORD DUNEDIN.—You say there could be no legitimation in cases of *zina* but the onus is on you to disprove the marriage.]

Yes.

[LORD DUNEDIN.—I believe what Sir John Simon said was that here were two persons between whom marriage is possible, and there is an acknowledgment of legitimate paternity; it is irrelevant to enquire whether there was a marriage or not.]

[LORD BUCKMASTER.—You say cases of legitimation are confined to child, (1) of a slave woman of the father and (2) of a union where it was doubtful whether there was a marriage or not. Then you take away this security, by enquiring into whether there was a marriage or not. So that you always have this case in doubt and reduce the cases of acknowledgment to an infinitely small number of cases.]

[MR. AMEER ALI.—In *Mahalata Bibee v. Md. Alimoozoman* (12), there is a case on this. At p. 313, the argument is given. The meaning of legitimation in Mohammedan law is different from its meaning in Scotch or other law.]

Acknowledgment is not a factor and is ineffectual in cases of fornication. Ameer Ali's Muhamadan Law, 3rd Edn., p. 250.

True character of acknowledgment is

(12) 10 C. L. R. 299 at p. 313 (1861).

illustrated in *Muhamamad Allahdad Khan v. Muhammad Ismail Khan* (1), where also Birjandi is cited at pp. 308 and 309, and *Ashrufooddowlak Ahmad v. Hyder Hossein* (8). It is really a declaration of legitimacy and not a legitimation. *Ashrufooddowlak Ahmad v. Hyder Hossein* (8) has already been read by Sir John Simon, but a little further on we get what is wanted.

Sadik Husain Khan v. Hashim Ali Khan (2) purports to be the statement of a rule. There a marriage was alleged and some evidence given and marriage was held established, but the rule is stated in the last 12 lines.

Muhammad Allahdad Khan v. Muhammad Ismail Khan (1) is the first case. At p. 324, Mahmud, J., held that there cannot be an effective acknowledgment where a person is proved to have been illegitimate. See also Straight, J., at p. 300 and at middle of p. 303.

Mr. DeGruyther, K. C. in reply.

[LORD SHAW.—There are concurrent findings of fact by both the Courts against you.]

The issue was not whether there was a marriage or not, but whether it was proved that there was no marriage, the burden being on the other side to disprove the marriage. In *Allahdad Khan v. Ismail Khan* (1), even cases of strangers are held to be acknowledged; see *Azmat Ali v. Lalli Begum* (7).

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—In this suit the Plaintiff and Appellant, Habibur Rahman

(1) I. L. R. 10 All. 289 at pp. 310, 312, 313 (1888).

(2) L. R. 43 I. A. 212, 234; s. c. 21 O. W. N. 130 (1916).

(7) L. R. 9 I. A. 8, 18; s. c. I. L. R. 8 Cal. 422, 432 (1881).

(8) 11 M. I. A. 94 at p. 113 (1886).

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Chowdhury, claims a declaration that he is the legitimate son of the late Nawab of Bogra, who died intestate on the 2nd July 1915. The suit is opposed by the late Nawab's grandson, who is the son of a legitimate daughter, and by two nephews, the sons of an elder brother. The Plaintiff is admittedly the natural son of the late Nawab, his mother having been a Jewess, Mozelle Cohen, who became a Mohammedan and cohabited with the Nawab. He was born in 1893. The Nawab had a daughter by the same lady in 1891. The Nawab's legitimate wife, the grandmother of the first Defendant, died in 1890. The Plaintiff based his claim on two grounds. He averred first that Mozelle was married to the Nawab. He further averred that on many occasions the Nawab had acknowledged him as his legitimate son. The Defendants aver that no marriage ever took place. They also deny that any proper acknowledgment of legitimacy was made.

The case went to trial before Greaves, J., and oral evidence was led and documentary evidence produced on both sides. Greaves, J., held that no marriage was proved, but that, on the contrary, it was proved that Mozelle Cohen was no better than a prostitute and that no marriage ever did take place. He held that the Nawab did acknowledge the Plaintiff as his legitimate son, but he held that in law, as the fact of no marriage was conclusively established, such acknowledgment would not confer the status of legitimacy. He therefore dismissed the suit.

Appeal was taken by the Plaintiff. In the Court of Appeal the Chief Justice agreed with Greaves, J., that the marriage was in fact disproved. Differing from Greaves, J., he held that there was no proper acknowledgment of legitimacy, but, upon the assumption that there was, he agreed with Greaves, J., on the law that

such an acknowledgment, in the face of the disproof of the marriage, was of no avail.

Woodroffe, J., thought that there was no acknowledgment of legitimacy and no affirmative proof of marriage, and therefore the Plaintiff failed, but he did not go the length of holding that there had been disproof of marriage.

Chitty, J., held that the marriage was disproved. That being so, he did not feel called upon to decide with certainty as to whether there was a good acknowledgment of legitimacy or not, though he indicated that the bias of his opinion was that there was not.

The Plaintiff is thus faced by two adverse concurrent findings of fact to the effect that the existence of a marriage is disproved. As, however, the junior counsel for the Plaintiff urged that this was not so, it is well to make it clear as to what constitute concurrent findings.

The first issue as settled by the trial Judge was, "Was Mozelle Cohen married to Sobhan" (the Nawab)? His finding as to this was:—

"I hold that upon the evidence the long connection of Sobhan and Mozelle was inconsistent with the relation of husband and wife, and that Mozelle is, upon the evidence, proved to be merely his concubine, and that Mozelle Cohen was not married to the deceased Nawab."

The Chief Justice said:—

"I think the learned judge was right in holding that Mozelle was never married to the late Nawab Sobhan; to put it in other words, in my judgment it has been proved that Mozelle was never married to the late Nawab."

and Chitty, J., said:—

"I do not believe that any marriage between Abdus Sobhan and Mozelle Cohen ever took place; in other words, I find the marriage disproved."

These two learned Judges form a majority of the Court of Appeal. That

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makes a concurrent finding, and it is not vitiated as such because, as here, the other Judge in the Court of Appeal does not come to the same conclusion in fact though coming to the same result in law arising from another fact. Of course, to be concurrent findings binding on this Board, the fact or facts found must be such as are necessary for the foundation of the proposition in law to be subsequently applied to them.

The senior counsel for the Appellants was unable to deny that there were concurrent findings as to the non-existence of the marriage. His argument was directed to this, that, assuming he could show a good acknowledgment of legitimacy, that conferred the status of legitimacy and made it irrelevant to enter into any enquiry as to the fact of marriage.

The case might be disposed of by holding, as the majority of the learned Judges of the Court of Appeal did, that there was no proper acknowledgment of legitimacy. There is not, however, as to this a "concurrent finding," for the learned trial Judge thought otherwise, and it would be necessary to examine the evidence before coming to the above conclusion. Their Lordships do not think it necessary to embark on this enquiry. They will, without deciding, assume that there was a proper acknowledgment, for, as is to be presently explained, they are of opinion that such acknowledgment, in face of the fact that there was no marriage, is of no avail. Their Lordships consider that this result is reached on principle, and is concluded by authority.

Before discussing the subject, it is as well at once to lay down with precision the difference between legitimacy and legitimation. Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense there

is no legitimation under the Mohammedan law. Examples of it may be found in other systems. The adoption of the Roman and the Hindoo law effected legitimacy. The same was done under the Canon Law and the Scotch Law in respect of what is known as legitimation *per subsequens matrimonium*. By the Mohammedan law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of *zina*, that is, illicit connection, and cannot be legitimate. The term "wife" necessarily connotes marriage; but, as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledgor meant to accept the other not only as his son, but as his legitimate son. It must not be impossible upon the face of it: i.e., it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not *juris et de jure*, it is, like every other presumption of

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fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgment of legitimacy is in this position: The marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact.

A large number of cases were cited to their Lordships which they think it unnecessary to discuss in detail. It is quite true that in the earlier of the series not only is stress laid on the fact that an acknowledgment of legitimacy has more than a mere evidential value, but also there are expressions used such as that by a proper acknowledgment the status of legitimacy is "acquired." Fastening on such expressions, the learned counsel for the Appellants argued that to enter into an enquiry into the fact of marriage when a good acknowledgment had been made out was not only bad law but a sin against the rules of logic. The simple answer to this is that the phraseology of such expressions as cited above must not be pressed to disturb what is the ruling principle, and that principle is that in Mohammedan law such an acknowledgment is a declaration of legitimacy and not a legitimation. A declaration, though it cannot be withdrawn, may be contradicted, for it is only a statement: legitimation is an act, which being done cannot be undone. So the rules of logic remain untouched.

The whole question was thoroughly examined in a very learned judgment by Mahmood, J., in the case of *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (1) and finally; in the case of *Sadik Husain*

Khan v. Hashim Ali Khan (2). Lord Atkinson, delivering the judgment of the Board, said as follows (p. 234):—

"If this be so, the rule of the Mahomedan law applicable to the case is well established. No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy be possible."

That statement is, in their Lordships' view, clear and conclusive, and what they have said above is no more than an elaboration of what was there said.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

R. M. P.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1203 OF 1921

AND

RULE NO. 1285 OF 1921

THE CHIEF MAN OF THE
MUNICIPAL COMMISSIONERS

SANDERSON, C.

CHOTZNER, J.

1921,

25, July.

SIGNERS OF KOTRONG and
Janr., Defendants Nos. 1
and 3, Appellants,

v.

BISSESWAR GHOSH,
Plaintiff, and ors.,
Respondents.

Election, suit to set aside—Specific Relief Act (I of 1877), sec. 42, scope of—Legal character, what is

The Plaintiff, who was unsuccessful as a candidate for election as a Muni-

(1) I. L. R. 10 All. 289 (1888).

(2) L. R. 43 I. A. 212; s. c. 21 O. W. N. 130 (1916).

CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF KOTRUNG v. BISSESWAR GHOSE.

mipal Commissioner, sued for a declaration that the election, being in contravention of the Plaintiff's right and franchise, right of election and right of being present at the polling place, was not according to law proper and valid and was ultra vires, and that the election of the Defendants was illegal, and he further prayed that they should be restrained by injunction from forming the Municipal Board:

Held—That although the words “legal character” in sec. 42 of the Specific Relief Act have been held to be wide enough to include the right of franchise and also a right of being elected as a Municipal Commissioner, it was doubtful whether, regard being had to the form of the suit and the declarations asked for, the case came within the words of the section.

That, assuming that the Court had inherent jurisdiction to entertain the suit, having regard to the circumstances of the case, there was no ground for setting aside the election.

This was an appeal against the decree of Babu Lal Behari Chatterjee, Subordinate Judge, 2nd Court of Zillah Hooghly, dated the 17th of May 1921, reversing the decree of Mr. S. P. Basu, Munsif, 2nd Court at Serampore, dated the 22nd of March 1920.

The facts of the case will appear from the judgment.

In S. A. No. 1263 of 1921.

Babus Narendra Kumar Bose, Charu Chandra Biswas and Mahindra Kumar Bose for the Appellants and Petitioners.

Babu Hiralal Sanyal for the Plaintiff-Respondent.

Babus Promotha Nath Mitter and Bireswar Bagchi for the Defendants Nos. 2 and 4, Respondents and Opposite Parties.

In Rule No. 1285 of 1921.

Babus Brojolal Chuckerbutty and Girin-

dra Nath Mukerjee for the Intervenor Abinas Ch. Pal.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal by one Jatindra Nath Kumar against a judgment which was given by the learned Subordinate Judge of Hooghly, by which he allowed the appeal which had been preferred to him, and set aside the judgment of the Court of first instance and decreed the Plaintiff's suit and declared that the election in question was invalid.

Jatindra Nath Kumar is Defendant No. 3; he was also made a party as Defendant No. 1 in his capacity of the then Chairman of the Municipal Commissioners of Kotrung and the other Defendants are Commissioners of that Municipality.

The Defendants Nos. 2 to 4 and the Plaintiff were candidates for election. These three Defendants were elected and the Plaintiff was not elected: the second Defendant obtained 232 votes, the third Defendant 200 votes; and the fourth Defendant 177 votes and the Plaintiff obtained 133 votes. The total number of voters on the register was 298 and the total number of voters who registered their votes was 244. The election was held so long ago as the 5th of October 1918.

The suit was filed on the 4th of January 1919. In that suit the Plaintiff asked for a declaration that the election being in contravention of the Plaintiff's right and franchise, right of election and right of being present at the polling place was not at all according to law proper and valid and fit to be confirmed, that the same was *ultra vires* and that the said election was not fit to be in force and that proper order might be passed setting aside the said election. The second prayer was that it might be declared that the election of Defendants Nos. 2, 3 and 4 was illegal: the

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third prayer was that an injunction should be issued restraining the Defendant No. 1 from forming the Municipal Board with the Defendants Nos. 2, 3 and 4. Then there was a prayer for incidental reliefs.

The learned Munsif, as I have already mentioned, dismissed the suit. The lower Appellate Court decreed the suit.

There were two grounds which were relied upon before the lower Appellate Court: and, the learned Subordinate Judge based his judgment upon one ground, namely, that there were 13 persons who had registered their votes, who according to his opinion were not qualified to be on the register as voters.

The learned Vakil who appeared in this Court for the Plaintiff in the first instance stated that he based his right of action upon sec. 42 of the Specific Relief Act, which runs as follows, "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the Plaintiff need not, in such suit, ask for any further relief; provided that no Court shall make any such declaration where the Plaintiff being able to seek further relief than a mere declaration of title, omits to do so." It was held in the case of *Sabhapat Singh v. Abdul Gaffur* (1) that "the words 'legal character' are wide enough to include the right of franchise and also a right of being elected as a Municipal Commissioner." The suit in that case was a suit for adjudication and declaration of the Plaintiff's right to vote and to stand as a candidate at the election of Municipal Commissioners which was held in Chapra in December 1893, and also for a declaration that he had been duly elected at that election. In the

present suit the Plaintiff is not asking for any declaration that he was elected at this Municipal election. But it was said that the words "legal character" are sufficient to include a person who, as a candidate, has a right to be present at the election and further to see that the election is properly held.

I confess I have considerable doubt, having regard to the form of this suit, and having regard to the declarations which were asked for in this suit, to which I have referred, whether this particular case would come within the words of sec. 42 of the Specific Relief Act. The late learned Chief Justice Sir Lawrence Jenkins had occasion to refer to this section in the case of *Deokali Koer v. Kedar Nath* (2), where he said at page 709 as follows: "The section does not sanction every form of declaration, but only a declaration that the Plaintiff is entitled to any legal character or to any right as to any property; it is the disregard of this that accounts for the multi-form and, at times, eccentric declarations which find a place in Indian plaints. If the Courts were astute—as I think they should be—to see that the plaints presented conformed to the terms of sec. 42, the difficulties that are to be found in this class of cases, would no longer arise." If I may say so, with respect to the learned Chief Justice, I entirely agree with him. During the course of the argument I intimated to the learned Vakeel that he might have considerable difficulty in showing that the particular claims in this suit came within sec. 42 of the Specific Relief Act. The learned Vakeel then changed his ground and urged that sec. 15 of the Bengal Municipal Act contained a proviso to this effect "provided that nothing contained in this section nor in any rules made under the authority of this Act"

(1) I. L. R. 24 Cal. 107 at p. 113 (1896).

(2) I. L. R. 39 Cal. 707: s. c. 16 C. W. N. 838 (1912).

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shall be deemed to affect the jurisdiction of the Civil Courts." He then argued that the Court which tried the suit has inherent jurisdiction to set aside a Municipal election on the ground that it has not been properly conducted or in accordance with the statute or the rules framed thereunder; and, he stated that there have been many cases in which Courts in this country have set aside elections for such reasons as I have mentioned. For the purpose of my judgment I propose to assume that the Court which tried this suit had inherent jurisdiction to deal with the suit, and, if a proper case had been made out, to grant such declaration and injunction as were prayed for in the plaint.

I, therefore, have to deal with the facts of this case: and, I propose to deal first with the ground on which the learned Subordinate Judge relied, namely, that there were 13 persons who had rendered their votes, and who, according to the judgment of the learned Subordinate Judge were not qualified to be on the register of voters. The question is whether the facts which the learned Subordinate Judge has found are sufficient to support his judgment. It should be mentioned that the list of voters was settled by the Chairman of the Municipality. The Plaintiff did not adopt the procedure which is laid down in the Rules and object to the Chairman, in respect of any names which were included in the register and as to which he had an objection. But he did apply to the Magistrate. Though there may be some doubt as to whether the Magistrate ought to have gone into the objection which the Plaintiff put forward, inasmuch as the Plaintiff did not make this objection in the first instance to the Chairman, the Magistrate did investigate the objections which the Plaintiff made and he dismissed them. The result was that the persons to whom the Plaintiff objected remained upon the

register. When the Plaintiff brought his suit he did not specify the names of the persons as to whom he was going to object in the suit: and, at the trial he seems to have made a somewhat roving attack upon certain persons with regard to whom he thought he could make a case. The learned Munsif came to the conclusion: "It is quite possible," said the learned Munsif, "that one or two unqualified men may have been registered as voters but there is no evidence to prove this:" and, yet the learned Subordinate Judge who heard the appeal came to the conclusion that there were 13 persons as to whose qualification he was not satisfied. Assuming that finding to be correct, as we must, because this is a second appeal—in my judgment having regard to the facts of this case that is not sufficient to justify the setting aside of the election: In fact, the learned Vakeel who argued this appeal on behalf of the Plaintiff did not really base his argument upon this ground, but relied mainly upon another ground to which I shall have to refer directly. It seems to me that even if we accept the finding of fact of the learned Subordinate Judge in the first appeal, it by no means follows that the Plaintiff would have been elected even if the votes of all these 13 voters had been disallowed; indeed, in my judgment, having regard to the number of votes recorded for the successful candidates and for the Plaintiff which I have already mentioned, it is apparent that even if the votes of the 13 voters who were held to be disqualified, had been disallowed the result of the election would have been the same.

Now, I come to the other point, upon which reliance has been chiefly placed in this Court, and that is, that the Plaintiff was not allowed to be present at the place where the votes were being recorded. In a sense he was present, that is to say, he was on one part of the premises, whereas

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the votes were being recorded in another part. But in order to make clear what the position really was I will read a short passage from the learned Munsif's judgment in which he gives a graphic description of what took place. "The voting took place in the Municipal Office

The votes were recorded by the Deputy Magistrate in the hall of this building. A little on the south of the entrance the identification stand was erected. The head clerk distributed the identification cards after satisfying himself as to the identity of the persons claiming identification cards. Each voter on receiving the card was examined at the entrance by the Chairman in the presence of the candidates and outsiders as to the correctness of the identity of each of the voters. Objections as to the right of the person to vote were invited at this stage with the idea that if there be any objections the presiding officer would be communicated with. There were no objections nor is there any allegation of false personation. From the entrance the passage to the hall was fenced so that the voter had no other way of getting out except through the hall where the presiding officer was seated." The learned Munsif then proceeds to refer to the fact that "the Act does not give any right to the candidate to be present at the place where the voting is recorded by any positive section." He goes on to say, "The so-called right is inferred from the fact that a candidate is required by the Act to take objections, regarding the admissibility or otherwise of a voter, to the presiding officer at the time of recording the votes. Here although the candidates were not allowed into the hall where the votes were recorded, ample opportunity was provided to the candidates to take objections if they wanted. The presiding officer sat within hearing distance and also came out in the verandah to hear com-

plaints, if any." "The Plaintiff's right to be present arises from the fact that he can take objections before the presiding officer. Here his privilege of taking objections was not interfered with. The procedure was adopted on the suggestion of the Commissioner of the Division. There were complaints before him that zemindars intimidated and used undue influence to secure elections in their own way. The Commissioner on enquiry was satisfied as to the truth of these allegations and suggested the present procedure to secure the free exercise of the right of franchise by the Municipal voters unhampered by threat or persuasion." That finding of fact has not been interfered with by the learned Judge: and I should have been prepared to hold upon that finding of fact that there was no ground for setting aside this election.

I do not intend to express any general opinion as to how these elections are to be conducted. That is not my business. I am only concerned with the facts of this particular case; I have stated the facts as found by the learned Munsif: and as I have already said, if the case rested there I should have been prepared to hold that the facts relating to this point did not disclose a sufficient ground for setting aside this election. I do not mean to say that I approve of the arrangement nor do I mean to say that I disapprove of the arrangement. I express no opinion one way or the other. But the case does not rest there, because I find that on the day of the election the Plaintiff himself wrote a letter to the presiding officer and here I may mention that the presiding officer was a Sub-Divisional Officer, Mr. Dutt, against whose integrity and uprightness not a word has been said. The Plaintiff wrote to him in these words, "In enclosing herewith a copy of my letter to the Chairman I beg to request that you will kindly consider the

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facts mentioned therein and either allow me or my agent to be present by the side of the election committee or you will kindly record the votes personally as the recording of votes in secret is quite illegal and fraud also might occur in the proceedings," upon which Mr. Dutt made a note: "I am recording votes personally, so this may be filed." The Plaintiff uses the phrase there "recording the votes in secret." It is perhaps right to add that votes were not recorded in secret; the presiding officer as I have already said was there, and there was a committee consisting of three men who had been appointed by the Chairman of the Municipality. As against these three men, as far as I know, there is not a word to be said as regards their integrity and honesty.

Having regard to the facts found by the learned Munsif and having regard to the letter which the Plaintiff himself wrote, which, in my opinion, amounts to a waiver of his alleged right to be present in the place where the votes were actually recorded provided the presiding officer himself recorded them, in my judgment there is no ground for setting aside the election.

For these reasons, in my judgment, this appeal ought to be allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored.

The Plaintiff Respondent will pay the costs of the Appellant in this Court and in the lower Appellate Court. The Defendant-Respondents will pay their own costs in this Court and in the lower Appellate Court. We assess the hearing fee in this Court at two gold mohurs.

The appeal being disposed of, no order is necessary in respect of the Rule for stay of execution or in respect of the application of the Intervenor to be made a party to the Rule. The Intervenor will pay his own costs. We make no order as to the costs in the Rule.

CHOTZNER, J.—I agree.

S. C. M.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 68 of 1920.

<p>MOOKERJEE, J. PANTON, J. 1921, 2, August.</p>	<p>SUDHANNA SANTRA and anr., Defendants, Appellants, v. BASANTA KUMAR SARKAR and anr., Plaintiffs, Respondents.</p>
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*Bengal Tenancy Act (VIII of 1885), sec. 153—
"Amount of rent annually payable by the tenant,"
meaning of—Suit for rent—Defendant denying
Plaintiff's title to a fractional share of the admitted
rent of the holding—Decision, if appealable.*

A decision in a suit for rent that the Plaintiff was entitled to the whole rent as claimed by him and not only to a two-fifths share of it as claimed by the Defendant was a decision of the question of the amount of rent annually payable by the tenant within the meaning of sec. 153 of the Bengal Tenancy Act.

PRASUNNA KUMAR v. SRINATH (2) was overruled by the Full Bench in NARAIN MAHTON v. MANOPI (4).

The expression "amount annually payable by the tenant" signifies the amount annually payable by the tenant to the landlord who has instituted the suit for the recovery of rent.

This was an appeal under sec. 15 of the Letters Patent from a decree of Mr. Justice Newbould in Second Appeal No. 2786 of 1919, which was an appeal from a decree of the District Judge of 24-Pergunnahs (Mr. Smither), dated the 9th September 1919, affirming that of the Munsif of Alipur (Babu Aswini Kumar Das Gupta), dated the 28th June 1919.

(2) I. L. R. 16 Cal. 231 (1887).

(4) I. L. R. 17 Cal. 489 (F. B.) (1890).

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The facts of the case will appear from the judgment of Newbould, J., which was as follows :—

NEWBOULD, J.—This appeal arises out of a rent suit which was heard by a Munsif who was specially empowered under sec. 153 of the Bengal Tenancy Act. The Plaintiffs claimed 16 annas rent from the Defendants on the allegation that they had inherited 6 annas and 8 gundas share in the *maliki* right from their mother and 9 annas and 12 gundas *ijara* right from their father. The contesting Defendants admitted the Plaintiffs' *maliki* right to the extent of 6 annas and 8 gundas but denied the existence of any "*ijara*" right. The Munsif found that the Plaintiffs established their *ijara* right as well as the admitted *maliki* right and gave the Plaintiffs a decree for the rent claimed. On appeal the learned District Judge held that no appeal lay, citing as an authority, the case of *Baidya Nath Bahara v. Dhon Krishna Sircar* (1). Against this decision of the lower Appellate Court this appeal has been preferred and the Appellants have also obtained a Rule in case it should be held that no second appeal lay to this Court. As regards the question whether an appeal lay to the lower Appellate Court, it is urged that the Munsif's decision decided the question of the amount annually payable by the tenant. It is contended that the point is covered by the decision of the Full Bench in the case of *Narain Mah-ton v. Manofi Pattak* (4). In that case the point actually decided by the Full Bench was in the following terms : that the words "amount of rent annually payable by a tenant" occurring in sec. 153 (a) of the Bengal Tenancy Act include the case of rent payable by a tenant to one of his co-sharer landlords who collects his share of the rent separately." It seems to

me that the decision in that case cannot be made applicable to the facts of the present case. The Plaintiffs were not, either on their pleadings or on the findings of the Court below, co-sharer landlords who were collecting their share of the rent separately. The issue on which the parties went on trial was framed in the following terms : "Was there any *ijara* of 3 9 annas 12 gundas share in favour of Ram Narain Sarkar and have the Plaintiffs inherited the same? Are the Defendants liable to pay 16 annas rent to the Plaintiffs?" That is to say, the issue between the parties was not one as to the amount of rent but as to the Plaintiff's title and as the person whose title was set up was not a party to the suit there could be no decision of a question of title as between parties having conflicting claims thereto. As, in the case relied on by the lower Appellate Court, if the Defendant was liable to pay the whole rent to the Plaintiff, there was no dispute as to the amount of rent payable. The only issue in dispute was whether the relationship of landlord and tenant existed between the parties with regard to the entire holding, and that was the only issue decided. The view I take that the Full Bench Reference above cited, is not applicable to a case of this sort, was also taken by a single Judge of this Court in the case of *Fakeer Mondul Gain v. Arshad Molla* (7). I therefore hold that the decision of the lower Appellate Court that no appeal lay was right and dismiss the appeal with costs. The Rule is discharged but without costs.

Babus Nagendra Nath Ghose and Kshitish Chandra Chakravarti for the Appellants.

Babu Monmohan Banerjee for the Respondents.

(1) 5 O. W. N. 515 (1900).
(4) I. L. R. 17 Cal. 489 (F. B. (1890)).

(7) 10 O. W. N. cclxxx (1906).

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The JUDGMENT OF THE COURT was as follows :—

This is an appeal under cl. 15 of the Letters Patent from the judgment of Mr. Justice Newbould in a suit for arrears of rent.

The suit was tried in the Court of first instance by a judicial officer specially empowered by the Local Government to exercise final jurisdiction under sec. 153 of the Bengal Tenancy Act and the amount claimed in the suit did not exceed Rs. 50. The suit was decreed with costs in favour of the Plaintiff. Thereupon the Defendant preferred an appeal to the District Judge. This was summarily dismissed under Or. XII, r. 11, C. P. C., on the ground that no appeal lay on the authority of the decision in *Baidya Nath v. Dhon Krishna* (1). A second appeal was thereupon preferred to this Court. In support of the appeal it was argued before Mr. Justice Newbould that the appeal to the District Judge was competent inasmuch as the decree of the primary Court had decided a question of the amount annually payable by the tenant. This contention was overruled and the decree of the District Judge was affirmed. Consequently, the point involved in the present appeal is, whether the appeal to the District Judge was or was not competent under sec. 153 of the Bengal Tenancy Act.* The determination of the question depends on the nature and contents of the decree made by the Court of first instance.

The suit was brought to recover arrears of rent at the rate of Rs. 8-3-4 pies a year with cesses and damages for a period of four years. The case for the Plaintiff was that in Mouzah Shapkhali he had inherited 6 as. 8 gds. share in *maliki* right from his mother Sarada Sundari Dassi and 9 as. 12 gds. share in *ijara* right from

his father Ram Narain Sarkar. On this allegation the Plaintiff sought to collect the sixteen annas rent from the tenant Defendants who were in occupation of 3 bighas 16 cottahs of land at a rental of Rs. 8-3-4 pies. The first Defendant, who alone entered appearance, admitted that the Plaintiff had *maliki* right to the extent of a 6 as. 8 gds. share inherited from his mother but denied the existence of the alleged *ijara* right during the period in suit. Consequently, the point arose for decision, whether there was an *ijara* of a 9 as. 12 gds. share in favour of Ram Narain Sarkar and whether the Plaintiff had inherited that share, in other words, was the Defendant liable to pay the sixteen annas share or only a 6 as. 8 gds. share of the rent to the Plaintiff. The trial Court came to the conclusion that not only the *maliki* right but also the *ijara* right was in existence and that the Plaintiff was consequently entitled to realise from the Defendant the entire sixteen annas rent claimed. On these facts, the question arises whether the decree of the trial Court decided a question of the amount annually payable by the tenant. If the expression "amount annually payable by the tenant" signifies the amount annually payable by the tenant in respect of the tenancy, there was no controversy between the parties and no decision on a disputed question, because they were agreed that the rent of the holding was Rs. 8-3-4 a year. On the other hand the expression "amount annually payable by the tenant" signifies the amount annually payable by the tenant to the landlord who had instituted the suit for recovery of rent as stated in an earlier part of the sub-section, there was a substantial point in controversy, namely, whether the amount payable by the Defendant to the Plaintiff was to be calculated at the rate of Rs. 8-3-4 a year or at the rate of two-fifths of that sum.

(1) 5 C. W. N. 515 (1900).

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The determination of this question at one time led to a divergence of judicial opinion in this Court, as is clear from the decisions in *Prasunno Kumar v. Srinath* (2) and *Abhoy Charan v. Shasi Bhusan* (3). In the first case, Norris and Beverley, JJ., held that when the question was whether the Plaintiff was entitled to the whole sixteen annas of the rent or only to a ten annas share of it, no appeal lay, because there was no question of the amount of rent annually payable by a tenant, these words in the section meaning the total amount of rent annually payable in respect of a holding and not the amount of rent which may be payable to any particular co-sharer in the property. In the second case, where the tenant was sued for a rental of Rs. 15, the Defendant contended that this rental had been divided and, that the Plaintiff was entitled only to a rent of Rs. 7-8 as. which was half of the total amount of rents payable by the tenant. Mitter and Macpherson, JJ., held that an appeal did lie as the decree of the lower Court had decided that the rent was Rs. 15 and not Rs. 2-8 which was in essence a decision on the question of the amount of rent annually payable by the tenant. These decisions were obviously in direct conflict with each other and led to a reference to a Full Bench in *Nara-in Mahton v. Manofi* (4). In that case the Plaintiff contended that he was entitled to an eight annas share of the rent of the disputed holding. The Defendant contended that the Plaintiff was entitled to eight pies share of the rent which was the extent of his share in the superior interest. It was ruled that an appeal lay against the decree which had decided whether the Plaintiff was entitled to eight annas share or eight pies share of the rent.

Mr. Justice Pigot who delivered the judgment of the Full Bench stated that the Full Bench agreed with the decision of Mitter and Macpherson, JJ., in the case of *Abhoy Charan v. Shasi Bhusan* (3). Although in the judgment of the Full Bench, reference is not expressly made to the decision of Norris and Beverley, JJ., in *Prasunno Kumar v. Srinath* (2), which we find was mentioned in the Order of Reference to the Full Bench, there can be no doubt that the decision in that case was overruled by the Full Bench.

In this view it is clear that in the present case, the decree of the primary Court which had decided the question, whether the Plaintiff was entitled to the whole rent as claimed by him or only to a two-fifths share as asserted by the Defendant, was a decision of the question of the amount of rent annually payable by the tenant within the meaning of sec. 153 of the Bengal Tenancy Act and consequently the appeal to the District Judge was competent. This view is in accord with the decisions in *Poresb Moni v. Nobo Kishore* (5) and *Banshiram v. Srinath* (6). The decision of Beachcroft, J., in the case last mentioned was, we are informed, ultimately approved by Chitty and Walmsley, JJ., by the dismissal of an appeal preferred under the Letters Patent. It may be difficult to reconcile the view with the decision of Geidt, J., in *Fakeer Mondul v. Arshad Molla* (7), which, it should not be overlooked, was pronounced before the decision in *Poresb Moni v. Nobo Kishore* (5). On the other hand, the case of *Baidya Nath v. Dhon Krishna* (1) and *Ram Mohan v. Badan Barai* (8) are distinguish-

(1) 5 C. W. N. 515 (1900).

(2) I. L. R. 15 Cal. 231 (1887).

(3) I. L. R. 16 Cal. 155 (1888).

(5) 8 C. W. N. 193 (1903).

(6) 23 C. W. N. 1276 (1910).

(7) 10 C. W. N. cclxxx (1906).

(8) 8 C. W. N. 436 (1902).

(2) I. L. R. 15 Cal. 231 (1887).

(3) I. L. R. 16 Cal. 155 (1888).

(4) I. L. R. 17 Cal. 469 (F. B.) (1890).

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able on the ground that in each of them the question in controversy was whether the relationship of landlord and tenant existed between the parties. In that class of cases, it has been uniformly held [*Shilabati v. Roderiques* (9)] that the question whether the relationship of landlord and tenant does or does not subsist between the parties is not a question relating to title to land or to some interest in land as between parties having conflicting claims there-to within the meaning of sec. 153 of the Bengal Tenancy Act, nor can the decision of such a question be treated as a decision of the question of the amount of rent annually payable by the tenant, because no question of the amount annually payable by a tenant can obviously arise for consideration, till it has been ascertained that the relationship of landlord and tenant existed between the parties. It is only in the event of the establishment of such a relationship that a question may arise as to the amount of rent annually payable by the tenant to the landlord.

We are of opinion that this appeal must be allowed, the judgment of Mr. Justice Newbould set aside and the case remanded to the District Judge to be heard on the merits. The Appellant is entitled to his costs both here and before Mr. Justice Newbould.

N. G.

• Appeal allowed.

(9) I. L. R. 35 Cal. 847: s. c. 12 C. W. N. 448 (1908).

CIVIL APPELLATE JURISDICTION.

APPEALS FROM APPELLATE DECRETES
Nos. 1497, 1531 AND 1532 OF 1919.

PRAFULLA NATH
TAGORE, Plaintiff,
Appellant,

CHATTERJEA, J.
PANTON, J.
1921,
17, May.

v.
THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL, Defendant,
Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 104H, sub-secs. 3 and (4), jurisdiction of Civil Court to settle fair rents payable by a proprietor in respect of tenure and raiyati holdings purchased by him—Raiyati holdings purchased before the Bengal Tenancy Amendment Act (I, E. B. & A., of 1908), if subsists as such.

A proprietor purchased a tenure and two raiyati holdings in execution of a decree for arrears of rent. In settlement proceedings, the Revenue Officer ignored the existence of these tenancies. Thereupon the proprietor brought suits for declaration of his tenancy right to the lands and for settlement of fair rents in respect thereof, but the Court held that it was beyond its jurisdiction to settle the annual rents:

Held—That sec. 104H, sub-sec. (3) allows a suit, amongst others, on the grounds (d) that land has been wrongly recorded as part of, or omitted from the lands of, an estate or tenancy, and (e) that the tenant belongs to a class different from that to which he is shown in the record-of-rights as belonging. Therefore the proprietor was entitled to maintain a suit on the grounds (d) and (e). The Court therefore had power, under sub-sec. (4) of the section, to settle the fair rent payable by the proprietor as holder of the tenure. With regard to the raiyati holdings, as they were acquired before the present Bengal Tenancy Amendment Act of 1908 came into force, the only effect of their

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purchase by the proprietor would be the extinction of the occupancy right, the holding itself subsisting as a raiyati holding.

MEAJAN v. MINNAT ALI (1) and JAWADUL HUQ v. RAM DAS (2) referred to.

That the proprietor was entitled to settlement of fair rents payable by him as holder of the raiyati jotes.

These were appeals against the decree of Babu Bhupal Chandra Ganguli, Subordinate Judge, 1st Court of Zillah Backergunj, dated the 14th of May 1919, affirming the decree of Babu Madan Mohan Saha, Munsif, 4th Court at Barisal, dated the 22nd of December 1917.

The facts of the case will appear from the judgment.

Babus D. N. Chakravartty and Broju Lal Chakravartty for the Appellant.

Babus Ram Ch. Mitter and Surendra N. Guha for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

These appeals arise out of suits for declaration of the Plaintiff's tenancy right to the lands mentioned in the plaints in these suits, and for settlement of fair rents in respect of the lands under the following circumstances.

The Plaintiff's predecessors-in-title held, under a temporary settlement from Government, a certain Dearah Mahal which was a contiguous accretion to their permanently settled estate, and during the time that it was so held, the Plaintiff's predecessor-in-title purchased three tenancies in execution of decrees for arrears of rent. One of these tenancies consisted of about 700 bighas of land, and the finding is that it was a tenure. The other two tenancies were raiyati holdings.

Now, in the proceedings under Chap. X

of the Bengal Tenancy Act, the Revenue Officer ignored the existence of these tenancies and treated the persons in possession of the land as raiyats and settled the rent on the basis of the rent payable by them to the proprietor. Thereupon these suits were instituted against the Secretary of State. The last paragraph of sec. 104H, sub-sec. (3) has no application to this case, as it is conceded that the Government let out the lands to the Plaintiffs as *ijaradars*.

The Courts below have held that the first tenancy was a tenure, and the right of the Plaintiffs as tenure-holders did not merge in their right as proprietor. They, however, were of opinion that the prayer (*gha*) in the plaint, namely, as to the settlement of the annual rent could not be granted in the present case as it was beyond the jurisdiction of the Court. We are of opinion that the Courts below are wrong on this view.

• Sec. 104H, sub-sec. (3) lays down that a suit under the section may be instituted on the grounds mentioned therein, namely, among others, (d) that land has been wrongly recorded as part of a particular estate or tenancy, or wrongly omitted from the lands of an estate or tenancy, and (e) that the tenant belongs to a class different from that to which he is shown in the record-of-rights as belonging. We think the Plaintiffs were entitled to maintain a suit on the ground (d) or (e). The rent payable by the Plaintiffs as tenure-holders was not settled, the settlement of the rent having proceeded, as already stated, on the basis of the rent payable by the raiyats to the proprietors. The Court therefore had power under sub-sec. (4) of the section to settle a fair rent. We think that having found that the tenure did not merge and was a subsisting one, the Courts below should have settled a fair rent in respect

(1) I. L. R. 24 Cal. 521 (1896)

(2) I. L. R. 24 Cal. 143 (1896).

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of that tenure. This is the subject-matter of Appeal No. 1497 of 1919.

The other two Appeals Nos. 1531 and 1532 of 1919 relate to the two raiyati holdings which had been purchased by the Plaintiffs' predecessor under sec. 22, cl. (1) of the Bengal Tenancy Act. As it stands after the amendment in 1908, the proprietor has no right to hold the land as a tenant and can hold it as proprietor. But the acquisition of these raiyati holdings took place in 1901 and 1903 respectively. Under sec. 22 as it then stood, only the occupancy right ceased to exist, and it had been held that the purchase of the raiyat's interest by the landlord did not extinguish the holding but divested it of the right of occupancy, if any, attached to it. [See *Meajan v. Minnat Ali* (1) following the decision in the case of *Jawadul Huq v. Ram Das Saha* (2), which, however, related to the case of a co-sharer landlord].

In the present case, it is stated in the plaint that the settlement authorities in the course of the previous settlement recognised the existence of the raiyati *jotes*. This statement made in the plaint has not been controverted in the two written statements of the Defendants. That being so, we do not see any reason why the Settlement Officer in the present proceedings should not recognise the existence of those holdings and settle the rent payable by the Plaintiffs as holders of those *jotes*.

We think there should be a declaration in favour of the Plaintiffs to the effect that they have the right of a tenure-holder in the *jote* which is the subject-matter of Appeal No. 1497 of 1919, and that they have a raiyati right in the *jotes* in the other two Appeals Nos. 1531 and 1532 of 1919. The cases must go back to the Court of first instance for settlement of

(1) I. L. R. 24 Cal. 521 (1896).

(2) I. L. R. 24 Cal. 148 (1896).

the rent of the tenure in the first case and of the raiyati holdings in the other two cases.

Costs to abide the result.

It is to be noted that the decision in these three cases will not affect any persons not parties to the suits.

J. N. R.

Appeals allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 475 OF 1921.

CHATTERJEA, J.	INDIAN ENGINEERING
CUMING, J.	AND MOTOR CO., LD.,
1921,	Petitioners,
Heard, 23 and	v.
24, August.	GLADSTONE WYLLIE &
Judgment,	Co. and anr., Opposite
24, August.	Party.

Calcutta Rent Act (III, B. C., of 1920), sec. 2, cl. (e)—Workshop, if "premises" See. 15—Application for standardisation of rent in respect of workshop does not lie.

A workshop does not come within the definition of "premises" in sec. 2 of the Calcutta Rent Act, and the fact that the Engineer in charge has a retiring room or that a particular room is used as an office does not make any difference.

This was a Rule obtained by the Petitioners against the order of the Controller of Rents, Calcutta (Babu Bangshidhar Banerjee), dated the 3rd June 1921.

The facts of the case will appear from the judgment.

Mr. P. N. Dutt and Babu Nripendra Chandra Das for the Petitioner.

Mr. S. C. Bose and Babus Asita Ranjan Ghose, Hira Lal Ganguli and Himadri Bh. Roy for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This Rule was directed against an order of the Rent Controller disallowing an application made by the Petitioner under

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sec. 15 of the Calcutta Rent Act for fixing the standard rent of No. 40, Middle Road, Entally, on the ground that the place was not "premises" as defined in sec. 2 (e) of the Rent Act and as such it did not come within the purview of the Act.

It appears that one Mr. Garvis obtained a lease of 40, Middle Road, Entally from the Opposite Party Nanda Lal Chunder sometime in 1915 for a period of two years with option of renewal of the same for another period of two years. Mr. Garvis took it for the purpose of "dwelling or a factory." He lived there for sometime but he used it mainly for the purpose of a factory (for preparing specic boxes for Government). He then left for Japan sometime in 1919.

The Petitioner before us—The Indian Engineering and Motor Company, Ltd., obtained a sub-lease from Mr. Garvis from the 1st November 1919.

Two applications were made to the Rent Controller—one by Gladstone Wyllie & Co., Managing Agents of Mr. Garvis for fixing the standard rent, and another by the Petitioners. The latter made an application to the Rent Controller, that their case might be heard along with the case instituted by their lessors. The first application, namely, that of Gladstone Wyllie & Co. was taken up and evidence was adduced in that case. The application was dismissed on the 31st March 1921. Messrs. Gladstone Wyllie & Co. have not taken any steps for setting aside that order.

Subsequently on the 3rd June the case in which the Petitioner was the applicant was taken up, and the Rent Controller held that no separate order was required in that case as it would be governed by the order passed in the case instituted by Gladstone Wyllie & Co.

It appears that the Rent Controller inspected the premises, and upon the evidence adduced on behalf of Messrs. Glad-

stone Wyllie & Co., came to the conclusion that the premises was nothing but a workshop, that although there was a small building which might formerly have been used as a residence, there was no doubt that it was a part of the workshop, that the building was now quite uninhabitable and that long disuse had brought on its present condition.

It is contended before us by the learned Counsel on behalf of the Petitioner first, that under sec. 2, cl. (e) of the Rent Act, the purpose for which the premises were let out should be considered, secondly, that even if the place was let out for the purposes of a workshop it comes within the definition of "premises" and that in any case, if any portion of it was used as an office or dwelling-house, it would come within the said definition, and lastly that the Petitioner had no opportunity of adducing evidence in the case instituted by him.

So far as the second contention is concerned, namely, that a workshop comes within the definition of "premises" under sec. 2 of the Act, it is to be observed that that section lays down that "premises" means any building or part of a building, or hut let separate for residential, charitable, educational or public purposes, or for the purposes of a shop or an office, including any land appertaining thereto and let therewith.

It is said that a "workshop" would come within the word "shop" and we are referred to the Oxford Dictionary in support of the contention that a shop means a "place, a house or building where goods are made or prepared for sale and sold." That is not how the expression "shop" is ordinarily understood. But apart from that, the word "shop," is defined in Wharton's Law Lexicon as being a "place where things are kept for sale." We have been referred to the case of *Epsam*

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Grand Stand Association Limited v. E. I. Clarke (1). But it seems that in that case the premises were let out for the purposes of residence, and business also. The Defendant, his family and servants had continually lived on the premises and their residence was in accordance with the terms of the lease. A portion of it was used as a public house. Bankes, J., observed: "The house was dwelt in and it was let to the Defendant for that purpose. In the fullest sense it was a dwelling-house and none the less so because it was a public house."

All that the case establishes is that when premises are let out and occupied as a dwelling-house, the fact that a part of them is also used for some business does not prevent them from being a "dwelling-house." The learned Judge also observed that he could not accept the contention that because it was let for business purposes it could not be a dwelling-house within the Act. But there the business for which a portion of the house was used, was the business of a publican which is the sale of wines, spirits and beer. That case is no authority for holding that a workshop or factory comes within the definition of a "shop" or a "dwelling-house."

With regard to the first contention, viz., the purpose for which the place was let out should be considered, it appears that in the present case the letting to Mr. Garvis was for dwelling or for a factory. The Petitioner before us, the Indian Engineering and Motor Company, however, took a sub-lease in 1919. There was no lease drawn up, and there was merely an exchange of letters which, however, have not been produced. Mr. Garvis says: "I have sub-let the premises from November 1919 and ever since November 1919 they have been using the place as their work-

shop in the same manner as they are doing now." He further states that negotiations about the lease to the Indian Engineering Company were made through one Mr. Mitter in October 1919, and that Mr. Mitter said that the place was required for their workshop. Other evidence was to the same effect and there is no doubt that at any rate since the Petitioners obtained the lease for the purpose of a workshop, they have used it as a workshop.

The fact that a room in the bungalow was used as an office does not, we think, bring the case within the word "premises." In a workshop or factory, a portion of it may be used for an office for supervising the work and keeping attendance registers, etc., and we do not think that the mere fact that the Engineer of the Company had a retiring room, or that a room was used for the purpose of an office connected with the workshop brings the case within the word "premises" as used in the Rent Act. It is clear that it was not let out to the Indian Engineering Company for the purpose of an office or for dwelling purposes.

As regards the third contention, we are not satisfied that the Petitioner has any reason for complaint. There is no suggestion that the Petitioners had any further evidence to adduce other than the evidence adduced by Messrs. Gladstone Wyllie & Co., the Managing Agents of Mr. Garvis (the lessor of the Petitioners). As a matter of fact, Mr. Garvis, Mr. Mitter, the Engineer of the Indian Engineering Company, and two of the Directors of the Company were examined in the case instituted by Messrs. Gladstone Wyllie & Co. There was no petition made to the lower Court that the Petitioners had any other evidence to adduce: and no ground has been taken before us complaining of any exclusion of evidence, nor that the Petitioner had been prejudiced

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by anything done by the Rent Controller. On the contrary, one of the grounds in the petition to the Court is that the Rent Controller had acted illegally and with irregularity in failing to consider the purpose for which 40, Middle Road was let out and the circumstances disclosed in the evidence.

In these circumstances, we think that the Rule must be discharged with costs, three gold mohurs to the Opposite Party, Nanda Lal and one gold mohur to Messrs. Gladstone Wyllie & Co.

S. C. M.

Rule discharged.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.	GOBINDA CHANDRA
LORD DUNEDIN.	PAL (a lunatic), and
LORD SHAW.	ors., Appellants,
	v.
SIR JOHN EDGE.	KAILASH CHANDRA
1921,	PAL (deceased), and
19, April.	ors., Respondents.

Privy Council—Practice—Appeal pending before the Privy Council—Compromise, in which persons under disability are concerned, application for approval of, should be moved before the High Court in India in the first instance.

In all cases where it is desired to bind persons under disability by a compromise which is proposed to be entered into in an appeal pending before the Judicial Committee, it is of the utmost importance that there should be a clear expression of opinion by the proper Court in India that such compromise is a beneficial one for these persons. Such a question is essentially and necessarily the proper subject for consideration of the Courts in India, who are in a position to institute the inquiries, to ask the questions and to obtain the information, which must always be required before sanctioning proceedings on behalf of persons who are unable to assent

for themselves. Although the Judicial Committee may in rare cases, in their desire to avoid the multiplication or prolongation of proceedings, entertain in the first instance an application to sanction a compromise in which persons under disability are interested, this is not the regular and usual course.

This matter arose upon a petition to approve of the compromise of an appeal, in which minors were interested.

Mr. Dubé for the Appellants.

Mr. Raikes for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—Their Lordships are unable to entertain this petition and regret that a procedure should have been adopted by the High Court which will delay the ultimate judgment and increase the expense. In truth, their Lordships are not in a position to decide whether the terms of compromise which they are asked to sanction are beneficial to the parties who are under a disability, nor can Counsel who appeared before them give them the requisite assurance that they have been able to investigate all material matters, and that the Board can safely act in making the desired order. All such questions are essentially and necessarily the proper subject for consideration of the Courts in India, who are in a position to institute the enquiries, to ask the questions, and to obtain the information which must always be required before sanctioning proceedings on behalf of people who are unable to assent for themselves. In rare cases it may be possible that this could be done here, and in their Lordships' desire to avoid the multiplication or prolongation of proceedings, they may occasionally accept the burden, as was done in the case of *Sakinbai v. Shrinibai* (1), but

(1) L.R. 47 I. A. 88 (1919).

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this is not the regular and usual course, and in this case they are unable to adopt it. In all cases where it is desired to bind persons under disability by a compromise, it is of the utmost importance that there should be a clear expression of opinion by the proper Court in India that such compromise is a beneficial one for those persons.

The petition must stand over until the proper certificate has been obtained from the High Court.

Solicitor: Mr. T. L. Wilson for the Appellants.

Solicitors: Messrs. Barrow, Rogers and Neville for the Respondents.

R. M. P.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

MALAYANDI

APPAYASAMI

NAICKER,

Appellant,

v.

THE MIDNAPORE

ZAMINDARY CO.,

Ld., Respondents.

1921,
Heard, 15 and
17, February.
Judgment, 16, March.

Palayam of Kannivadi, whether inalienable—Palayams, originally held on military tenure, which was abolished—Palayagars continued as zamindars—Rights of Palayagars with whom tenure not permanently settled—Abolition of police duties of zamindars—Effect, to make palayam alienable.

Where lands in British India are held on military service tenure, there is good reason for holding that no one of the successive tenants could deal with the land so as to deprive the next holder of the source from which his duties might be discharged.

NARAGUNTY LUCHMEDAVAMAH v. VEN-GAMA NAIDOO (2) followed.

(2) 9 M. I. A. 66 (1901).

Held—That it may be accepted as a fact that the palayam of Kannivadi was originally held on military tenure and subject to the payment of a tribute to the paramount power, but that the tenure of military service under which the palayam had been held was abolished and determined by the proclamation of the 1st December 1801 issued by the Governor of Madras in Council.

That the palayam was not permanently settled under Reg. XXV of 1902 before 1895 (when it was mortgaged by the holder for the time being); but that did not take away from the former owner any rights he then had—the only difference between a polliam or zamindari which is permanently settled and one that is not, being that in the former the Government is precluded for ever from raising the revenue and in the latter the Government may or may not have that power.

That the conditions in certain sanads granted to the Palayagars of Kannivadi by which the Palayagar was bound to protect the inhabitants by preventing, as far as might be in the power of the Palayagar, robberies, depredations, etc., in their properties, to deliver up persons guilty of murder and not to give shelter to deserters and to apprehend and deliver them to the Collector, were similar to the duties which all landholders and zamindars in British India have to perform. But that even if it were possible to infer from these sanads that the Palayam of Kannivadi was then held on a tenure of rendering police duties to the State, the police duties of zamindars in that part of the country were abolished in 1816 by the Government of Madras.

Held, therefore, that the Palayam of Kannivadi was not inalienable in 1805.

This was an appeal from a decree, dated the 18th February 1918, of the High

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Court of Madras, which reversed a decree, dated the 11th September 1916, of the District Judge of Madura.

The facts of the case will appear from the judgment.

Mr. A. M. Dunne, K. C. (with *Mr. K. V. L. Narasimham*) for the Appellant.—This is an unsettled palayam. In *The Collector of Trichinopoly v. Lekkamani* (3), it was held that there is no difference between a settled and an unsettled Palayam. This was a service palayam and so unsettled one. It has been settled since (in 1905).

Reg. XXV of 1802.

The tenure was the same after 1800 as before although the Government might have changed it. This is the conclusion that the trial Court comes to.

Reads High Court judgment dealing with Reg. XXXI of 1802. *The Collector of Trichinopoly v. Lekkamani* (3), *Chauki Gounden v. Venkataramanier* (4) and *Lekkamani v. Ranga Kristna* (5).

[LORD BUCKMASTER.—The duty you wish to set up is that of a military chieftain, whose duty is to surround himself with men. The time for this is long gone by.]

The object is merely to establish the nature of tenure. As in Ghatwali, where the tenure is established that shews that the succession is to go to some person in a certain manner.

[LORD DUNEDIN.—Mayne, sec. 338.]

Refers to the notification by Government.

[Their Lordships said they would consider it unnecessary to call on the Respondents.]

Mr. L. DeGruyther, K. C. (with *Mr. Kenworthy Brown*) for the Respondents were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal from a decree, dated the 18th February 1918, of the High Court at Madras, which reversed a decree, dated the 11th September 1916, of the District Judge of Madura.

The suit in which this appeal has arisen was brought to obtain so far as is now material, against the Midnapore Zamindari Company, Limited, hereinafter referred to as the Respondent Company, a decree for possession of the properties specified in Schedules A and C of the plaint, and for mesne profits. The properties claimed were villages of the Palayam of Kannivadi. The suit was brought by two brothers, sons by different wives of the late Malayandi Appaya Naicker, a Hindu, one of whom only could have obtained a decree if their case had been proved. The first Plaintiff on the record was Malayandi Appayasami Naicker, who was the son of Malayandi Appaya Naicker by his first or senior wife; he is the Appellant here, and will be hereafter referred to as the Appellant. The second Plaintiff on the record was the son of Malayandi Appaya Naicker by his second or junior wife, and is by date of birth the elder of the two brothers. They were obviously joined as Plaintiffs, owing to some doubt as to which of them was entitled, on the death of their father in 1911, to succeed to the Palayam by the custom of primogeniture applicable in the family. The second Plaintiff did not appear and was not represented in the High Court, and he is not a party to this appeal, so need not again be referred to.

In the plaint it was alleged that the Palayam of Kannivadi is an ancient impartible Palayam, descendible to a single heir according to the custom of primogeniture; that the Palayam was conferred as a

(3) L. R. 1 I. A. 282 (1874).

(4) 5 M. H. C. 208 (1870).

(5) 6 M. H. C. 208 (1871).

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military fief by a Nayak Ruler of Madura about A.D. 1500 upon an ancestor of the Appellant who was placed in charge of one of the principal bastions of Madura Fort; that the Palayagar was by virtue of the tenure liable to be called upon to render military service by furnishing men and other aid, and for police duties and to pay annual tribute to the State; that the Palayam continued to be held by the Appellant's family under the same conditions of tenure and service after the assumption of the Dindigul country by the British; and "That the said Kannivadi Palayam is inalienable beyond the life of the Palayagar for the time being, both by reason of the tenure and according to the custom of the family, which custom came into existence in consequence of the character of the tenure."

Briefly stated, the connection of the Respondent Company with the Palayam of Kannivadi according to the allegations in plaint is as follows:—The grandfather and father of the Appellant in 1895 mortgaged the Palayam to the Commercial Bank, Limited, of Madras, in respect of debts of theirs which were not binding upon the Appellant or upon the Palayam; on that mortgage the Bank obtained a decree, and in execution of that decree, brought the Palayam to sale at auction, and at the sales purchased the estate in 1900, and on the 8th January 1909, conveyed all their rights under the decree and under the auction sales to the Respondent Company, who have since then been in possession.

Various other matters were alleged in the plaint as to which no arguments were addressed to their Lordships by either side.

The Respondent Company in their written statement admitted that the Zamindari of Kannivadi was at the time of the sale to the Bank impartible and was

descendible to a single heir according to the custom of primogeniture, but they denied that it had been conferred upon an ancestor of the Appellant "for being in charge of a bastion of the Madura Fort;" denied that the estate had been granted or was ever held subject to any obligation of rendering military or police service, or was inalienable, or that the Zamindar had ever held any office by virtue of which he was under any obligation to perform military or police duties; denied that there is any family custom or anything in the tenure of the Kannivadi Zamindari which rendered it inalienable beyond the life of the Palayagar, and alleged that in law the Zamindar for the time being of the Kannivadi Zamindari always possessed an absolute interest in it with full powers of alienation. The Respondent Company in their written statement pleaded several other matters, which in the view that their Lordships take of the case are not now necessary to be considered.

There were 27 issues fixed for the trial of the suit, but in their Lordships' opinion, the tenth issue was in the circumstances that upon which the decision of this appeal depends. It was:—"X. Whether the plaint mentioned Zamindari is inalienable either by custom or by virtue of its tenure?" If it was not inalienable either by custom or by reason of its tenure the Palayagar for the time was entitled to mortgage or to transfer absolutely every village in the Palayam according to his pleasure. That is the result of the decisions of the Board in cases of impartible estates in India which descend according to a custom of primogeniture. Until the law on this subject was placed by decisions of the Board beyond a doubt there was a current of judicial decisions in the Presidency of Madras to the effect that a holder of an impartible

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estate which descended by a rule of primogeniture could not transfer except for his own lifetime any part of the estate unless possibly for necessity.

The suit was tried by the District Judge of Madura. The District Judge states in his judgment that:—

“The Plaintiffs base their case not on custom but on the military and police nature of the tenure and rely on the decision in *Sartaj Kuari v. Deoraj Kuari* (1) to establish that if such is its tenure it (the estate) is inalienable . . . A distinction is also sought to be drawn between the present case and others in that in them there was a Permanent Settlement, whereas in the present case the estate was an unsettled Palayam till the Bank obtained a Permanent Sannad in 1905 from the Government.”

The District Judge, after an elaborate consideration of all the historical references to the family to which the Appellant here belonged, and of reports and proceedings of Officers of the Government, came to the conclusion that the Palayam of Kannivadi was held down to 1816 for police as well as military service, and that although by 1816 the Government had removed from the Palayagar the duty of police services, the Government had not by the grant of a Zamindari sannad altered the tenure by which the Palayam was held. His final conclusion on the tenth issue is thus expressed:—“It seems to me, therefore, that as I have held the Palayam to have been held on a military and karal (Police) tenure, that as it had never been settled and as there was no express putting an end to the military liabilities, the estate must be held to have been held on the old tenure up to the grant of the sannad in 1905 to the Bank, and that therefore up to that date the estate was inalienable. This is my finding on issue 10.” The District Judge made a decree in favour of the Appellant

here, against the Respondent Company. From that decree the Respondent Company appealed to the High Court at Madras.

The High Court in dealing with the appeal considered separately the question as to whether the Palayam of Kannivadi was held on military service tenure, and the question as to whether it was held on a tenure of performing for the State police duties. Their Lordships will adopt the same course in dealing with this appeal. The learned Judges in their judgment referred to the fact that the Board in *Naraguntty Luchmudavamah v. Vengama Naidoo* (2) which related to the Naraguntty Palayam in the District of Chittore in the Presidency of Madras, had accepted as correct the explanation in Wilson's Glossary that Palayagars were originally petty Chieftains occupying usually tracts of hills or forest country subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent; but as having at present, since the subjugation of the country by the East India Company, subsided into peaceable landholders. With reference to that description the learned Judges found that:—“There can be no doubt that Kannivadi was a Palayam of this nature.” It has not been suggested at the hearing of this appeal that that conclusion of the High Court was not correct. The High Court do not state when the Palayam of Kannivadi was first granted to an ancestor of the Appellant; there was not on the record any reliable evidence on that point, but they obviously and rightly considered that the grant had been made before Dindigul, in which District Kannivadi is situated, was ceded to the East India Company by the Treaty of Seringapatam, 1792.

It may be accepted as a fact that the

(1) 1, 4. R. 10 All. 272, 288 (1888).

(2) 9 M. I. A. 66 (1861).

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Palayam of Kannivadi was originally held on military service tenure and subject to the payment of a tribute to the paramount power. Where lands in British India are held on military service tenure, there is good reason for holding that "no one of the successive tenants could deal with the land so as to deprive the next holder of the source from which his duties might be discharged." (See Mayne's Hindu Law, para. 337). "A Palayam is in the nature of a Raj, it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time." (See the *Naragunty* case (2) cited above). The question, so far as it depends on military service tenure is concerned, is—Did the Palayam continue to be held on military service tenure when the mortgage to the Bank was made in 1895? The High Court held that the military service of Palayagars of the Madura and Tinnevely Districts was abolished in 1801 by the Proclamation of the 1st December 1801, of Lord Clive, Governor in Council.

On the 2nd October 1799, in consequence of a rebellion which had been fomented and supported by Palayagars of the Tinnevely District, Major Bannerman, as Military Commandant of the Southern Detachment, had been obliged to issue a Proclamation to the Palayagars, landholders and inhabitants of the Tinnevely District, ordering the Palayagars to destroy all forts in their Palayams and to deliver all guns, gingal pieces, firelocks, matchlocks and pikes in their possession, or in the possession of any of the inhabitants, to the Military Detachments sent to receive them. The Court of Directors in their letter of 11th February 1801, to Fort St. George (the Government of Madras), sanctioned the gradual introduction of a permanent land settlement in the Presi-

dency, but laid down that it was of first importance that "all subordinate military establishments should be annihilated within the limits subject to the Dominions of the Company." That must have meant that military service tenures should be abolished in the Districts subordinate to Fort St. George.

In consequence of those orders of the 31th February 1801, Lord Clive, Governor in Council, issued the Proclamation of the 1st December 1801, which was addressed to the Palayagars of the Madura and Tinnevely Districts. That proclamation referred to a proclamation of the 9th December 1799, of the Governor in Council of Fort St. George addressed to the Palayagars of Tinnevely and to a rebellion excited and maintained in arms by Palayagars of Panchalam Kurishi and of Virupakshi and by the Sherogars of Sivaganga. The following paragraphs of the Proclamation of the 1st December 1801, show clearly what the Government of Fort St. George intended.

"Wherefore the Right Honourable Edward Lord Clive, Governor in Council, aforesaid, with the view of preventing the recurrence of the fatal evils which have attended the possession of arms by the Palayagars and Sherogars of the southern provinces and with the view also of enforcing the conditions of the Proclamation published by Major Bannerman on the 2nd October 1799, formally announces to the Palayagars, Sherogars and inhabitants of the southern provinces the positive determination of His Lordship in Council to suppress the use and exercise of all weapons of offence with the exception of such as shall be authorised by the British Government."

"The military service heretofore rendered by the Palayagars and Sherogars having been suppressed and the Company having in consequence charged itself with the protection and defence of the Palayagar countries, the possession of fire arms and weapons of offence is manifestly become unnecessary to the safety of people. The Right Honourable

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the Governor in Council therefore orders and directs all persons possessed of arms in the provinces of Dindigul, Tinnevely, Rannadpuram, Sivaganga, and Madura to deliver the said arms consisting of muskets, matchlocks, pikes (to?) Lieutenant-Colonel Agnew, the Officer now commanding the forces in those provinces.

"It is unnecessary to assure the people of the southern provinces that the Right Honourable the Governor in Council in the determination of carrying this resolution into effect can be governed by no other motives than those connected with the sacred duty of providing for the permanent tranquility of those countries. His Lordship disclaims every wish of subjecting the chiefs and hereditary landlords to any humiliation, but the discontinuance of the general use of arms according to the prevailing habits of those countries being indispensably necessary to the preservation of peace and to the restoration of prosperity, the Governor in Council hopes that the chieftains will with cheerfulness sacrifice a custom now become useless to the attainment of those important objects.

"With a view therefore of tempering the execution of their general resolution with as great a degree of attention as may be practicable to the hereditary customs and to the personal feelings of the chieftains, the Right Honourable Lord Clive, Governor in Council aforesaid, hereby authorises each Palayagar or Zamindar to retain a certain number of peons carrying pikes for the purpose of maintaining the pomp and state heretofore attached to the persons of the said Palayagars. But the said number of authorised pikemen shall be fixed and shall continue to be limited for the better execution of this intention, the said number of pikemen shall be determined by the Governor in Council of Fort St. George upon the representation of the several Palayagars transmitted through the regular channel of the Company's Collector, after proclamation of the number so fixed, the names of the said pikemen shall be registered in the public cutcherry of the Collector, and the pikes shall in like manner be publicly stamped by the Collector with a mark bearing the sanction of the British Government.

"In the confident expectation of reclaim-

ing the people of the southern provinces from the habit of predatory warfare and in the hope of inducing them to resume the arts of peace and agriculture, the Right Honourable Edward Lord Clive, Governor in Council of Fort Saint George aforesaid, announces to the Palayagars and to all the inhabitants of their Palayams that it is the intention of British Government to establish a permanent assessment of revenue on the lands of the Palayams upon the principles of Zamindari tenures, which assessment being once fixed shall be liable to no change in any time to come, that the Palayagars becoming by these means Zamindars of their hereditary estates will be exempted from all military service and that the possessions of their ancestors will be secured to them under the operation of limited and defined laws to be printed and published as well for the purpose of restraining its own officers to the regulations and ordinances of the Government as of securing to the people their property, their lives and their religious usages of their respective castes."

It appears to their Lordships that by that Proclamation military service tenures in the districts to which the Proclamation applied were abolished whether the Palayagars obtained a permanent assessment sannad or not.

Following upon the Proclamation of the 1st December 1801, came Reg. XXV of 1802, under which a permanent settlement so far, if at all, as it has any bearing on this case was made with the Bank; and an Istimvari Sannad was granted to the Bank on the 29th September 1805. The Palayam estate had not been previously settled. The Palayagars generally, including the Palayagar of Kannivadi, refused to accept Istimvari sannads, and when the Palayagar of Kannivadi for the time being was willing to accept a sannad the Government refused in 1863 to grant him one. There can be little doubt that that refusal to grant him a sannad was out of consideration for the family, as it was generally believed that it was more

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difficult for a creditor to bring to sale unsettled Palayams than Palayam estates which were held under an Istimvari Settlement sannad. It appears to their Lordships that Reg. XXV of 1802 does not affect the question as to whether in 1895 the Palayam of Kannivadi was alienable or not. The Board decided in the *Marungapuri* case [*The Collector v. Trichinopoly v. Lekkamani* (3)], that the affirmative words of the 2nd section of Reg. XXV of 1802, "That in consequence of the assessment the proprietary right of the soil shall become vested in zemindars, etc., did not either give to or take away from the former owners of lands not permanently settled, any rights which they then had. It (a settlement under that Regulation) merely vested in all zamindars an hereditary right at a fixed revenue upon the conclusion of the permanent settlement with them" *Murungapuri* case (3). In that case the Board approved of the opinion expressed by the High Court of Madras: "That the existence of a proprietary estate in polliams or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property" (p. 312). In the same case the Board held that: "The only difference between a polliam or zamindari which is permanently settled and one that is not, is that, in the former, the Government is precluded for ever from raising the revenue; and, in the latter, the Government may or may not have that power" (p. 313). In the present case the learned Judges of the High Court held that the tenure of military service under which the Palayam of Kannivadi had been held, had been abolished and determined by the Proclamation of the 1st

December 1801, and with that decision their Lordships have agreed.

It remains to be considered whether the Palayam of Kannivadi was held under a tenure of the Palayagar rendering police service to the State. The best and most reliable evidence that the Palayam was held on police service tenure would be a sannad showing that it was so held. Only two sannads which were granted to any Palayagar of Kannivadi have been brought to the attention of this Board. They are sannads which were granted respectively on the 13th July 1797, for the Fasli year 1207, and the 13th July 1800, for the Fasli year 1200 (?) to Appaya Naicker, the then Palayagar. There is nothing in either of those sannads from which their Lordships can infer that the Palayam of Kannivadi was held on a tenure of rendering police duties to the State. The conditions in those sannads by which the Palayagar was bound to protect the inhabitants by preventing as far as might be in the power of the Palayagar robberies, depredations, etc., in their properties; to deliver up persons guilty of murder; and not to give shelter to deserters, and to apprehend and deliver them to the Collector are similar to the duties which all landholders and zamindars in British India have to perform. Even if it were possible to infer from those sannads that the Palayam of Kannivadi was then held on a tenure of rendering police duties to the State, the police duties of zamindars in that part of the country were abolished in 1816 by the Government of Madras.

Their Lordships hold that in 1895 the Palayam of Kannivadi was not inalienable, and that the then Palayagar had power to alienate it to suit his own purposes, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

R. M. P.

Appeal dismissed.

(3) L. R. 1 I. A. 282 at pp. 290, 312, 313 (1874).

[CIVIL APPELLATE JURISDICTION.]**APPEAL FROM ORIGINAL DECREE****No. 279 OF 1919.****SREEMUTTY SAROJINI****DASSI, Petitioner,****Appellant,****v.****HARI DAS GHOSE,****Opposite Party,****Respondent.****MOOKERJEE, J.****BUCKLAND, J.****1921.****14, April.**

Will, execution of—Duty of Judge in weighing evidence—Positive testimony when to be discounted on the ground of suspicion—Application of the rule when will not inofficious—Propriety of rejecting evidence of witness on the ground of prosecution on criminal charge which resulted in acquittal—Handwriting how to be proved, comparison of handwriting and evidentiary value thereof—Expert testimony of value of.

Where a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator the Court ought not to pronounce in favour of it unless the suspicion is removed, but this suspicion must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.

In order to prevail against positive evidence adduced in support of a Will the improbability must be clear and cogent and must approach very nearly to, if it did not altogether constitute, an impossibility.

In the case of a Will, reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable or tinged with impropriety.

In estimating the value of the evidence given by a witness the elementary principle must not be overlooked that where there has been an acquittal the acquittal is conclusive and it would be a very danger-

ous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates.

The ordinary methods of proving handwriting are (1) by calling as a witness a person who wrote the document or saw it written or who is qualified to express an opinion as to the handwriting by virtue of sec. 47 of the Evidence Act, (2) by a comparison of handwriting as provided in sec. 73 of the Evidence Act, and (3) by the admission of the person against whom the document is tendered. In applying the provision of sec. 73 of the Evidence Act, it is important not to lose sight of its exact terms. It does not sanction the comparison of any two documents but requires that the writing with which the comparison is to be made, or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed and next the writing to be compared with the standard, or in other words, the disputed writing, must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person.

A comparison of handwriting is at all times, as a mode of proof, hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the evidence of experts. A comparison of writings has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution.

Although from the dissimilarity of signatures a Court may legitimately draw the inference that a particular signature is not genuine because it varies from an admittedly genuine signature, yet resemblance of two signatures affords no safe foundation that one of them is genuine.

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This was an appeal against the decree of G. N. Ray, Esq., District Judge of Zillah Hooghly, dated the 10th of September 1919.

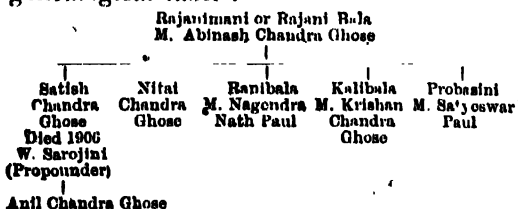
The facts of the case will appear from the judgment.

Babus Ram Chandra Mozumdar, Monmotha Nath Mukherjee, Satindra Nath Mukherjee and Rama Prosad Mukherjee for the Appellant.

Dr. Dwarka Nath Mitter and Babu Debendra Nath Mondal for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—The subject-matter of the litigation which has resulted in this appeal is the estate left by one Rajani Moni *alias* Rajanibala Dasi, a Hindu lady who died on the 21st March 1917. She left a son Nitai, a grandson Anil by a pre-deceased son, and three married daughters. The relationship of the several members of the family is indicated on the following genealogical table :—



The case for the Appellant is that three days before her death, Rajanimani made a testamentary disposition of her properties. On the 25th August 1917, an application for probate was lodged in the Court of the District Delegate by the present Appellant Sarojini, the widowed daughter-in-law of the deceased, but it was returned as objection was filed. An application for letters of administration with a copy of the Will annexed was consequently presented to the District Judge on the 12th October 1917. Objection was thereupon lodged on the 22nd January 1918 by the

Respondent Haridas Ghose on the allegation that he had, on the 28th May 1917, acquired title to the estate left by Rajanimani, by purchase from her son Nitai Chandra Ghose who had succeeded thereto as the heir-at-law. Thus emerged the question in controversy between the parties, namely, whether the Will alleged to have been executed by Rajanimani on the 18th March 1917, is or is not genuine. The District Judge has come to the conclusion that the Will propounded was not duly executed. On the present appeal the correctness of this view has been impeached on behalf of the propounder.

The preamble to the Will recites that the testatrix had been in failing health for some time and had come to the residence of his second son-in-law Krishna Chandra Ghose at Baranagar in the northern suburbs of Calcutta. The first clause enumerates the relations of the testatrix as set out in the genealogical table. The second clause states that her surviving son Nitai Chandra Ghose had taken to evil ways and that she had consequently decided not to leave him any portion of her estate but that if he left any son or sons of good character, the said grandson or grandsons would, after attainment of majority, be competent to possess and enjoy the property according to the terms of the Will. The third clause gives a description of her properties, namely, two houses in Calcutta, one purchased with her own money, the other obtained by virtue of a deed of gift from her mother-in-law. The fourth clause provides for maintenance allowance to an aunt-in-law dependent upon her. The fifth clause gives a monthly allowance to her son Nitai, her grandson Anil and to her three married daughters. The sixth clause provides for the performance of her *Sradh* from the sale proceeds of her ornaments, the surplus to be taken by her son Nitai.

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The seventh clause gives one-half of her property to her grandson Anil and the other half to the son or sons that might be born of the loins of her son Nitai. The eighth paragraph makes the various sums, payable as maintenance, a charge on the estate. The ninth clause contains miscellaneous directions. There can be little doubt that the primary object of the testatrix was to keep her property out of the hands of her son who had taken to drink and women at an early age, and had in 1912 become involved in a shooting case.

There are six attesting witnesses to the Will including the scribe. All of them have been examined. The evidence of Babu Jyotish Chandra Hazra, a Vakil of this Court who is related to the family and was consulted by the lady as to a possible testamentary disposition, has also been recorded. The District Judge has stated that he believed in full the evidence of Babu Jyotish Chandra Hazra. That evidence shows that the lady sent for him and requested him to draft a Will, so that Nitai might not be able to destroy the estate. She said that she had two houses in Calcutta and that she wished to leave one half to the son of his predeceased son and the other half to the son of Nitai, if one should be born. She also desired to provide small monthly annuities for her aunt and her married daughters. Jyotish Babu thereupon told the lady that such a Will, leaving something to an unborn person, was not possible, but that as the law might soon be altered by a Bill already introduced into the Council, she could make the Will she desired after the law had been changed. This Bill as we know was passed on the 28th September 1916, and was placed on the statute book as Act XV of 1916. Jyotish Babu further stated that he met Krishna Chandra Ghose, the son-in-law of the lady, after the law had been altered, and told him to inform her

that she could then make the Will she wanted. Some time afterwards, Krishna Chandra came to the house of Jyotish Babu at Bhowanipore, told him that the lady was very ill at Baranagar and requested him to draft a Will. Jyotish Babu told Krishna Chandra that he was occupied with examination work and could not afford time to see the lady for the next ten or fifteen days. Upon this evidence, strengthened by that of Dr. Gokul Chandra Dhar, there is no room for doubt that before September 1916, the lady had intended to make a testamentary disposition of her properties so as to exclude her son from the inheritance, and that she retained such intention as late as the end of February or the beginning of March 1917 after she had removed from her residence in British Chandernagore to the house of her second son-in-law at Baranagar. The question has accordingly to be faced, whether she did in fact carry out her intention by means of the document under consideration. Her son-in-law Krishna Chandra Ghose who holds an important position in a mercantile firm and who takes no benefit under the Will, unless indeed the annuity of Rs. 2 a month in favour of his wife can be regarded as such, has been examined and cross-examined at considerable length. He corroborates the narrative of Babu Jyotish Chandra Hazra in every material particular and adds that his mother-in-law repeatedly expressed a wish to make a Will in view of the conduct and character of her son Nitai. On the refusal of Jyotish Babu, he went to Narayan Chandra Chatterjee a pleader of Baranagar, now dead, who expressed his inability to come on the Sunday, on which the Will was made. Thereupon a neighbour Adhar Chandra Ghose, a trader in rice, offered to secure the services of a deed-writer Nanda Lal Das, who was known to him. Krishna

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Chandra accordingly took Nanda Lal to his mother-in-law who gave him instructions about the provisions to be inserted in the Will. Nanda Lal thereupon prepared a draft which has been produced in these proceedings. It was read over to Rajanimani, and after she had expressed her approval, Nanda Lal made a fair copy. At this juncture, Rash Behari Mukherjee, the physician who attended upon Rajanimani, came to see her, and as was quite natural, he was requested to stay and attest the Will. Krishna Chandra also asked a neighbour Sailsewar Sanyal, a trader, to come and attest the Will. It so happened that Jitendra Nath Upadhyaya, a pleader of the Alipur Bar, had just at that time come to Saileswar Sanyal to collect some money due to his brother. Krishna Chandra, seeing him present, and learning that he was a pleader, pressed him to come and be attesting witness. The Will was subsequently executed by the lady and was attested by Nanda Lal Das, the scribe, Krishna Chandra Ghose, the son-in-law of the testatrix, Adhar Chandra Ghose a local trader, Rash Behari Mukherjee, the physician, Saileswar Sanyal a neighbour and a trader, and Jitendra Nath Upadhyaya the pleader. These persons have come forward to pledge their oath that the Will was executed by the lady and was duly attested by them. They are persons of respectability, and no hypothesis has been put forward, except the innate perversity of human nature to explain why they should all conspire to forge the Will, and to perjure themselves in Court. The version given by them in examination-in-chief has not been affected by cross-examination; on the other hand, their statements are free from material contradictions, and their narratives have the ring of truth about them. These statements are further supported by Sarojini, the widowed daughter-in-law of the testatrix who was

in the room where the document was executed; she was subjected to a severe and prolonged cross-examination, but with no effect. This mass of testimony has however, been summarily brushed aside by the District Judge on grounds of suspicion for which no foundation has been laid in the evidence. No doubt, as stated by Lord Davey in *Tyrrell v. Painton* (1), wherever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed. But as was explained by Jenkins, C. J., in *Jarat Kumari v. Biseswar Dutt* (2), this suspicion must be one inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction. The reasons assigned by the District Judge for his refusal to act upon the testimony of some at any rate of the witnesses examined in this case indicate, however, that he has approached the evidence from an entirely erroneous standpoint. Thus, with regard to Nanda Lal Das, the scribe, he notes that he was procured from Serampore across the river and adds that as he has been a pleader's clerk and writes for people frequenting Courts and Registration Offices, he is a likely hand to be chosen for getting up a deed. There is no foundation laid in the evidence for the imputation thus made against professional deed-writers in general. He next dismisses the evidence of the doctor Rash Behari Mukherjee with the remark that he does not pay income tax and was prosecuted in a forgery case. This comment is based apparently on a statement made by the witness in the following terms: "there was a criminal case against me for forging a

(1) [1894] 2, 151, 159.

(2) I. L. R. 89 Cal. 245 (1911).

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currency note; there were fourteen accused in the case; only one Phani Bhusan Pan was convicted; all the other including myself were acquitted in the Sessions Court; that was seven or eight years ago." The District Judge thus overlooks the elementary principle that where there has been an acquittal, the acquittal is conclusive; as Jenkins, C. J., observed in *King-Emperer v. Nani Gopal* (3), on the authority of the decision in *R. v. Plummer* (4), it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates. Again, Saileswar Sanyal is discredited because he is a neighbour, while Jitendra Nath Upadhaya is not, relied on because he is a chance witness from a distance. The District Judge, however, concedes that the evidence of all these witnesses could be accepted if the Will had been executed in the natural way and publicity given to it, though he does not state how the execution was unnatural and how secrecy could have been intended when at least half a dozen strangers were present in the assembly. The District Judge next proceeds to make the general observation that it must be acknowledged that there is no great reluctance in our country in getting up a deed of this kind. There is no trace of evidence in the record to support this remark with regard to the people either of the province in general or of the localities where the lady resided, or the Will was executed. The Judge then proceeds to rely upon a statement made by Babu Jyotish Chandra Hazra in cross-examination to the effect that Kanti Chandra Ghose and Kailas Chandra Ghose two members of the Ghose family of Chandernagore, had propounded a Will alleged to have been executed by Trailokhya Nath

Ghose, brother of Kanti Chandra Ghose that probate of the Will was refused by the trial Court, and that during the pendency of an appeal in this Court, the matters in difference were settled by a deed of release, dated the 9th March 1916. It is difficult to see how this statement is relevant to the present proceedings and how it can be admissible in evidence. The recitals in the deed of release are plainly inadmissible, and the document was introduced into evidence for an entirely different purpose, namely, as containing the signature of Rajanibala who had acted as the guardian of her infant grandson Anil Chandra in the transaction. The District Judge plainly should not have allowed his judgment upon the question of the genuineness of the Will now in controversy to be affected in the remotest degree by what took place in connection with the alleged Will of Trailokhya Nath Ghose. Moreover, his observation that the Will of Trailokhya Nath was designed to cheat his daughters while the present Will is intended to save the estate from the effect of the conduct of a dissolute son, can only be regarded as embodying a wholly misleading analogy. This is followed up by the entirely groundless imputation that a friendly neighbour (Saileswar Sanyal) and a young student (the pleader Jitendra Nath Upadhaya) would not be averse to helping a minor. In view of these and other remarks made by the District Judge, we see no escape from the conclusion that the adverse opinion formed by him with regard to the Will in dispute is not based upon a consideration and analysis of the positive evidence on the record. He has in fact adopted the method which has been more than once condemned by the Judicial Committee; *Chotey Narayan v. Ratan Koer* (5) and

(3) 15 C. W. N. 593 (1911).

(4) [1902] 2 K. B. 339.

(5) L. R. 22 I. A. 13 s. c. I. L. R. 22 Cal. 519 (1894).

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Jagrani Koer v. Durga Prosad (6). As was observed by Lord Watson in the first of these cases, in order to prevail against such evidence as has been adduced, the improbability must be clear and cogent and must approach very nearly to, if it did not altogether constitute, an impossibility. This was emphasised by Lord Shaw in the second case when he added that the objection that the witnesses might have been of a better class is at an end when execution and attestation are proved. A comment of this character has no force except upon something of a much higher level than mere suspicion, namely, proof which would thoroughly satisfy the mind of a Court that the witnesses had committed both forgery and perjury. In the case of a Will reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely that they are unnatural, unreasonable or tinged with impropriety. In view of all these circumstances, we cannot attach much weight to the opinion of the trial Judge who had the advantage of seeing the witnesses and noticing their look and manner, as laid down by the Judicial Committee in *Shama Charan v. Kshettormoni* (7), *Shun Muga v. Manikka* (8), *Bombay Cotton Manufacturing Co. v. Motilal* (9), *R. v. Bertrand* (10), and other decisions reviewed in *Laljee Mahomed v. Guzdar* (11)

and *Surendra Krishna v. Rani Dasi* (12).

We may further observe that the evidence adduced by the propounder is practically uncontradicted. We have on the other side some evidence as to realization of rent from the tenants of the houses after the death of the testatrix. On one occasion Nitai and Krishna jointly demanded rent; that was apparently to meet the expenses of the Sradh ceremony. The tenant, however did not pay the rent, and he continued to withhold it when he found there was a dispute as to the title. The only evidence worthy of notice adduced on the side of the caveator is the signature of the testatrix on the release. There may be a controversy as to whether the document was duly proved and received in evidence but even if we assume that it was really executed by the lady, it does not assist the case of the caveator. The District Judge limited himself to the observation that the signature on the Will is firm and not like that of a pale and emaciated lady on the point of death. We have no evidence to show how much vitality the lady possessed three days before her death; but this much is plain that a comparison of the signature on the Will with that on the deed of release is not calculated to excite suspicion. In this connection, reference may be made to the exposition of the methods of proving handwriting given by Jenkins, C. J., in the case of *Barindra Kumar v. Emperor* (13) which was followed in *Pulin Behari v. King-Emperor* (14). The ordinary methods of proving handwritings are (1) by calling as a witness a person who wrote

(6) L. R. 41 I. A. 76; s. c. I. L. R. 36 All. 93; 18 C. W. N. 521 (1913).

(7) L. R. 27 I. A. 10; s. c. I. L. R. 27 Cal. 521; 4 C. W. N. 501 (1899).

(8) L. R. 36 I. A. 185; s. c. I. L. R. 32 Mad. 400 (1909).

(9) L. R. 42 I. A. 119; s. c. I. L. R. 39 Bom. 386; 19 C. W. N. 617 (1915).

(10) L. R. 1 P. C. 520 (535) (1887).

(11) I. L. R. 43 Cal. 538; s. c. 20 C. W. N. 335 (1915).

(12) I. L. R. 47 Cal. 1043; s. c. 24 C. W. N. 860 (1920).

(13) I. L. R. 37 Cal. 457 (502); s. c. 14 C. W. N. 1114 (1909).

(14) 16 C. W. N. 1105; s. c. 35 C. L. J. 517, 590 (1911).

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the document or saw it written, or who is qualified to express an opinion as to the handwriting by virtue of sec. 47 of the Evidence Act; (2) by a comparison of handwriting as provided in sec. 73 of the Evidence Act; and (3) by the admission of the person against whom the document is tendered. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear. In applying the provisions of sec. 73 of the Evidence Act, it is important not to lose sight of its exact terms. It does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made, or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard or, in other words, the disputed writing must purport to have been written by the same person, that is to say the writing itself must state or indicate that it was written by that person. The section does not specifically state by whom the comparison may be made, though the second paragraph of the section dealing with a related subject expressly provides by way of contrast that in that particular connection the Court may make the comparison. A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the evidence of experts. In *Phooddee Bibee v. Govind Chunder Roy* (15), it was said by the Court that "a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution." It is true that the opinions of

experts on handwriting meet with their full share of disparagement at times, but at any-rate there is this use in their employment, that the appearance on which they rely are disclosed, and can thus be supported or criticised, whereas an opinion formed by a Judge in the privacy of his own room is subject to no such check. And that the aid of an expert may be of value was clearly the opinion of so distinguished a Judge as Mr. Justice Blackburn, who in *Reg. v. Harvey* (16) refused to allow a comparison to be made without the help of experts. A comparison of writings has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution, *Nobin Krishna v. Rasik Lal* (17) and *Kurali Prasad v. Anantaram* (18), specially if no skilled witness has been called to make the comparison, *R. v. Silverlock* (19), *R. v. Harvey* (16), *Doc v. Suckermore* (20), *Rajendra Nath v. Jogendra Nath* (21) and *Rames Chandra v. Rajani Kanta* (22). We must further bear in mind that although from the dissimilarity of signatures, a Court may legitimately draw the inference that a particular signature is not genuine because it varies from an admittedly genuine signature, yet resemblance of two signatures affords no safe foundation that one of them is genuine. Now it may be conceded that if two signatures are exactly identical, there is room for suspicion that the one in question may be a copy or careful imitation of the

(16) 11 Cox. G. C. 546 (1869).

(17) I. L. R. 10 Cal. 1047, 1051 (1884).

(18) 8 B. L. R. 490, 502 (P. C.); 16 W. R. P. C. 16 (1871).

(19) [1894] 2 Q. B. 766.

(20) 5 A. & E. 703, 784 (1836).

(21) 14 M. I. A. 67; 7 B. L. R. 216; 15 W. R. 41 (1871).

(22) L. R. 20 I. A. 95; s. c. I. L. R. 21 Cal. 11 (1893).

(15) 22 W. R. 272 (1874).

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genuine signature. It is a fact well-known and may be readily verified that no two signatures, actually written in the ordinary course of writing them are precisely alike. The character of a person's signatures is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent but the coincidence is seldom known where a genuine signature of a person superposed over another genuine signature of the same person is such a facsimile that one is a perfect match to the other in every respect. There is generally diversity in the makes of the pen, the size of the letter, the level of the signature and space it occupies, that stands as a guard over the genuine signature and characterises it as the true signature. But as was observed by Coleridge, J., in *Doe v. Suckermore* (20), "the test of genuineness ought to be the resemblance not to the formation of letters in some other specimen or specimens but to the general character of the writing which is impressed on it as the involuntary and unconscious result of constitution, habit or other permanent cause and is, therefore, itself permanent." Again as Sir J. Nicholl said in *Robson v. Locke* (23) "the best, usually perhaps, the only proper evidence of handwriting is that of persons who have acquired a previous knowledge of the party's handwriting from seeing him write and who form their opinion from the general character and manner of these, and not from criticising the particular letters." I have compared the two signatures and the impression left upon my mind by their prevailing character is that they are signatures of the same person, although on one document she signs her name as Rajanibala and in the other as Rajanimoni. But notwithstanding

this general correspondence of the signature, justifying a reasonable inference that they were made by the same person, I do not desire to base my conclusion upon the similarity of the signatures, because, as has been well-observed, it is not difficult to forge the handwriting of almost any person so that it may be impossible for even the most acute and experienced Judge to discriminate between the false and the true. Besides, such reliance upon similarity of signatures is unnecessary in the present case, as there is in my opinion a mass of direct and circumstantial evidence which points unmistakably to the genuineness of the Will. After an examination of that evidence and a consideration of the criticisms thereon by the District Judge and by Counsel for the Respondent in this Court, I feel no doubt that the Will was duly executed and attested by the testatrix. I may add that it is not necessary here to consider what may be the legal effect of the grant of probate upon the title set up by the caveator.

The result is that the appeal must be allowed, the decree of the District Judge set aside and the application for letters of administration with copy of the Will annexed granted to the Appellant with costs in both Courts.

BUCKLAND, J.—I agree.

S. C. M.

Appeal allowed.

(20) 5 A. & E. 708 at p. 705 (1836).

(23) 2 Addams 53 (1824).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 493 of 1917.

MOOKERJEE, J.
BEACHOROFF, J. GOPAL CHANDRA SEN
1917, and ors., Defendants,
Heard, 26, July. Appellants,
1919, v.
Judgment, BANKIM BEHARI ROY,
26, March. Plaintiff, Respondent.

Indian Limitation Act (IX of 1908), sec. 26—Suit for declaration of right of way—Necessity of proving that enjoyment of the right ended within two years before suit—Affirmative proof of “actual user,” if necessary—Distinction between “enjoyment” of a right of easement and “actual exercise” of the right.

Plaintiff brought a suit for declaration of a right of way and for removal of an obstruction thereto. The right was enjoyed for more than 20 years peaceably and openly, without interruption, as an easement, and as of right. There was no discontinuance of the “enjoyment” by reason of the obstruction by the Defendant, till within a few days previous to the institution of the suit, and there was no suggestion that the Plaintiff voluntarily abandoned or discontinued the exercise of the right at any time before such date:

Held—That it was not necessary for the Plaintiff to prove affirmatively “actual user” of the way down to a date within two years before the suit.

SHAM CHURN v. TARINEY CHURN (4), KOYLASH v. SONATUN (5), VINAYAK v. MARTAND (6) and GHULAM v. GULSHER (7) referred to.

A person may without violence to language, be said to be in “enjoyment” of a right of way during a period of time, though he does not actually “use” the way every moment. Cessation of user is

not always inconsistent with continuance of enjoyment of a right, or in other words, cessation of user is not an invariable indication of abeyance of enjoyment of a right.

JANHAVI v. BINDU (3), CARR v. FOSTER (8), JAMES v. STEVENSON (9) and CROSSLEY v. LIGHTOWLER (10) referred to.

This was an appeal preferred on the 13th March 1917, against the decree of Babu Bejoy Gopal Chatterjee, Officiating Subordinate Judge, 2nd Court, of Zillah Midnapore, dated 10th January 1917, modifying the decree of Babu Jyotish Chandra Neogi, Munsif, 1st Court at Contai, dated 7th October 1915.

The facts of the case will appear from the judgment.

Babus Mohendra Nath Roy, Biraj Mohan Mozumdar, Sajani Kanta Sinha and Sarada Charan Maity for the Appellants.

Babus Jyotish Chandra Hazra and Bepin Behari Ghosh for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This is an appeal by the Defendants in a suit for declaration of right of way, for removal of an obstruction thereto, for a permanent injunction and for incidental reliefs. The Plaintiff set up a claim to use the pathway for several purposes, namely, (a) to obtain access to a public road across the sanddune which lies towards the north of his homestead, (b) to enable his workmen to bring materials for the repair and construction of houses, (c) to enable his sweepers to remove night soil, and (d) to take his cattle to the field. The Defendants denied the existence of the alleged

(4) I. L. R. 1 Cal. 422 (1876).

(5) I. L. R. 7 Cal. 132 (1881).

(6) 6 Bom. L. R. 257 (1904).

(7) [1886] P. R. 38.

(3) I. L. R. 24 Cal. 593: a. c. 3 C. W. N. 610 (1899).

(8) [1842] 3 Q. B. 581.

(9) [1893] A. C. 162.

(10) L. R. 2 Ch. App. 478 (1867).

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way and pleaded the bar of limitation. The trial Court decreed the suit. Upon appeal the Subordinate Judge held that there was ample evidence to prove that the inmates of the house of the Plaintiff had, for a period much exceeding 20 years, used the way for access to the sanddune where they went to answer calls of nature; but he was not satisfied with the evidence as to the user of the pathway by sweepers, labourers and cattle. In this view, the Subordinate Judge modified the decree of the primary Court and limited the declaration of the way for use by the inmates of the house of the Plaintiff as a passage for access to the sanddune on the north of the land of the Defendants. The Defendants were not satisfied with this partial success and have appealed to this Court, substantially on the ground that the facts found are not sufficient to justify the declaration of a prescriptive right of way under sec. 26 of the Indian Limitation Act.

To enable a Plaintiff to establish that he has acquired, under the statute an absolute and indefeasible right of way, he must prove that the way has been peaceably and openly enjoyed by a person claiming title thereto as an easement and as of right, without interruption, and for twenty years. The Subordinate Judge has found that in this case the user extended over a period much longer than 20 years, that the right was peaceably and openly enjoyed, without interruption, as an easement and not on account of any proprietary interest in the land, and that no permission was obtained from the Defendants or their predecessors. The Plaintiff must accordingly be deemed to have acquired an absolute and indefeasible right of way.

The question next arises whether, as required by the statute, the period of "enjoyment" for twenty years ended within two years next before the institution of this

suit; for the Plaintiff cannot succeed merely by proof of enjoyment for twenty years; he must show also that such enjoyment ended only within two years before suit. [*Gopee v. Bhooban* (1), *Luchmee v. Tiluckdaree* (2) and *Janhavi v. Bindu* (3)]. Upon this point, the Subordinate Judge is not explicit. In the eighth paragraph of the plaint, filed on the 19th March 1915, it was alleged that the Defendants made the first attempt at obstruction on the 13th March and built the wall across the path three days later on the 16th March, thereby preventing the Plaintiff from using the disputed way. In the written statement, although the right of way was denied, the assertion that the wall had been erected on the date mentioned was not expressly challenged. The Court of first instance found that the wall was erected in March and held that no question of limitation consequently arises. This finding does not appear to have been impugned before the lower Appellate Court. The position, then, is that the Plaintiff acquired an absolute and indefeasible right of way by "enjoyment" for the statutory period; there was no discontinuance of the "enjoyment" by reason of an obstruction by the Defendants, till within a few days previous to the institution of this suit, and there is no suggestion that the Plaintiff voluntarily abandoned or discontinued the exercise of the right at any time before such date. In these circumstances, it is not necessary for the Plaintiff to prove affirmatively "actual user" of the way down to a date within two years before the suit. [*Sham Churn v. Tariney Churn* (4), *Koylash v. Sonatun* (5), *Vinayak v. Mar-*

(1) 23 W. R. 401 (1875).

(2) 24 W. R. 296 (1875).

(3) I. L. R. 26 Cal. 592: S. C. 3 C. W. N. 610 (1899).

(4) I. L. R. 1 Cal. 122 (430) (1876).

(5) I. L. R. 7 Cal. 182 (1881).

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and (6) and *Ghulam v. Gulsher* (7)]. A person may, without violence to language, be said to be in "enjoyment" of a right of way during a period of time, though he does not actually "use" the way every moment. As explained by Garth, C. J., in *Sham Churn v. Tariney Churn* (4) mere non-user, for a time, of an easement which the owner might, if he pleased, enjoy during every hour of that time, but which, for some good reason he does not care to enjoy, is not necessarily discontinuance of enjoyment of the right; for instance, where the owner of a house does not use a way to it because the house is for a time unoccupied or where a farmer desists for a time from using a pasture because he happens to have no pasturable cattle or because the herbage is scanty or unwholesome by reason of draught or like cause, each may still be considered as in "enjoyment" of the right of easement. This distinction between "enjoyment" of a right of easement and "actual exercise" of the right was overlooked in illustration (b) to sec. 26 of the Indian Limitation Act, 1877, [as was pointed out by Garth, C. J., in *Koylash v. Sonatun* (5)] which was consequently not reproduced in the Indian Limitation Act, 1908. To put the matter briefly, cessation of user is not always inconsistent with continuance of enjoyment of a right [*Janhavi v Bindu* (3)] or in other words, cessation of user is not an invariable indication of abeyance of enjoyment of a right. This was recognised in *Carr v. Foster* (8), in which it was ruled that where a commoner had ceased to use the common during two years of the thirty (as he had no com-

monable cattle at the time), but had used it before and after, the jury was justified in finding a continued enjoyment of the right during thirty years. See also the decision of the Judicial Committee in *James v. Stevenson* (9) and of Lord Chelmsford, L. C., in *Crossley v. Lightowler* (10). In our opinion, the disputed way was "enjoyed" by the Plaintiff as an easement within two years next before the institution of the suit.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BEACHCROFT, J.—I agree.

J. N. R.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 1464 AND 1465 OF 1919.

PRASUNNA KUMAR

CHATTERJEA, J.

MONDAL, Defendant,

NEWBOULD, J.

Appellant,

1921,

v.

17, February.

NILAMBAR MONDAL,

Plaintiff, Respondent.

Suit for redemption of an usufructuary mortgage and for recovery of surplus profits from the mortgagee—Limitation Act (IX of 1908), Arts. 148 and 105, applicability of—Civil Procedure Code (Act V of 1908), Or. 34, rr. (7) and (9), scope and effect of.

A mortgagor brought a suit for redemption of an usufructuary mortgage, and alleged that if accounts were taken a large sum would be found due from the mortgagee. The mortgagee contended that the claim for recovery of the surplus profits received by him was barred under Art. 120 of the Limitation Act:

Held—That having regard to the provisions of Or. XXXIV, rr. (7) and (9) of the Civil Procedure Code, the claim for recovery of the surplus profits received by the mortgagee is a relief which is a part

(9) [1893] A. C. 162.

(10) L. R. 2 Ch. App. 478 (482) (1867).

(3) I. L. R. 26 Cal. 593 : s. c. 3 C. W. N. 610 (1899).

(4) I. L. R. 1 Cal. 422 (1876).

(5) I. L. R. 7 Cal. 132 (1881).

(6) 6 Bom. L. R. 287 (1904).

(7) [1896] P. R. 38.

(8) [1842] 3 Q. B. 581.

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of the suit for redemption itself, for which the limitation is provided by Art. 148 of the Limitation Act. Therefore the claim for recovery of the surplus collections was not barred by limitation.

BABOOLAL DASS v. JAMAL ALLY. (1) *discussed.*

Art. 105 of the Limitation Act applies to cases where the mortgagor has not to bring a suit for redemption but has to sue only for recovery of the surplus collections.

RAM DIN v. BHUP SINGH (2), VINAYAK SHIVRAO v. DATATRAYA GOPAL (3) and VENKATESH v. PANDURANG (4) *referred to.*

This was an appeal against the decrees of Babu Aparajit Prosad Mukherjee, Subordinate Judge, 3rd Court of Zillah 24-Perganas, dated the 2nd of April 1919, affirming the decree of Babu Probodh Chandra Roy, Munsif, 2nd Court at Basirhat, dated the 22nd of April 1918 and 10th May 1918 respectively.

The facts of the case will appear from the judgment.

Babus Rupendra Kumar Mitter and Pramatha Nath Bandopadhyaya for the Appellant.

No one for the Respondent in No. 1464.

Babus Mahendra Nath Roy and Manmatha Nath Roy for the Respondent in No. 1465.

THE JUDGMENT OF THE COURT was as follows:—

S. A. No. 1465 of 1919.

This appeal arises out of a suit for redemption of an usufructuary mortgage. The Plaintiff alleged that the mortgage-debt, principal and interest had been satisfied long ago from the usufruct of the property, and that if accounts were taken,

a large sum of money would be found due to the Plaintiff. He accordingly, prayed for a declaration that the principal amount had been satisfied, that a decree might be passed awarding possession of the mortgaged property to the Plaintiff and for directing the Defendant to render an account for the period of possession held by him and that a decree might be passed for the amount which may be found due to the Plaintiff after adjustment of accounts. The Court of first instance decreed the suit and that decree has been affirmed on appeal.

The contention which has been raised in this second appeal is that the claim for recovery of the surplus profits received by the mortgagee was barred under Art. 120 of the Indian Limitation Act and reliance has been placed upon the case of *Baboolal Dass v. Jamal Ally* (1). In that case, it was held by the Full Bench, that when a mortgagor, after a mortgage has been satisfied, sues for the property mortgaged, the case comes within cl. 15 of sec. (1), Act XIV of 1859, but when he sues for surplus collections which have been received by the mortgagee the case comes under cl. 16 of that section. That case was decided under Act XIV of 1859. Cl. 15 of sec. 1 of Act XIV of 1859 provided a period of sixty years for a suit against a mortgagee of any immoveable property for recovery of the same, and it was pointed out by Sir Barnes Peacock in the referring order that cl. 15 does not say that all suits against the mortgagee are to be so limited, but only suits against a mortgagee of any property moveable or immoveable, for the recovery of the same and the question before the Court was whether that applied merely to the matter which was pledged such as, land, or to money, which might be found, upon account, to have been received by the mortgagee in excess of the prin-

(1) 9 W. R. 187 (1868).

(2) I. L. R. 30 All. 225 (1908).

(3) I. L. R. 26 Bom. 661 (1902).

(4) 1 Bom. L. R. 859 (1899).

(1) 9 W. R. 187 (1868).

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principal and the interest. It was held that the latter claim, that is, the recovery of the surplus profits received by the mortgagee could not come under cl. 15, but fell under cl. 16 which provided for suits for which no other period of limitation was fixed. Art. 148 of the present Limitation Act provides that in a suit for redemption or for recovery of possession of immoveable property mortgaged the period is 60 years. Or. XXXIV, r. (7) of the present Code of Civil Procedure lays down that if, in a suit for redemption, the Plaintiff succeeds, the Court shall pass a decree ordering that an account be taken of what will be due to the Defendant for principal and interest on the mortgage, and for his costs of the suit, (if any) awarded to him on the day next herein after referred to. R. 9 lays down, "Notwithstanding anything herein before contained, if it appears upon taking the account referred to in r. 7 that nothing is due to the Defendant or that he has been overpaid the Court shall pass a decree directing the Defendant, if so required, to retransfer the property and to pay to the Plaintiff the amount which may be found due to him, and the Plaintiff, shall, if necessary be put in possession of the mortgaged property." The claim for recovery of the over-payment, i.e., the surplus profits received by the mortgagee is a relief which is part of a suit for redemption itself. That being so, the claim for recovery of the surplus profits would be included in a suit for redemption for which the limitation is provided by Art. 148 of the Limitation Act.

It is contended on behalf of the Appellant, that in that view, Art. 105 of the Limitation Act would be unnecessary. That article provides a period of limitation of three years to a suit by a mortgagor, after the mortgage has been satisfied, to recover the surplus collections received by the mortgagee and the date from which

the period runs is when the mortgagor re-enters on the mortgaged property. But there may be cases where the mortgagee has given up the mortgaged property after the mortgage-debt has been satisfied and the mortgagor has re-entered on the mortgage-property otherwise than by means of a suit for redemption. The mortgagor in such a case, has not to bring a suit either for redemption or for possession of the mortgaged property. But he may have to bring a suit for recovery of surplus collections received by the mortgagee, and to such a suit, we think Art. 105 would apply. That seems to be the view taken by the Allahabad High Court in *Ram Din v. Bhup Singh* (2).

We are also referred to the case of *Vinayak Shivrao Dighe v. Dattatraya Gopal* (3). There the mortgagor in a suit for redemption was directed to pay a certain sum to the mortgagee which was paid and the mortgagor obtained possession. On appeal by the mortgagee the amount was varied and an additional sum was directed to be paid which was also paid. The mortgagee then sued for recovery of the profits between the date on which the mortgagor obtained possession and the date on which he paid the full amount ordered by the Appellate Court. It was held that the matter was *res judicata* and the suit was barred, the question raised being one directly arising out of the mortgage transaction which was the subject of the suit for redemption. But that question does not arise here as in the present case, the claim for recovery of surplus profit has been made in the suit for redemption itself. In the case of *Venkatesh Gangadhar v. Pandurang Lukshuman Athni* (4), Jenkins, C. J., held that Art. 109 of the Limitation Act was applicable to the claim for re-

(2) I. L. R. 30 All. 225 (1908).

(3) I. L. R. 26 Bom. 661 (1902).

(4) 1 Bom. L. R. 858 (1899).

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covery of profits received by the mortgagee in that case, and that Art. 105 had no application. But there, it was not a suit for redemption, and the mortgagor's interest in the equity of redemption had been put an end to, before the suit was brought. Having regard to the provisions of Or. XXXIV, rr. 7 and 9 which provide expressly for recovery of the surplus profits received by the mortgagee in a suit for redemption we think that the period prescribed in Art. 148 for a suit for redemption will apply to the present case. That being so, the suit is not barred by limitation.

The appeal is, accordingly, dismissed with costs.

Appeal No. 1464 is dismissed without costs.

J. N. R.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 394 of 1921.

CHATTERJEA, J.	SATINDRA NATH
PEARSON, J.	BANERJEE, Plaintiff,
1921,	Petitioner,
Heard, 5 and	v.
6, July.	SHIVA PRASAD BHAKAT,
Judgment,	Defendant, Opposite
11, July.	Party.

Court Fees Act (VII of 1870), Sch. II, Art. 17—Court-fee payable in suit by person whose claim in respect of property attached in execution of decree has been rejected for default.

Under Art. 17, Sch. II of the Court Fees Act, a court-fee of Rs. 10 is payable upon the plaint in a suit by a person, whose claim to properties attached in execution of a decree has been dismissed for default, to set aside the decision.

An order dismissing a claim for default is an order within the meaning of Or. XXI, r. 63 of the Civil Procedure Code, and, subject to the result of a regular suit, is conclusive.

PHUL KUMARI v. GHANASHYAM (9) and NAGENDRA LAL v. FANI BHUSAN (8) *relied on.*

This was a Rule granted against an order of the Subordinate Judge of Burdwan, dated the 26th February 1921.

The facts of the case will appear from the judgment.

Babu Mahesh Chandra Banerjee for the Petitioner.

Babus Ram Charan Mitra and Ambica Pada Choudhuri for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The question raised in this Rule is whether an *ad valorem* Court-fee is payable upon the plaint in a suit by a person who had preferred a claim to properties attached in execution of a decree, which was rejected by the Court.

The Petitioner who was the Plaintiff in the suit paid a Court-fee of Rs. 10 for a declaration of his title to the properties, and annas 12 for an injunction.

It appears that when certain properties of the judgment-debtor were attached in execution of a decree for money by the Opposite Party Nos. 1 to 8, the Petitioner preferred a claim on the ground that the properties were purchased by him, and did not belong to the judgment-debtor. The 26th February 1921 was fixed as the date for hearing the claim. On that day a petition was put in on behalf of the claimant for time to enable him to produce his *kabala*. The decree-holder Opposite Party was present with his witnesses. The Court was of opinion that the petition was not a *bond fide* one and rejected it. From another order on the same day, it appears that nobody appeared for the claimant

(8) I. L. R. 45 Cal. 785 : s. c. 23 C. W. N. 375 (1918).

(9) I. L. R. 35 Cal. 202 : s. c. 12 C. W. N. 169 (P. C.) (1907).

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though repeatedly called. The order of the learned Subordinate Judge is as follows :—"The decree-holder Opposite Party is ready with pleader and witnesses. The petition of claim is rejected with costs and Rs. 8 as pleader's fee and the claim case No. 3 of 1920 be dismissed."

The first question is whether the order in the claim case was conclusive subject to the result of a regular suit as provided in Or. XXI, r. 63, C. P. C.

There are a large number of cases on the question whether one year's rule of limitation contained in Art. 11 of the Limitation Act is applicable to a suit brought by a person whose claim has been rejected without investigation. That question does not arise in the present case except in so far as it has a bearing upon the question whether an order rejecting a claim under such circumstances is conclusive subject to the result of a regular suit. The decisions on the point under the former Codes were numerous and they were not uniform. See the cases collected in *Kallar Singh v. Toril Kahlon* (1). See also *Rahim Bux v. Abdul Kader* (2).

In the case of *Jugal Kishore Marwari v. Ambica Devi* (3), where a claim preferred under Or. XXI, r. 58 was dismissed for non-prosecution and the property was sold, Mookerjee and Beachcroft, JJ., held that the only remedy of the claimant after his claim was dismissed under Or. XXI, r. 63 though for default was by a suit. The learned Judges observed "No doubt in relation to the question of limitation applicable to a suit of the description mentioned in r. 63, it has been held that Art. 11 of the second schedule of the Limitation Act does not apply if the application has been refused without an investigation on

the merits, *Kallar Singh v. Toril Kahlon* (1). Upon this point, however, there is a divergence of judicial opinion and there is weighty authority in support of the view that where an application has been dismissed, with or without investigation, a regular suit, if instituted, must be commenced within one year from the date of such order. *Gooroo Das v. Sona Monee* (4), *Sreemunto Hazrah v. Tajooddin* (5), *Tripura S onduree v. Ijjatounnissa* (6) and *Sadat Ali v. Ramdhone* (7). But it is not necessary for our present purpose to express any opinion upon this question. It is sufficient to hold that, on the face of r. 63 the order of refusal is plainly final till a regular suit has been instituted and successfully prosecuted.

In the case of *Nagendra Lal Choudhuri v. Fani Bhusan Das* (8), where the claim was rejected for default, the learned Judges referring to the change in the wording of Or. XXI, r. 63 as compared with that of sec. 283 of the Code of 1882, and the corresponding change in Art. 11 of the present Limitation Act, observed that the decisions under Art. 11 of the Limitation Act of 1877 are no longer of authority. They held that all that is now necessary is that a claim should be preferred under r. 58 and that there should be an order either allowing or rejecting it. The party against whom the order is made may then bring a suit in the language of r. 63 "to establish the right which he claims to the property in dispute," or in the language of Art. 11 of Sch. II of the Limitation Act, 1908, to "establish the right which he claims to the property comprised in the order," and the suit must be

(1) 1 C. W. N. 24 (1895).

(4) 20 W. R. 345 (1873).

(5) 21 W. R. 409 (1874).

(6) 24 W. R. 411 (1875).

(7) 12 C. L. B. 43 (1882).

(8) 1, L. B. 45 Cal. 785; s. c. 23 C. W. N. 375 (1913).

(1) 1 C. W. N. 24 (1895).

(2) 1, L. B. 32 Cal. 537 (1904).

(3) 16 C. W. N. 882 (1912).

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brought within the year allowed by the Art. 11 irrespective of whether any investigation took place or not.

It is clear therefore that an order dismissing a claim for default is an order within the meaning of Or. XXI, r. 63 and subject to the result of a regular suit, is conclusive.

In the case of *Phul Kumari v. Ghanashyam Misra* (9), where a claim having been rejected, a suit was brought for declaration of the Plaintiff's right to the property and for an injunction restraining the Defendant from executing his decree against the property claimed, it was held by the Judicial Committee reversing the decision of the Courts below that the suit was one under sec. 283, C. P. C., for which the proper Court-fee was that prescribed by sub-sec. (1) of Art. 17, Sch. II of the Court Fees Act; namely, Rs. 10 for a "suit to alter or set aside a summary decision or order of a Civil Court not established by Letters Patent." It does not appear that there was a dismissal for default in that case; but as pointed out in the case of *Nagendra Lal Choudhuri v. Fani Bhusan Das* (8), under the present Code any order rejecting a claim whether upon investigation or for default would come under the purview of Or. XXI, r. 63. And if that is so, the observations of the Judicial Committee referred to above would apply to either case.

There is no definition of "summary decision or order" in the Court-fees Act; but in the case of *Daya Chand Nemchand v. Hem Chand Dhuran Chand* (10), Sir M. R. Westropp, C. J., in delivering the opinion of the majority of the Full Bench said "In the absence of any definition in

the Court-Fees Act of the term "summary decision or order," we should rather be disposed to regard it as a decision or order not made in a regular suit or appeal." And further on he observed "Without positively binding ourselves to the proposition that every decision or order not made in a regular suit or appeal is a summary decision or order, we are clearly of opinion that decisions as to the removal or retention of attachments pronounced under sec. 246 of Act VIII of 1859 are summary decisions or orders."

No doubt the facts of that case are different from those of the present, as there was a *decision* in the claim case. We have referred to that case only for the meaning of the words "summary decisions or orders." If, as pointed out in that case, the words "summary decision or order" mean a decision or order not made in a regular suit or appeal, then the present case would fall within the words "summary order" made by the Court.

It is unnecessary, however, to rely upon the observations in that case. Having regard to the decision of the Judicial Committee in *Phul Kumari v. Ghanashyam* (9), as to the article of the Court-fees Act applicable to suits under sec. 283 of the Civil Procedure Code, and to the decision in *Nagendra Lal v. Fani Bhusan* (8), that the provisions of Or. XXI, r. 63 are applicable to all orders passed upon claims preferred under r. 58, whether upon investigation or for default, we think that the case falls under Art. 17, Sch. II of the Court-fees Act and that the proper Court-fee payable is Rs. 10.

We ought to point out, however, that the plaint in the present case is open to the same observations which were made

(8) I. L. R. 45 Cal. 785 : s. c. 28 C. W. N. 375 (1918).

(9) I. L. R. 35 Cal. 202 : s. c. 12 C. W. N. 109 (P. C.) (1907).

(10) I. L. R. 4 Bom. 515 (F. B.) (1880).

(8) I. L. R. 45 Cal. 785 : s. c. 19 C. W. N. 375 (1918).

(9) I. L. R. 35 Cal. 202 : s. c. 12 C. W. N. 109 (P. C.) (1907).

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by the Judicial Committee in the case of *Phul Kumari v. Ghanashyam* (9). But for the reasons given by their Lordships in that case, we think the suit may be treated as substantially one under Or. XXI, r. 63, and therefore falls under Art. 17, Sch. II of the Court-fees Act.

The Rule is made absolute and the order of the Court below is set aside.

No order as to costs.

S. C. M.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD BUCKMASTER. BHAIIDAS SHIVDAS,
LORD ATKINSON. Plaintiff, Appellant,
LORD CARMON. v.
SIR JOHN EDGE. BAI GULAB and anr.,
1921, Defendants,
25, October. Respondents.

Hindu Law—Will—Construction—“Malik,” if a term of art and imports full ownership—Trust, if valid, when subject-matter uncertain.

A Hindu testator gave the whole of his immoveable estate to his wife as “malik” and directed that she should leave the property to his two daughters in such manner as she might like:

Held—That the word “malik” taken in conjunction with the context indicated a clear intention to pass an absolute estate, and that even assuming it were intended to create a trust, the subject-matter of such trust was too uncertain.

The word “malik” is not a term of art, it does not necessarily define the quality of estate taken but the ownership of whatever that estate may be, but in the context of the present Will, it imported that the estate was absolute.

If words are used in a Hindu's Will conferring absolute ownership upon the wife, the wife enjoys the rights of ownership

without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended.

MUSSAMMAT SURAJMANI v. RABI NATH OJHA (1) referred to.

Appeal from a decree of the High Court, dated the 23rd March 1917, affirming a decree of Macleod, J., dated the 8th September 1916.

This appeal originally came before the Board in February 1921 when a preliminary objection was taken by the Appellant that the procedure in the lower Court was erroneous. That objection was upheld by their Lordships [vide *Bhaidas Shivdas v. Bai Gulab* (3)] and the question in issue now came before the Board for determination on the merits.

The case raised a question as to the construction of a Hindu Will. The Will in the case is sufficiently set out in their Lordships' judgment. At the time of his death the testator had a wife Laxmibai and two daughters Jamnabai and Diwali. Laxmibai took out probate of the testator's Will and was in exclusive possession of the property until her death in 1911. Diwali having died in 1906, Jamnabai was in possession, from 1911 until her death in 1914 after which her daughters Bai Gulab and Ratanbai came into possession. Ratanbai died in 1915 leaving Mohanji Jutha her only heir. Bhaidas Shivdas the widower and heir of Diwali thereupon brought his suit claiming a half share in the testator's estate.

Messrs. DeGruyther, K. C. and Parikh for the Appellant.—The law of intestacy in Gujrat is set out in *Mayne's Hindu Law*, paras. 614 and 615. Had the testator died

(1) L. R. 35 I. A. 17 : s. c. I. L. R. 30 All 84 ; 12 C. W. N. 231 (1907).

(3) L. R. 43 I. A. 181 : s. c. 25 C. W. N. 605 (1921).

(9) I. L. R. 35 Cal. 202 : s. c. 12 C. W. N. 169 (P. C.) (1907).

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intestate Laxmibai would only have taken a widow's estate. Daughters if surviving her would have taken absolute estate. The question is whether there is a gift over to the daughters or a power to the widow to appoint among the daughters. The correct translation of the Gujrati is doubtful.

[LORD BUCKMASTER.—If the Courts below have propounded the right question to themselves and have then considered the actual Gujrati words the Board would be unwilling to interfere.]

The testator's real intention was to keep out his brothers—a power of appointment is possible in a Hindu Will.

The fact that sec. 79 of the Indian Succession Act was excluded from the Hindu Wills Act does not preclude equity and good conscience from construing a Hindu Will according to the provisions of that section. The translation was not questioned in the first Court and could not be questioned later.

Sir G. R. Lowndes, K. C. and Mr. Raikes for the Respondents.—Meaning of "malik" was settled in *Musammal Surajmani v. Rabi Nath Ojha* (1). The intention to give a full heritable estate is clear. All Gujrati speaking judges consider an absolute estate was granted. If you accept the Appellant's contention, Laxmibai, if she were to adopt, would be unable to give anything to the adopted child. The Court of Appeal may check the translation. *Mutu Ramanadan Chettiar v. Vava Leevai Marakayar* (4).

Mr. DeGruyther replied.

Reference was also made to the following authorities: *Waghela Rajsanji v. Sheikh Masludin* (5), *Bai Motizahoo v. Bai*

Mamobai (6), *Parnall v. Parnall* (7), *Le Marchant v. Le Marchant* (8) and *Horwood v. West* (2).

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—This is an appeal against a decree, dated the 23rd March 1917, of the High Court of Judicature at Bombay (Appellate Civil Jurisdiction), affirming a decree, dated the 8th September 1916, of the High Court in its Ordinary Original Civil Jurisdiction.

The question raised for determination arises on the construction of the Will, dated the 6th August 1894, of one Nathoo Moolji who died on the 8th December 1894.

The Appellant is the husband of one of the two daughters of the testator, who pre-deceased her mother, the testator's widow. The Respondents claim under the other daughter who survived her mother.

At the date of the Will there were living the testator's widow, his two daughters, and the widow of a pre-deceased son. The two daughters were named Jannabai and Diwali. Diwali died on the 13th May 1906; and the testator's widow on the 15th August 1911.

In these circumstances the Appellant claims as the husband of Diwali that according to the true construction of the Will the two daughters took a vested interest in the testator's residuary estate, which was not divested by reason of the death of one of the daughters before the death of the widow. The history of the suit has been fully dealt with by their Lordships when this appeal was formerly before them, and need not be repeated.

The Will was made in the Gujrati

(1) L. R. 35 I. A. 17; s. c. I. L. R. 30 All. 84; 12 C. W. N. 231 (1907).

(4) L. R. 44 I. A. 21 at p. 27; s. c. I. L. R. 40 Mad. 116; 21 C. W. N. 521 (1916).

(5) L. R. 14 I. A. 89; s. c. I. L. R. 11 Bom. 551 (1887).

(2) 1 Simons and Stuart 387.

(6) L. R. 24 I. A. 93; s. c. L. C. W. N. 366 (1897).

(7) 9 Ch. Div. 96 (1878).

(8) 18 Eq. Cas. 414 (1874).

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language, and in the translation is divided into clauses. By cl. 2 the testator appoints his wife as his sole executrix. In the next clause, after stating that as he has no son he appoints his wife to be his heir; and the clause continues in these words :—

“ And I constitute her the owner. And as to whatever property there may remain after her death my wife shall leave the said property to my two daughters in such manner as she may like (either) by making a ‘ Will ’ or by making (some) other instrument. Of my two daughters one named Bai Jannabai was married to Shah Haridas Hemchand, but as he subsequently died she has now become a widow. To her and to (my) other daughter Bai Diwali who has been married to Shah Bhaidas Shivdas (*i.e.*) to both of them my wife shall give (my) property in such manner as (she) may like.”

By later clauses of the Will the testator referred to powers that he desired his wife to enjoy; for example, by cl. 6 he expressly states that he gives his wife authority to do what she thinks right with the profits and the ready moneys of a shop where he carried on business, and further to continue in partnership with the partners if she so desired. By cl. 18 he provides that after there have been defrayed out of the rents of certain specified immoveable property, the expenses in connection with a religious object, for which he had made provision, the wife should apply the surplus for her maintenance and use and for the maintenance and use of her daughters if they were living with her, and if the surplus were insufficient she should deal with the moveable and immoveable properties in such manner as she thought fit. By cl. 20, again, he gave express power to his wife to mortgage, lease, sell and use the properties. Finally by cl. 23 he provided that after the death of his wife his daughters should be named executrices, and he gave them authority to deal with or manage the whole of his property and effects. There is no dispute that the word

that was used in cl. 3 as the original word of gift was the word “ *malik* ” which could be appropriately used to constitute the wife absolute owner. It is not that the word is a “ term of art,” it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be; and in the context of the present Will their Lordships think the estate was absolute. At the time when the Will was executed it may well have been that whoever drew the Will was aware that at that time words of absolute gift in favour of a Hindoo widow might not be supposed capable of conferring upon her a power of alienation, for in the case of *Mussammatt Surajmani v. Rabi Nath Ojha* (1) which ultimately came before this Board, we find that the High Court had ruled :—

“ that under the Hindu law, as interpreted up to the present in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate, unless the power of alienation is conferred upon her in express terms.”

The decision in *Mussammatt Surajmani v. Rabi Nath Ojha* (1) showed that that provision was no longer sound and that if words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended. If cl. 3 stood by itself it would, their Lordships think, be difficult to dispute that whatever the testator desired with regard to the disposition of his property after the death of his wife he had not expressed his wishes in such a manner that they bound the property. The words under which the Appellant claims are words which only attach to whatever property there may remain after the death of the wife. Without for

(1) L. R. 35 I. A. 17; S. C. I. L. R. 30 All. 84; 12 C. W. N. 231 (1907).

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the moment considering whether the desire expressed by the testator is expressed in a form that makes her disposition of it mandatory or no, it is sufficient to say that if that clause stood alone the principle stated in the case of *Horwood v. West* (2), would be applicable to this Will as it would to a Will in England. The Vice-Chancellor says at p. 389 :—

“It is essential to the execution of a trust that the subject should be certain; and if this testator intended that his wife should, at her pleasure, during her life, dispose of the property which he left to her, and that his recommendation should extend only to what, if anything happened to remain of his property at her death undisposed of by her, then there is no trust to be administered by this Court.”

But the Appellant points out with considerable force that cl. 3 does not stand by itself; but that the clauses referred to, and most notably cls. 18 and 23, are in their terms inconsistent with the view that the provisions of cl. 3 constituted the wife the absolute owner. Their Lordships are very far from saying that there is not force in this argument; but so far as cl. 18 is concerned it should be remembered that even there there is a provision that the surplus, after the property has been used for maintenance in the manner suggested, is to remain with the wife for her maintenance and use, and power is given to her to deal with the immoveable or moveable property as she may think fit. Again, with regard to cl. 23, the appointment of the daughters as executrices of the property, if in fact there had been a gift to them after the widow's death, would be quite unnecessary. The only purpose for creating them executrices would on either hypothesis be to see that the religious purpose to which part of the property had been devoted and a certain beneficial trust given to the widow of the son should be carried

out. If and so far as they were absolute owners it had little value.

Their Lordships therefore think that these subsequent clauses in the Will are not sufficient to displace the language of cl. 3, fortified by the powers given in cl. 20, and by that language there is no trust created in favour of the two daughters of the testator. In forming this conclusion their Lordships have not considered the serious difficulty that is placed in the way of the Appellant by the judgments of the Court from which this appeal has proceeded. In the Court of Appeal one at least of the judges was thoroughly acquainted with the language in which this Will is drawn, and he took the view that the actual words used in cl. 3 suggesting how the property should be left after the death of the testator's widow were in themselves inadequate to do anything more than to express a wish and did not create an obligation. Their Lordships have not dealt with that part of the case, because in their opinion the matter is better decided upon the principle to which reference has already been made, *viz.* : even assuming it was intended to create a trust and the words were sufficient for that purpose the subject-matter on which the trust is to operate is by the terms of this Will too uncertain to enable the Court to give it administration.

For these reasons their Lordships are of opinion that this appeal must fail and ought to be dismissed with costs; the costs incurred in the Court below from the 13th March 1917, and of the appeal on the preliminary point that was argued before this hearing on the merits was reached, which were reserved, in their Lordships' opinion, should be costs in the appeal; and they will humbly advise His Majesty accordingly.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.

LORD DONEDIN.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

1921,

Heard, 14 and

15, February

Judgment, 19, April.

RAJA PEARY

MOHAN MUKERJI,

Appellant,

v.

MONOHAR

MUKERJI and ors.,

Respondents.

Shebait, purchasing debutter property at Court sale in the benami of his son for adequate price, if can keep his purchase—Fiduciary relationship, purchase by person standing in, valid if full disclosure made to cestui que trust—Secret purchase in another's name invalid.

The grounds for removing a shebait from his office may not be identical with those upon which a trustee would be removed in England. The close intermingling of duties and personal interest which together make up the office of shebait may well prevent the closeness of the analogy, but as part of the office, it is indisputable that there are duties which must be performed, that the estate does need to be safeguarded and kept in proper custody, and if it be found that a man in the exercise of his duties has put himself in a position in which the Court thinks that the obligation of his office can no longer be faithfully discharged, that is sufficient ground for his removal.

A trustee who is not a trustee for sale may acquire from beneficiaries who are sui juris an estate in which they are interested, but he can only do this if he has made the fullest disclosure to them of all the relevant and material facts within his knowledge affecting or that might affect the value and condition of the estate, and the parties are at arm's length, the cestui qui trust knowing that he is dealing with the trustee. Otherwise the purchase is bad and it is bad because any person who occupies a fiduciary rela-

tionship may be able by virtue of his position to acquire information with regard to the trust estate which he is not permitted to use for his own benefit.

This rule is of general application to dealings by persons with an estate in regard to which they stand in a fiduciary relationship and therefore governs purchases of debutter estate by a shebait.

The rule laid down in *LEWIS v. HILLMAN* (2) that even if an attorney or agent can show that he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase can stand, applied to the purchase in this case by a shebait at a Court sale in the benami of his son, and it was declared invalid in spite of the fact that the price fetched was abundant.

These were consolidated appeals from a judgment, dated the 24th July 1919, of the High Court at Fort William in Bengal, reversing a judgment, dated the 23rd December 1915, of the second Court of the Subordinate Judge of Hooghly.

The facts of the case sufficiently appear from the judgment.

Sir John Simon, K. C. (with Messrs. L. DeGruyther, K. C. and J. M. Parikh) for the Appellant.—It has been questioned whether the purchase was not benami for the Raja, and was or was not the Raja in the position of a trustee at that time. This action was brought to remove the Raja from Shebaitship and to get a receiver appointed. The Subordinate Judge's finding is right and the High Court is wrong.

[LORD BUCKMASTER.—The question is whether when he was trustee he had not access to information about the property, which was not known to the public.]

My point is that the sale is not a sale by the Raja as trustee. There is no doubt

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that it is the Raja's own private money that was used to purchase it.

There is a consensus of opinion that the price he had paid was an exorbitant one. He was fighting to save this property while the sale has been confirmed.

The High Court struck out the sale on the fact that I was a trustee. My view is that the sale is not *ipso facto* void, but could be set aside if the Court could discover something wrong—or if there was a real duty on the trustee which was in itself a bar *Thomson v. Bastwood* (3), (Lord Cairn's judgment), Lord Macnaghten refers to this in *Dougan v. Macpherson* (4).

[LORD BUCKMASTER.—The law in India seems to be different. In the case of a mortgage sale it interposes a special protection as against the mortgagee.]

Civil Procedure Code, Sec. 1, Or. XXI. rr. 72 and 64 ff.

[LORD SHAW.—R. 73 is added after r. 72 to make the matter doubly sure; to keep away any one who has an interest in keeping the price down. "Any one connected with the Court proceedings."]

[LORD BUCKMASTER.—Is it not the duty of the trustee to give all information?]

Would it not do if I make good my main contention that the property has been out of my hands? (R. 66, Or. XXII).

It is not that there is no sale, but that the sale could be set aside. The circumstances are similar to those in Bengal Tenancy Act, sec. 173, sub-sec. (2) about judgment-debtors referred to by the Subordinate Judge. *Ploverright v. Lambert* (5) and *Nugent v. Nugent* (1).

[Mr. Dunne referred to *Nugent v. Nugent* (1) on appeal.]
Strafford v. Turynen (6).

The scheme in India seems to be that the particular connection of the Shebaitship is broken when the property is sold by Court, *Allen v. Gillette* (7), cited in the High Court's judgment is exactly similar to this case.

Refers to findings by the Court that the Raja has paid far more than its real value.

[LORD SHAW.—Is there any way under the Code by which he could have applied for and got permission to bid?]

No.

If the transaction is not void from the beginning, then no sufficient ground has been shown to avoid the sale.

The proper order to be made brings in a complication. The order is that an account is to be taken, and the Raja's personal liability is to be computed later:

First: We resisted Bijoy 31 years ago. We have exercised the Shebaitship for the last 28 years;

Second: We have resisted Bijoy's sons' claims;

Third: We denied the trust character of some promissory notes. Since 1898 we ourselves took steps to have the notes declared trust property.

The above points must now be specially noticed.

Fourth: It was alleged there were funds to pay the execution creditor. 'This is not true and has not been proved.

Fifth: The accounts were produced.

These are the alleged grounds of misconduct. Mayne's Hindu Law, sec. 519. I have a complete answer to these allegations in the plaint. *Pearý Mohun v. Norendra Nath* (8), per Lord Macnaghten.

Mr. A. M. Dunne, K. C. (with Mr. Kenworthy Brown) for the Respondent.—This is merely a question of fact. It is the duty of the trustee to protect the *cestui*

(1) [1907] 2 Ch. 292; on app. [1908] 1 Ch. 546.

(3) 2 App. Cas. 236 (1877).

(4) [1902] App. Cas. 197 at p. 204.

(5) 52 L. J. 642 at pp. 652, 653 (1885).

(6) [1822] Jacob 418 at p. 421.

(7) 127 U. S. 559 (1887).

(8) L. R. 37 I. A. 88; s. o. I. L. R. 37 Cal. 229; 14 O. W. N. 261 (1909).

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que trust. Both the Courts in India have found that the Raja had hidden the fact that he was the purchaser. In the case of *Macpherson v. Watt* (9), this fact was held sufficient to upset the sale.

Mr. DeGruyther, K. C.—Your Lordships would hear me only on the form of the order.

[LORD BUCKMASTER.—Yes, else we would not have called on Mr. Dunne at all.]

The question of taking a general account does not arise, as there is no prayer for it. Again the Courts have found that the Raja had carried out his trust properly. The suit was instituted in 1913. Is the Raja when he purchases in the name of a son who is a member of the Raja's undivided family concealing that he has some interest in the property? The moment the purchase-money was paid into Court, the estate began having the benefit of the money and so no order for mesne profits should be made. There is also no account for any money due from the Appellant. The order to take an account would be a very roving one.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—Many questions were originally involved in the dispute which has given rise to this appeal, but of these two only remain. The first relates to the continuance of the Appellant Raja Peary Mohan Mukerji in the office of Shebait to the debottar estate of Sri Sri Iswar Gopaleswar Shiva Thakur and Sri Sri Iswar Shridhar Thakur, and the second to the purchase in January 1913, of a certain Lot known as Lot Bahirgora, which was sold in execution under circumstances to which their Lordships will briefly refer.

By his Will, dated the 11th September

(9) 3 App. Cas. 254 (1877).

1840, Jaga Mohan Mukerji dedicated certain properties to the worship of the two Thakurs established by him, for the annual celebration of the Durga Puja, the Sradh of ancestors, and other pious usages, the Will providing for the order of succession to the office of the Shebait among the testator's own descendants. The testator died shortly after the execution of his Will, and in September of 1890 the succession to the Shebaitship opened, owing to the death of the then Shebait. Disputes arose as to who was the true successor, which resulted in a decree of the 29th January 1894 that one Bijoy Krishna was the rightful Shebait, but on the day of the decree he died. Further litigation then ensued between the sons of Bijoy Krishna and the Raja who is the Appellant in the first of these appeals, which ultimately resulted in a decree of the 30th June 1903, made by the Subordinate Judge in favour of the sons of Bijoy Krishna for Rs. 45,960, which sum it was ordered should be recovered by the Plaintiffs out of the debottar estate in the hands of the Raja as its Shebait. Appeals were taken from this judgment to the High Court, and again from the High Court to His Majesty in Council, but these appeals failed. Execution proceedings were then instituted in order to secure a sale out of the debottar estate of the Lot that is now in dispute, and on the 14th January 1913, the said Lot was sold at a public Court-sale for Rs. 1,56,600 to the Appellant in the second appeal, who is the son of the Raja.

On the 17th February 1913, proceedings were taken by Monohar Mukerji, who is the first Respondent to these appeals, asking among other things for the removal of the Raja from the office of Shebait and for an order to set aside the purchase of the estate. The Subordinate Judge dismissed the suit, but he held, contrary to the contention of the Raja's son, that the pur-

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chase was benami and made with the Raja's money for his benefit. An appeal was taken from the decree following this judgment to the High Court of Calcutta and was allowed. The High Court supported the view that the sale was in fact benami for the Raja who held a fiduciary position in relation to the estate, and they held that in these circumstances the purchase could not be supported. They also decided that the Raja should cease to be Shebait and that the management of the estate should be vested in a Receiver to be appointed by the Court. A decree was accordingly drawn up carrying out these views, and from this decree both the Raja and his son have brought the present appeals, which have been consolidated by an Order in Council.

Upon the question of the removal of the Raja, the learned Subordinate Judge thought that there was no sufficient charge of misconduct to justify his removal; but the High Court took a different view, and thought that the protracted litigations by which the estate had become heavily burdened with debts, and the circumstances associated with the claims which he was seeking to establish against the estate for litigation expenses, were such as to render it undesirable that he should continue in the office. They also found that the purchase could not be sustained. Their Lordships are not prepared to interfere with these conclusions. The grounds for removing a Shebait from his office may not be identical with those upon which a trustee would be removed in this country. The close intermingling of duties and personal interest which together make up the office of Shebait may well prevent the closeness of the analogy, but as part of the office it is indisputable that there are duties which must be performed, that the estate does need to be safeguarded and kept in proper custody, and if it be found that

a man in the exercise of his duties has put himself in a position in which the Court thinks that the obligations of his office can no longer be faithfully discharged, that is sufficient ground for his removal. It is this that forms the foundation of the judgment of the High Court, and the Appellant has not satisfied their Lordships that the facts were misinterpreted or the reasoning unsound.

Upon the remaining question also their Lordships think that the High Court was right. The argument in favour of the Appellant here also turns upon the dissimilarity between the office of Shebait and the ordinary office of a trustee. A trustee for sale cannot purchase; he cannot purchase because the same person cannot be both vendor and purchaser, and he who acts for another cannot also act for himself. But even if he be not a trustee for sale, if in any capacity he is trustee of the estate, although his incapacity to buy is not absolute and is subject to different limitations it is equally well established. A trustee may indeed acquire from beneficiaries who are *sui juris* an estate in which they are interested, but he can only do this if he has made the fullest disclosure to them of all the relevant and material facts within his knowledge affecting or that might affect the value and condition of the estate and the parties are at arm's length, the *cestui que trust* knowing that he is dealing with the trustee. Otherwise the purchase is bad, and it is bad because any person who occupies a fiduciary relationship may be able by virtue of his position to acquire information with regard to the trust estate which he is not permitted to use for his own benefit. Their Lordships recognize the force of the argument that points out the dissimilarity between a Shebait and trustees to whom this rule applies. There is no doubt that the word "trustee"

RAJA PEARY MOHAN MUKERJI v. MONOHAR MUKERJI.

covers a very large number of relationships, involving different obligations; the word "trust," therefore, may be so used that it is intended to apply only to one class of such duties; and it follows that rules and decisions which depend upon the special conditions attached to the particular class would not of necessity apply to another where these conditions did not exist. The rule forbidding the purchase of an estate by a person who stands in regard to his dealings with it in a fiduciary relationship is, however, general in its application. In the case of *Nugent v. Nugent* (1), it was held that a Receiver appointed by the Court cannot purchase the property of which he is Receiver without the leave of the Court, even where the sale is not made in the action in which he was appointed, but by a mortgagee selling with leave outside the suit. Their Lordships think that this was a correct decision and shows the wide area of dispute which is covered by the rule.

Further, in the present case it is now established by two concurrent findings of fact that the Raja purchased the property benami in the name of his son, and by this means concealed the fact that he was the real purchaser; their Lordships bear in mind that such classes of purchase are very common in India and are due to many considerations which may not find their counterpart here, yet none the less they can easily be made a cloak and cover for improper and even dishonest transactions, and they think the rule laid down by Lord St. Leonards in *Lewis v. Hillman* (2) that even if an attorney or agent can show that he is entitled to purchase, yet if instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as

that can stand for a single moment, should apply to this case.

Their Lordships have not overlooked the fact that in the present instance the purchase was for an abundant price, one that is said to be largely above its market value, but such considerations cannot have weight where the purchase is challenged upon the grounds in the present suit.

It is unnecessary to examine further in detail the law upon this matter, for it is fully, and in their Lordships' opinion accurately, analysed in the judgment of the High Court, where the relevant authorities are quoted and properly applied. They think, therefore, that this appeal must fail and that an order must be made declaring that the purchase by the second Appellant was invalid and that proper and necessary steps should be taken to secure the property; and that the first Appellant is entitled, subject as herein mentioned, to repayment of the purchase money. An account should be directed showing what, if anything, is due from the first Appellant to the estate, and such money should be deducted from the purchase moneys, the balance, if any, of the moneys in Court to be paid out and the first Appellant to have a charge on the estate for such sum. The Appellants will pay the costs of the appeals.

They will humbly advise His Majesty to this effect.

Solicitor: *Mr. Edward Dalgado* for the Appellants.

Solicitors: *Messrs. Vallance and Vallance* for the Respondents.

R. M. P.

(1) [1857] 2 Ch. 292; on app. [1808] 1 Ch. 548.

(2) 3 H. L. C. (1852).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECISIONS

Nos. 801 AND 802 OF 1919.

MOOKERJEE, C. J. FLETCHER, J. 1920, 27, July.	}	SARWATI FAIJUNNESSA, Plaintiff, Appellant, v. RAMTARAN CHOWDHURY and ors., Defendants, Respondents.
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Bengal Tenancy Act (VIII of 1885), sec. 15, omission by heirs of a tenure-holder to give the prescribed notice to the landlord, if entitles the landlord to recognize one of the heirs as the representative of the tenancy—Sale of entire tenure in execution of a rent decree obtained against the said representative, if affects the rights of the other heirs

On the death of a permanent tenure-holder his heirs did not give the notice under sec. 15, Bengal Tenancy Act, to the landlord. The landlord, however, chose to recognize one of the heirs as the representative of the tenancy and obtained a rent decree against him alone. In execution of that decree the tenure was sold, and the other heirs brought a suit for recovery of their shares saying that their interest in the tenure was unaffected by the sale :

Held—That the shares of the heirs who were not parties to the rent decree did not pass under the sale, and only the right, title and interest of the tenant who was the sole Defendant in the rent suit passed. It is not sufficient to show that the landlord has chosen to obtain a decree for rent against one out of several heirs. It has to be established that all the tenants have held out one of them as their representative in their transactions with the landlord.

NETAI v. HARI (1), JEO LAL v. GUNGA (2), RUPNARAIN v. JUGGO (3) and ANANDA v. HARIDAS (4) and other cases referred to.

Failure on the part of heirs to comply

(1) I. L. R. 28 Cal 677 (1899).

(2) I. L. R. 10 Cal 446 (1884).

(3) 10 W. R. 804 (1888).

(4) I. L. R. 27 Cal. 545 (1900).

with the requirements of sec. 15, Bengal Tenancy Act, does not necessarily entitle the landlord to treat one of the several heirs of the original tenure-holder as representative of the tenancy.

KHETTER MOHAN v. PRAN KRISTO (12) distinguished.

This was an appeal from a decision of C. Sells, Esq., District Judge, Chittagong, dated 28th November 1918, affirming that of Babu Aswini Kumar Das, Munsif, Satkania, dated 24th May 1917.

A permanent tenure belonged to one Abdul Rashid. After his death no notice under sec. 15 of the Bengal Tenancy Act was given to the landlord by his successors. The landlord chose to treat Abdul Rashid's son Wahed as the representative of the tenancy and his name was entered in the record-of-rights as the sole possessor in respect of these lands. In a suit for rent against Wahed alone, a decree was passed and the tenure was sold in execution. Thereupon Abdul Rashid's daughter and daughter-in-law sued for recovery of their shares of the lands. The Court of first instance held that as the Plaintiffs had allowed Wahed to represent the ownership of the tenure in their transactions with the landlord they had no right to complain if any untoward consequences followed. On appeal the District Judge confirmed that decision of dismissal. Hence the present appeal to the High Court.

Babus Surendra Chandra Sen, D. L. Kastagir, Chandra Sekhar Sen and Paresh Chandra Sen for the Appellant.

Babu Norendra Kumar Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, C. J.—These are appeals by the Plaintiffs in two suits for recovery of joint possession of land.

(12) 3 C. W. N. 371 (1899).

SRIMATI FAIJUNNESSA v. RAMTARAN CHOWDHURY.

The land admittedly belonged at one time to Abdul Rashid. The Plaintiff in one of these suits is one of his daughters, the Plaintiff in the other suit is one of his daughters-in-law. Their contention is that their interest in the tenure has not been affected by a sale held on the 7th August 1906 in execution of a decree for rent obtained against Abdul Wahed, one of the sons of the original tenure-holder Abdul Rashid.

The Courts below have dismissed the suits. The Court of first instance found that the claim was not barred by limitation, but that the circumstances indicated that the Plaintiffs had allowed Abdul Wahed to represent the ownership of the tenure in their transactions with the landlord, and that consequently they had no right to complain if any untoward consequences followed. Upon appeal, the District Judge has confirmed the decrees of dismissal, although he has not accepted all the findings of the Court of first instance. He has held that Abdul Wahed was not the recorded tenant, but has added that even though he was not the recorded tenant, the very fact that rent decrees were obtained against him shows that he was recognized by the landlord as the tenant, and that consequently the non-registration of his name was without significance. The District Judge has further laid stress on the circumstance that the name of Abdul Wahed was entered in the record-of-rights as the sole possessor in respect of these lands.

On the present appeal, it has been contended that the facts found by the District Judge make it impossible for the Defendants, the execution-purchasers, to contend successfully that they have acquired a right to the shares claimed by the Plaintiffs. The argument in substance is that the principle of representation has no application to this case, and that as Abdul

Wahed alone was a party to the rent suit, only his right, title and interest have passed under the sale, leaving unaffected the interest of the Plaintiffs. We are of opinion that this contention is well-founded and must prevail.

In order to entitle the execution-purchaser to invoke the aid of the principle of representation enunciated in the case of *Netai Bihary Shaha Pramanick v. Hari Gobinda Saha* (1) which followed the rule recognised in *Jeo Lal v. Gunga Pershad* (2), it is not sufficient to show that the landlord has chosen to obtain a decree for rent against one out of several heirs. It has to be established that all the tenants have held out one of them as their representative in their transactions with the landlord. If they have so held out one of them to represent them in the matter of the tenancy, they cannot complain if a decree for rent is obtained by the landlord against that representative, and the entire tenancy brought to sale in execution thereof; such co-owners would be affected by the sale even though they were not parties to the decree *Rupnarain v. Juggo* (3), *Ananda v. Haridas* (4), *Asok v. Karim* (5), *Chamatkari v. Triguna* (6), *Budayar Rahaman v. Karam Ali* (7), *Doorgadhur v. Huromohinee* (8), *Bejoy v. Rajendra* (9), *Afraz Mollah v. Kulsuhunnessa Bibi* (10) and *Manurattan v. Harnath* (11).

In the case before us, no reason has been assigned why the landlord should have

(1) I. L. R. 28 Cal. 677 (1899)

(2) I. L. R. 10 Cal. 996 (1884).

(3) 10 W. R. 304 (1868).

(4) I. L. R. 27 Cal. 545 (1900).

(5) 9 C. W. N. 848 (1905)

(6) 17 C. W. N. 544 (1913)

(7) 18 C. L. J. 271 (1913).

(8) 18 C. W. N. 270 (1888)

(9) 9 C. L. J. 479 (1902).

(10) 4 C. L. J. 68 (1905)

(11) 1 C. L. J. 500 (514) (1901).

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brought the suit for rent against one out of several representatives of the original tenant. On the other hand, the facts found in the judgment of the Court of first instance make it abundantly clear that if the slightest enquiry had been made, the landlord would have discovered that there were other heirs than the person whom he intended to sue. Reference has finally been made to the provisions of sec. 15 of the Bengal Tenancy Act which prescribes the procedure to be followed by persons who have succeeded to a permanent tenure. It has been suggested that as the Plaintiffs did not appear to have given the requisite notice under that section, they are debarred from relief in the present suits. We are of opinion that there is no foundation for this contention. Failure on the part of heirs to comply with the requirements of sec. 15, does not necessarily entitle the landlord to treat one of the several heirs of the original tenure-holders as representative of the tenancy. The case of *Khetter v. Pran Kristo* (12) is clearly distinguishable; the objection as to defect of parties was raised in the rent suit and no question arose as to the effect of the decree which might be made therein. In our opinion, upon the facts found by the District Judge, which we have summarised above, there is no answer to the claim of the Plaintiffs.

The result is that these appeals are allowed, the decrees of the District Judge set aside and the suits decreed with costs in all the Courts.

FLETCHER, J.—I agree.

J. N. R. Appeal decreed with costs.

(12) 3 O. W. N. 371 (1899).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES

No. 137 OF 1918

AND

No. 135 OF 1919.

RICHARDSON, J.

GREAVES, J.

1920,

25, May.

MANMOTH NATH
MULLICK, Defendant,
Appellant,
v.
MAHAMED SOLEMAN,
Plaintiff, Respondent.

Act XI of 1859, secs. 2 and 3—Bengal Act (VII of 1868)—Tenures in Dihi Panchannogram—Board's Notification regarding time for sale, effect of—Sale for arrears of revenue when premature and ultra vires—Date of payment of revenue.

The effect of the Notification of the Board of Revenue, dated the 6th October 1871 is that no holding can be sold till after the 28th June next after the first day of the month following the month in which the revenue or rent should have been paid.

The date on which the revenue is payable depends primarily not on general or administrative considerations such as the course of business in the Collectorate or the mode in which the accounts are kept but on the contract between the parties.

Where a tenure was held under a kabuliya, dated the 10th November 1862, containing a stipulation to pay rent year by year in Dihi Panchannogram to which by virtue of Bengal Act VII of 1868, Act XI of 1859 was applicable, and the tenure was sold for arrears of revenue of 1914 and 1915 on the 17th May 1915, it was held that the sale was premature and ultra vires and conferred no title on the purchaser as the current demand for 1914-1915 was not payable till the 10th November 1914, so that the tenure could not be sold before the 28th June 1915.

Haji BUKSHI ELAHI v. DURLAV CHANDRA KAR (1) followed.

(1) I. L. R. 39 Cal. 991 : s. c. 16 C. W. N. 842 (P. C.) (1912).

MANMOTHO NATH MULLICK v. MAHAMED SOLEMAN.

This was an appeal against the decree of Babu Amulya Charan Ghose, second Subordinate Judge of Zillah 24-Per-gannahs, dated the 31st of January 1918.

The facts of the case will appear from the judgment.

The Hon'ble the Advocate-General, Mr. T. C. P. Gibbons and Babus Joges Chandra Roy, Sarat Chandra Mukherjee, Lal Mohan Ghose and Narendra Nath Mukherjee for the Appellant.

Mr. B. Chakravarty and Babus Ram Chandra Majumdar and Bijon Kumar Mukherjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

RICHARDSON, J. —The Plaintiff in the two suits out of which these appeals arise purchased holding No. 20-A in Mehal Panchannogram in the 24-Pergannahs at a sale for arrears of revenue or rent held under Act VII of 1868, which incorporates the provisions of the Bengal Revenue Sales Act (XI of 1859). The holding is a tenure within Act VII of 1868 and the Defendant in each suit is an under-tenure-holder in occupation of lands comprised in the holding. Appeal No. 135 relates to Suit No. 20 of the Court below and Appeal No. 137 to Suit No. 19.

The holding was sold on the 17th May 1915, for an arrear of Rs. 6-10-5 and the price paid by the Plaintiff was Rs. 8,900.

The suits were brought to vacate the under-tenure of the Defendants under sec. 12 of the Act of 1868 as incumbrances imposed upon the tenure after its creation or after the time of settlement. The Defendants contend in the first place that the sale was invalid inasmuch as the Collector had no authority under the law to sell the tenure when he did, and in the second place that their under-tenures are within the first or the third exception to sec. 12 and therefore protected. Before

us the plea that the sale was brought about by collusion between the purchaser and the defaulter, was in effect abandoned. The Plaintiff won in the Court below and the Defendants have appealed.

The point of the first defence is whether the sale was premature and it turns on the application of the Privy Council's decision in *Haji Bukshi Elahi v. Durlav Chandra Kar* (1) to the facts of the present case. Their Lordships dealt with the effect of the two Acts and of the Board's Notification of 6th October 1871, issued under sec. 3 of the Act of 1859, in relation to the time at which these holdings in Panchannogram become saleable for arrears. The result is that no holding can be sold till after the 28th June next after the first day of the month following the month in which the revenue or rent should have been paid.

The rents of the holdings are payable annually and the result is arrived at in this way. Determine the day on which the rent is annually payable. If not paid on or before that date the rent is in arrear on the first day of the following month (Act XI of 1859, sec. 2). Under the Board's Notification of 1871, the tenure-holder may save his tenure by paying the arrear on or before the 28th June next following. It is not till after that date has passed without the arrear being paid that the holding becomes saleable at public auction to the highest bidder.

In the case cited, the tenure-holder's engagement or *kabuliyat* required him to pay his rent "within the 28th day of June every year." It was held that the rent so payable in any year was not in arrear till July of that year and the holding could not be sold till after June 28th of the following year.

The first question to be determined,

(1) I. L. R. 39 Cal. 981 : s. c. 16 C. W. N. 842 P. C.) (1912).

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therefore, is on what day the rent in the present case was payable.

For the Plaintiff it is said that the rent was payable annually according to the Bengali year and reliance is placed on the evidence of the Collectorate Record-keeper called by the Defendants, who says that "the rent of this Panchannogram mahal is generally collected according to the Bengali year." In the *jama wasil baki* of the holding (Ex. A), the years are entered as 1911-12, 1912-13 and so on. The entries may refer either to the financial year ending on the 31st March, or to the Bengali year ending about the middle of April. It is immaterial which of these years is intended. The account shows that there was nothing due at the close of 1912-13 (or 1319 B. S.). The year 1913-14 or (1320 B. S.) opened with a "current demand" of Rs. 6-10-5 and no arrear demand. The "current demand" for that year was paid on 23rd March 1914. Accordingly 1914-15 (or 1321 B. S.) also opened with no entry in the arrear column and an entry of Rs. 6-10-5 in the column provided for the current demand. This demand was not paid on 28th June 1914, or later and the holding was sold in consequence in May 1915. If, as is argued for the Plaintiff, the amount became due and payable on the 1st April 1914, or the 1st Baisakh 1321, the rent was in arrear on 1st May 1914, and the Collector was at liberty to sell it after June 28th of the same year. If, on the other hand, the amount became due and payable in or after June 1914, the holding could not be sold till after 28th June 1915.

As the Privy Council point out, the date on which the amount was payable depends primarily, not on general or administrative considerations, such as the course of business in the Collectorate or the mode in which the accounts are kept, but on the contract between the parties. In the pre-

sent case that contract is embodied in a *kabuliyat*, dated 10th November 1862, which is in the following terms:—

"This deed of *kabuliyat* is executed by Sayad Abdulali (a former tenure-holder) to the following effect:—'That I have got a permanent *maurashi patta* in respect of lands measuring 17 bighas 5 katas 4 chataks and 10 gandas acknowledging as yearly rent thereof Rs. 20-12 annas 4 pies. I shall pay the rent year by year. Accordingly on receiving a *patta*, I execute this *kabuliyat*.' Finis 10th November 1862."

The original holding appears to have been split up. Holding No. 20-A comprises about a third of the original area and is responsible for an aliquot share of the rent.

It will be observed that the *kabuliyat* bears an English date and that it does not expressly mention the date on which the rent is due to be paid each year. There seems no reason why it should refer to the Bengali year or the financial year or the English calendar year, rather than to the year beginning on the date it bears, the 10th November and ending on the 9th November of the following year, which may be called the year of the tenancy. The meaning of the words as they stand is presumably that the rent should be paid year by year on the 10th November of each year. If that be so, the account would show that the rent due on the 10th November 1913, was paid on the 23rd March 1914, and that the current demand for 1914-15 was not payable till the 10th November 1914. The rent, therefore, was not in arrear till the 1st December 1914, and the Collector was without authority to sell before the 28th June 1915. Accordingly, the sale held in May 1915, was invalid and *ultra vires* and conferred no right on the Plaintiff, as the purchaser at the sale, to vacate these under-tenures.

If that view be right, the Defendants

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succeed on their first contention and it becomes unnecessary for us to consider whether the Defendants' under-tenure is within any of the exceptions to sec. 12 of the Act of 1868, a question with which the Court below seems to have dealt somewhat cursorily.

It may be added that according to the sale notice issued on 14th April 1915, under sec. 7 of the Act of 1859 (Ex. 15), the sale was held "for the realization of the Government Revenue for the year 1320 B. S. which was payable on the 28th July (June 1914)." On a strict construction of these words, the result would be the same as that already arrived at. The revenue, if payable on the 28th July, was in arrear on the 1st August 1914 and the holding could not be sold till after 28th June 1915. But it is probable that the notice means that the 28th July or the 28th June, was the last day for the payment of revenue which was previously in arrear. That is to say it was assumed that the revenue was due for the Bengali year 1320 and that it was payable on the 1st Baisakh 1321, an assumption, which in the view I take is inconsistent with the *kabuliyat*.

The appeals should be allowed with costs in this Court and the Court below.

GREAVES, J.—I agree.

RICHARDSON and GREAVES, JJ.—We assess the hearing fee in Appeal No. 135 at one hundred and fifty rupees.

S. C. C.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1165 OF 1919.

CHATTERJEA, J.
SUMRAWARDY, J.

1921,
15, March.

BANKA BHARI GHOSH,
Defendant, Appellant,
v.

MADAN MOHAN ROY,
Plaintiff, Respondent.

Suit for rent—Onus for proportionate abatement

of rent on the ground of eviction from a portion of the land by a person not having a title paramount—"Eviction by title paramount," meaning of—Physical dispossession, if necessary to amount to eviction—Suit by stranger against tenant, and attornment by latter to former in respect of a portion of the tenure under Court's decree—Onus to prove eviction by title paramount, if on landlord.

An execution purchaser of some decretal lands obtained delivery of khas possession of the lands through Court and let out a portion thereof to B. Subsequently the Government settled with a third party some lands including a portion of the lands let out by the said execution purchaser. The Government lessee on the strength of the settlement sued B alone for recovery of the said lands and got a decree which provided that being a bonâ fide tenant B should not be ejected but should pay rent to the Government lessee in respect of the lands of which he was in possession. Subsequently the aforesaid execution purchaser brought a suit for rent against B, who claimed proportionate abatement of rent in respect of the said portion:

Held—That in order to be entitled to proportionate abatement of rent, forcible expulsion is not necessary, nor is it necessary that the tenant should actually go out of possession, and if, upon a claim being made by a person with a title paramount, he consents by an attornment to such person to change the title under which he holds or enters into a new arrangement for holding under him, this will be equivalent to an eviction and a fresh taking. But an eviction, whether actual or constructive, must be by a party with a title paramount. The Government lessee had no doubt obtained a decree against B, but that was not sufficient to show that he had a title superior to that of the execution purchaser. Nor was the onus to prove that the Government lessee had no title shifted on the execution purchaser in consequence of such a decree.

BANKA BEHARI GHOSH v. MADAN MOHAN ROY.

RANI DASSI v. ASUTOSH ROY CHOUDEHURY (1) and NOORIJAN SARDAR v. BIMOLA SUNDARI GUPTA (2) distinguished.

"Eviction by title paramount" means eviction by a title superior to the titles both of lessor and lessee, against which neither is enabled to make a defence.

NEALE v. MACKENZIE (3), SYED MUKHTAR AHMAD v. RANI SUNDAR KOER (4) and RUNG LALL SINGH v. LALLA ROODUR PERSHAD (5) referred to.

This was an appeal against the decree of R. F. Jack, Esq., District Judge of Zillah Nadia, dated the 31st of May 1919, affirming the decree of Babu Ananda Kisore Dutta Roy, Subordinate Judge of that District, dated the 13th of December 1917.

The facts of the case will appear from the judgment.

Babus Brajalal Chuckerbutty and Susil Kumar Bose for the Appellant.

Babus Mohendra Nath Roy and Hemendra Nath Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for rent. The defence was that the Defendant had been ejected from a portion of the land by a title paramount and that he was, therefore, entitled to a proportionate abatement of rent.

It appears that the Administrator-General of Bengal representing the estate of Kumar Indra Chundra Singha Bahadur brought a suit for possession in respect of the land the rent of which is in dispute in the present suit, and certain other lands, against certain persons representing the estate of one Haripada Shaha and who may

be referred to in this judgment as the "Shahas": He claimed the land as appertaining to his estate Sujapur. The Shahas claimed the land as appertaining to their village Juranpur. The suit, however, was decreed and Madan Mohan Roy (the Plaintiff in the present suit) purchased the decree and the decretal land from the decree-holder, and in execution of the decree obtained delivery of possession of the land through Court. While in *lhas* possession of the decretal land, he let out 279 bighas out of the same to the Defendant in 1908. Subsequently, however, the Government settled a portion of the lands of which the rent is claimed in this suit, together with certain other land as reformed land (bed of a river) with the Shahas on the 1st April 1908. On the strength of that settlement the Shahas brought a suit for recovery of possession of some lands including a portion of the land for which the rent is in dispute against the Defendant, Banka Behari Ghosh alone. Banka in that suit, among other defence set up the title of the present Plaintiff Madan Mohan Roy, and also pleaded that the latter should be made a party to the suit. This was disallowed. The Court however, held that the Defendant was a *bond fide* tenant and should not be ejected. The Shahas were accordingly, given a decree for possession by receipt of rent from the Defendant in respect of 131 bighas in May 1912. There was an appeal and a second appeal and ultimately the decree of the Court of first instance was upheld.

The present suit was instituted by Madan Mohan, the Plaintiff, for rent in respect of the 279 bighas of land which was let out by him to the Defendant Banka Behari, who pleaded that there should be an abatement of rent in respect of 131 bighas of land, with regard to which there was a decree obtained by the Shahas against him. The Courts below have come

(1) 15 C. L. J. 310 (1910).

(2) 18 C. W. N. 552 (1912).

(3) 1 Meeson and Welsby 747 at p. 759 (1836).

(4) 17 C. W. N. 960 (1913).

(5) 17 W. E. 396 (1872).

BANKA BEHARI GHOSH v. MADAN MOHAN ROY.

to the conclusion that the Defendant was not entitled to claim abatement of rent, as the Defendant was not dispossessed, and the Plaintiff was not a party to the suit upon which the Defendant relies in claiming abatement of rent. The Defendant has appealed to this Court and two questions have been raised on his behalf. The first is that it is not necessary that the tenant should be physically dispossessed by a person having a title paramount, and secondly that it was not necessary that the Plaintiff should have been a party to the decree in the previous suit which resulted in eviction, in order to entitle the Defendant to claim abatement of rent.

So far as the first contention is concerned, it is true that a forcible expulsion is not necessary, nor is it necessary that the tenant should actually go out of possession, and that if, upon a claim being made by a person with title paramount, he consents by an attornment to such person to change the title under which he holds or enters into a new arrangement for holding under him, this will be equivalent to an eviction and a fresh taking. See *Foa on Landlord and Tenant*, 4th Edn. 169. But an eviction, whether actual or constructive, must be by a party having a *good title*. There is no doubt that the Shahas obtained a decree against the Defendant. But that is not sufficient to show that they had a title superior to that of the Plaintiff of the present suit. The learned Pleader for the Appellant relies upon the case of *Rani Dassi v. Asutosh Roy Choudhury* (1) and the case of *Noorijan Sardar v. Bimola Sundari Gupta* (2). In the first case no question of the lessor's title was in controversy. It was assumed for the purposes of the judgment that the lessor had no title. It was a suit by a lessee for abatement of rent against the

lessor, and the only question which the Court had to consider was what was the quantity of land for which the tenant could claim abatement of rent. There was no suggestion in that case that the person who dispossessed the Plaintiff in that suit was not a person having a title paramount. In the second case cited above, the decision was that, where a tenant is induced to attorn to the superior landlord by an offer to accept a reduced rent the doctrine of *quasi*-eviction does not apply, and in the course of their judgment, the learned Judges referred to the general principle enunciated in *Foa on Landlord and Tenant*, 4th Edn. at p. 169. The question which we have to decide in the present case was not dealt with in either of the cases cited above.

In the case of *Neale v. Mackenzie* (3), Lord Denham, C. J., observed that eviction by title paramount means "eviction by a title superior to the titles both of lessor and lessee, against which neither is enabled to make a defence." Here although the Shahas have obtained a decree against the Defendant, it cannot be said that they have got a title superior to that of the present Plaintiff who was no party to that suit, and had no opportunity of showing that they had got a title to the land.

It is found in the present case that after the Plaintiff had obtained delivery of possession through Court, he was put into *khas* possession of the land in suit and he then let out 279 bighas to the Defendant. The Defendant obtained possession and was in possession, when the Shahas brought the suit against him alone and obtained a decree. We do not think, under the circumstances, that the Plaintiff was bound by any implied covenant, which the learned Pleader for the Appellant set up, to restore the Defendant to possession un-

(1) 15 C. L. J. 310 (1910).

(2) 18 C. W. N. 552 (1912).

(3) 1 Meeson and Welsby 747 at p. 759 (1834)

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less it is shown that the Shahas have a title superior to that of the Plaintiff. We have been referred to certain passage from Redman on Landlord and Tenant, 7th Edn. at page 263, where the learned author says "Any proceeding in a Court of Law interfering with the title and possession of the land amounts to a breach of a covenant for quiet enjoyment, e.g., an action of ejectment or for trespass." But the proposition is qualified by the words "by a person having a lawful title." See also Woodfall's Law of Landlord and Tenant, 19th Edn., p. 812, where it is stated "The express covenant for quiet enjoyment without any interruption or disturbance by the lessor, his heirs or assigns, even though followed by the words 'or by any other person or persons whomsoever' does not extend to the unlawful acts of third persons having no title. The law will never adjudge that the lessor covenants against the wrongful acts of strangers, except his covenant is express to that purpose; for the law itself does defend every man against wrong; and therefore, though one warrants land to another expressly (or covenants for quiet enjoyment generally) yet he does not defend against tortious entries."

The learned Pleader for the Appellant referred to a passage in Redman that the landlord is allowed to come in, in order to show that he has a good title, and to maintain the possession of the lessee. It is not stated, however, that the landlord is bound to come in a suit brought against the lessee by a person who has not a superior title. There is also no authority for the contention raised on behalf of the Appellant that where a third party has obtained a decree against the lessee the onus is shifted on the landlord to prove that such a third party has got no title.

In the case of *Syed Mukhtar Ahmad v.*

Rani Sundar Koer (4), it was pointed out that sec. 108, cl. (c) of the Transfer of Property Act provided for an implied covenant to the lessee to hold a lease without interruption and that the clause was wide enough to include disturbance of possession by a person with a paramount title. It was also observed that even before the Transfer of Property Act, it was held that in the absence of an express agreement to the contrary, a landlord is under an implied obligation to indemnify the tenant against ouster or disturbance in his possession by his own acts or by the acts of those who claim under or have paramount right to him, but not against the wrongful acts of strangers. The same view has been taken of the section in Shepherd and Brown's notes to sub-sec. (c) of sec. 108 of the Transfer of Property Act, at page 404, 7th Edition. There it was pointed "The covenant in the unqualified form followed in the section covers the case of the superior landlord, or other person claiming by title paramount, exercising power of re-entry or otherwise dispossessing the lessee. But it does not include a case of disturbance by persons having no lawful title or right of entry." We do not think, therefore, that there was any covenant to protect the tenant from persons having no title superior to that of the Plaintiff, or that the decree obtained against the tenant shifted on the Plaintiff the burden of proving that the third party had no title. In the case of *Rung Lall Singh v. Lalla Roodur Pershad* (5) the learned Judges observed. "The Defendant accepted a lease from and was let in possession by the lessors. He has not shown in this suit that his lessors had no title and that the person who ousted him had a title, and he has relied for that purpose upon the result of certain suits one of which in no way affects this property at

(4) 17 C. W. N. 960 (1913).

(5) 17 W. R. 386 (1872).

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all and the other in no way affects the title of his lessors who were not parties to it. Therefore the defence which he attempts to raise surely fails." The observations apply to this case also. It is no doubt hard that the Defendant who has set up the title of the Plaintiff in the suit brought against him by the Shahas should have to pay rent to them as well as to the Plaintiff in respect of the 131 bighas.

It is not for us, however, to express any opinion as to what step should be taken by the Defendant for being relieved from such a position. Having regard to the fact that the Plaintiff was no party to that suit, we must hold that the decree of the lower Appellate Court is right.

The appeal is dismissed with half costs in this Court.

J. N. R. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2147 OF 1920.

CHATTERJEA, J. NEWBOULD, J. 1921, 22, February		SYAM CHAND BASAK, Plaintiff, Appellant, v. NAHENDRA NATH BASAK and anr., Defendants, Respondents.
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Bengal Municipal Election Rules - R. 4, register of voters R. 7, application for removal of name of a voter from the register Rr. 6 and 10, application by the said voter for inclusion of his name in the register, if lies when his name was already in the register—R. 29, District Magistrate's powers.

A certain name was entered in the Register of voters prepared under r. 4 of the Bengal Municipal Election Rules. Several applications were made to the Chairman of the Municipality under r. 7 for removal of his name, and the said voter too made an application under r. 6 for inclusion of his name in the Register. All these applications were disposed of by the Chairman on the same date. He allowed

the applications under r. 7, and directed the name of the said voter to be removed from the register. The said voter thereupon applied to the District Magistrate under r. 10, who restored his name in the register. On appeal it was contended that r. 10 was inapplicable because the name of the said voter was already on the register when he made the application under r. 6 for inclusion of his name therein:

Held—That the Chairman could not have dealt with the application of the voter in question before he had decided the applications under sec. 7, and he had not rejected the application of the said voter as premature. In these circumstances, the application might well be regarded as having been presented on the day and after the applications under sec. 7 were disposed of, although it was on the record from before. In that view the Magistrate had power under r. 10 to make an order for the insertion of the name in the register. Besides, r. 29, gives a general power to the Magistrate to decide all disputes arising under the Rules, so the Magistrate had power to decide the point under r. 29.

This was an appeal against the decree of C. Bartley, Esq., District Judge of Zillah Dacca, dated the 30th of July 1920, affirming the decree of Babu Ananga Mohan Lahiri, Munsif, 2nd Court at that place, dated the 7th of June 1920.

The facts of the case will appear from the judgment.

Mr. Pugh and Babu Sasauthar Roy for the Appellant.

Babus Ram Chunder Majumdar and Upendra Lal Roy for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for a declaration that the election of the Defendant No. 1 as a Commissioner of the Dacca Municipality was void, and for

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cancelling the same. The election took place on the 31st July 1918. That election, however, was set aside by this Court on the ground of irregularities at the time of polling. A fresh election took place on the 8th December 1918 at which the Defendant was again elected.

It appears that a register of persons qualified to vote was prepared under r. 4 of the Municipal Election Rules. The Defendant's name was entered in that register as a voter. Several applications were, however, made to the Chairman under r. 7 for striking out the name of the Defendant from the Register of Voters. An application was also made by the Defendant under r. 6 for inclusion of his name in the Register. All these applications were disposed of by the Chairman of the Municipality on the 13th July 1918. He allowed the applications under r. 7, and further directed the name of the Defendant to be struck out from the Register. Thereupon the Defendant applied to the District Magistrate under r. 10, who on the 22nd July restored his name in the register. On the 15th July the list of voters omitting his name was published. But as we have said, on the 22nd July, his name was registered under the orders of the Magistrate and he was elected a Commissioner.

The main ground upon which the election has been attacked is that r. 10 under which the Magistrate directed the name of the Defendant to be inserted in the register was inapplicable because the name of the Defendant was already on the register when he made the application, and that an application under r. 6 is to be made by a person whose name does not appear in the register and who claims a right to vote. There is no doubt that the name of the Defendant was on the register on the date on which the application was made by him to the Chairman. The proper course; no

doubt, would have been to make the application after disposal of the applications under r. 7. Evidently, however, it was intended that the application would be taken up only after the disposal of the applications under r. 7. The Chairman could not have dealt with the application of the Defendant before he had decided the applications under sec. 7 and he had not rejected the application of the Defendant as premature. In these circumstances the application might well be regarded as having been presented on the day and after the applications under sec. 7 were disposed of, although it was on the record from before. In that view, the Magistrate had power under r. 10 to make an order for the insertion of the name of the Defendant in the register. But assuming that the case did not come under r. 6 or r. 10, there was a dispute as to whether the name of the Defendant should or should not be on the register. The Chairman decided the question in a particular way. R. 29 gives a general power to the Magistrate to decide all disputes arising under the Rules and lays down that his decision shall be final. We think that the Magistrate had power to decide the point under r. 29.

So far as the qualification of the Defendant is concerned, it was admitted in the Court of first instance that he was a qualified voter, and the only ground upon which the election was attacked was that his name was not properly included in the register.

It is unnecessary to consider the other questions raised and discussed before us.

The appeal is accordingly, dismissed with costs.

J. N. R.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 16 OF 1921.

<p>SANDERSON, C. J. CHOTZNER, J. 1921, 21, July.</p>	}	<p>SARADAKRIPA LALA, Petitioner, v. HARENDRA LAL DAS and anr., Opposite Party.</p>
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Civil Procedure Code (Act V of 1908), Or. XXI, r. 89—Sale in execution of decree—Judgment-debtor privately selling the property so sold to a third person after the execution sale but before confirmation of sale—Such subsequent purchaser, if entitled to apply under Or. XXI, r. 89 to have the court-sale set aside.

Where a judgment-debtor, after the sale in execution of his immoveable property but before the confirmation of the sale, sold such property to a third person, and such subsequent purchaser applied to have the Court-sale set aside under Or. XXI, r. 89, of the Civil Procedure Code :

Held—That he was not entitled to make the said application.

The interest, if any, which he held in the property was not by virtue of a title acquired by him before the execution sale : his interest, if any, was by virtue of a title acquired after such sale and consequently he was precluded by the very terms of the rule from applying under Or. XXI, r. 89 of the Civil Procedure Code.

ANANTHA LAKSHMI AMMAL v. KUNAN CHANKURATH SANKARAM NAIR (1), ISHWAR DAS v. ASAF ALI KHAN (2), DHANWANTI KOER v. SHEO SHANKAR LAL (3), PANDURANG LAXMAN UPPADE v. GOVIND DADH UPPADHE (4) and DULHIN MATHURA KOER v. BANGSHIDHARI SINGH (5) referred to.

This was a Rule granted against the judgment of the Subordinate Judge of Chittagong (Babu Aswini Kumar Das

(1) 24 Mad. L. J. 205; [1913] Mad. W. N.

* 101.

(2) 1 L. R. 84 All. 186 (1911).

(3) 4 P. L. J. 340 (1917).

(4) 1 L. R. 40 Bom. 557 (1916).

(5) 15 C. L. J. 89 (1911).

Gupta), dated the 30th September 1920, which reversed the judgment of the Munsif of Chittagong (Babu Jnan Ch. Mukerjee), dated the 22nd March 1920.

The facts material to this report are as follows :—

The Petitioner obtained a money-decree against the Opposite Party No. 2. Rames Chandra Das and in execution of the aforesaid decree put the property of the said Opposite Party to sale, and purchased the same for Rs. 375 at the auction sale on the 10th February 1920. Two days after that, the judgment-debtor, i.e., the Opposite Party No. 2, sold the same property to the Opposite Party No. 1 Harendra Lal Das by a *kabala*. On the strength of the aforesaid sale-deed the Opposite Party No. 2 made an application for depositing the decretal amount under Or. XXI, r. 89 of the Civil Procedure Code.

The learned Munsif dismissed the application and passed the following order on the 22nd March 1920.

“ Heard Pleaders. The *kabala* by the judgment-debtor in favour of the applicant appears to have been executed on the 12th February last, two days after the sale. The private sale is therefore void as against the decree-holder auction-purchaser, *vide* sec. 64, C. P. C. The deposit is accordingly invalid and it cannot be accepted. Depositor may take refund of the money in deposit. Accountant to note. The sale is confirmed and execution case is dismissed on full satisfaction.”

On appeal by the Opposite party No. 1, the learned Subordinate Judge reversed the order of the Munsif and remanded the case for taking the deposit.

The following portion of the judgment of the learned Subordinate Judge will be found material to this report :—

“ The learned Munsif held that the private sale after the Court-sale is void under sec. 64, C. P. C. and so the deposit is invalid. This view of the law is clearly

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erroneous. Sec. 64, defines the effect of a purchase made in contravention of sub-r. (1) of r. 54. The effect of sec. 64 is not to invalidate all sales, but its effect is of a limited character—limited as against all claims enforceable under the attachment. Justice Sir Ashutosh Mookerjee in the ruling *Gosto Behari v. Sankar Nath* (6), has pointed out how in such a case, while the private purchaser comes to make a deposit of the decretal amount under Or. XXI, r. 39, the claim enforceable under the attachment being fully satisfied, the private alienation cannot be regarded as void.

The next point that has been argued at some length before me is whether the applicant can make an application for depositing the decretal amount under Or. XXI, r. 89.

I think, he can. Under the present rule, the application may be made by (1) any person owning the property or (2) any person holding an interest in such property by virtue of a title acquired before the sale. That is the interpretation given to the rule by Justice Mookerjee [vide *Gosto Behari v. Sankar Nath* (6)].

So it is not necessary that the Applicant should acquire the property, i.e., own the property before sale. That part of the rule refers to the holding of an interest in the property by virtue of a title acquired before the sale.

Now, it has been held that the words "owning the property" would mean "owning the property at the date of the application [vide *Subbarayudu v. Lakshminarasama* (7) and also *Ishwar Das v. Asaf Ali* (2)]. The application under Or. XXI, r. 89 was made on 3rd March 1920. On that date he was certainly the person owning the property for he purchased it from

the judgment-debtor on 12th February 1920. So he is entitled to make the deposit.

The learned Pleader for the Opposite Party drew my attention to the ruling in *Ishwar Das v. Asaf Ali Khan* (2). There it was held that the judgment-debtor would, after the private sale, be incompetent to apply under Or. XXI, r. 89. But here the private purchaser is the applicant. Of course Justice Chamier remarked that neither the judgment-debtor nor the new purchaser would be competent to make a deposit. That was, however, *obiter dicta*. This has been disagreed to by Justice Sadasiva Ayyar in *Subbarayudu v. T. Lakshminarasama* (7). The ruling in the case of *Anantha Lakshmi Ammal v. Kunan Chankurath Sankaram Nair* (1) is quoted in *Subbarayudu v. Lakshminarasama* (7) as to the point and shows that the subsequent purchaser from the judgment-debtor is entitled to apply under Or. XXI, r. 89.

It has been held in many cases that this rule affords a special indulgence to the judgment-debtor and gives him yet one more chance of saving the property. The rule should be interpreted liberally. Properties are often sold at auction sales at inadequate prices. For judgment-debtors who cannot raise the money by any other means, the only remedy open is to sell the property or a portion thereof. This will ensure that no loss is sustained by sale in Court at inadequate prices. But if the purchaser is deprived of the right to make a deposit, the ultimate result would be that the judgment-debtor must remain satisfied with the inadequate price fetched at the sale. The ruling in *Hazari Ram v. Badar Ram* (8) was decided under the old

(1) 24 Mad. L. J. 205; [1918] Mad. W. N. 101.

(2) I. L. R. 34 All. 186 (1911).

(7) I. L. R. 38 Mad. 775 (1913).

(8) I. O. W. N. 279 (1897).

(2) I. L. R. 34 All. 186 at p. 189 (1911).

(6) 28 O. L. J. 127, 129 (1916).

(7) I. L. R. 38 Mad. 775, 777 (1913).

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Civil Procedure Code and is not now applicable.

For these reasons, I hold that the applicant is competent to make the deposit.

The appeal is allowed and the lower Court's order is set aside. The case is remanded for taking the deposit and making necessary orders thereon if not otherwise barred."

The Petitioner thereupon moved the High Court under sec. 115 of the Civil Procedure Code and obtained the present Rule.

Babu Chandra Sekhar Sen for the Petitioner.—I do not contend that the private sale after the Court-sale is void under sec. 64, C. P. C. I confine myself to the second question raised and decided by the Court of Appeal below, namely, whether a purchaser at a private sale from the judgment-debtor of a property after the same was sold in auction sale in execution of a decree can make a deposit under Or. XXI, r. 89, C. P. C. The learned Subordinate Judge relying on the cases of *Subbarayudu v. Lakshmi* (7) and *Anantha Lakshmi v. Kunan Chankurath* (1) has answered the question in the affirmative.

My submission is that the two decisions of the Madras Court are wrong in principle and are against the express language of the statute as embodied in Or. XXI, r. 89, C. P. C.

I rely on the decision in *Ishwar Das v. Asaf Ali* (2). The case of *Pandurang v. Govind* (4) supports the view taken by the Allahabad High Court.

See the observations of Mookerjee, J., in *Mathura v. Bangshidhari* (5).

See also *Dhanwanti v. Sheo Shankar* (3).

(1) 24 Mad. L. J. 205; [1913] Mad. W. N. 101.

(2) I. L. R. 34 All. 186 (1911).

(3) 4 P. L. J. 340 (1919).

(4) I. L. R. 40 Bom. 557 (1916).

(5) 15 C. L. J. 83 (1911).

(7) I. L. R. 38 Mad. 775 (1913).

The cases under the old Code are in my favour.

See *Hazari v. Badar* (8) and *Narain v. Sourindra* (9).

Apart from the decisions I strongly rely upon the wording of the section. The words "at the date of the application" are not to be found in the rule. Moreover after the sale the judgment-debtor had no interest which he could sell.

Babu Kanaidhon Dutt for the Opposite Party.—The case of *Anantha v. Kunan* (1) is in my favour and is expressly on the point. Before the sale is confirmed the judgment-debtor remains the owner of the property and as such he is entitled to sell the same. The rule ought to be liberally construed as it affords relief to the judgment-debtor. If the contention of the Petitioner be correct then the rule takes away what relief the legislature wanted to give to the judgment-debtor.

See *Subbarayudu v. Lakshmi* (7), *Appaya v. Kunhati* (10) and *Banko Behary v. Krishna Chandra* (11).

THE JUDGMENT OF THE COURT was as follows :—

SANDEBSON, C. J.—This Rule arises out of an order of the Officiating Subordinate Judge of Chittagong by which he overruled the decisions which had been arrived at by the learned Munsif. It appears that the Petitioner to this Court had obtained a money-decree against one Ramesh Chandra Das, and that in execution of the decree the property of Ramesh Chandra Das was put up to sale by auction: The Petitioner, the decree-holder, purchased the

(1) 24 Mad. L. J. 205; [1913] Mad. W. N. 101.

(7) I. L. R. 38 Mad. 775, 777 (1913).

(8) 1 C. W. N. 279 (1897).

(9) I. L. R. 22 Cal. 107 (1905).

(10) I. L. R. 30 Mad. 214 (1906).

(11) 18 C. W. N. 349; s. c. 18 C. L. J. 170 (1913).

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property at the auction sale for Rs. 375. Two days after the auction sale the judgment-debtor purported to sell the property by means of a *kabala* to a third party whose name was Harendra Lal Das. Harendra Lal Das then applied under Or. XXI, r. 89, Code of Civil Procedure, for the purpose of making the deposits which are therein specified. The learned Munsif came to the conclusion that Harendra Lal Das was not qualified to make the deposit under Or. XXI, r. 89. The learned Munsif held that the private sale was void as against the decree-holder who was the auction-purchaser and referred to sec. 64 of the Civil Procedure Code and he confirmed the sale to the auction-purchaser. The result was that Harendra Lal Das appealed to the Subordinate Judge, who reversed the learned Munsif's order and remanded the case for taking the deposit and making the necessary orders thereon, if not otherwise barred. The rule was issued at the instance of the decree-holder calling upon the Opposite Party to show cause why the order of the learned Subordinate Judge should not be set aside.

The question which has been argued on the Rule is whether Harendra Lal Das was a person entitled, within the meaning of Or. XXI, r. 89 to apply to have the sale set aside upon complying with the terms of that rule.

The learned Vakil who has argued this case in support of the rule has drawn our attention to several cases, the decisions in which go to show that there is a considerable difference of opinion as to the meaning of the terms of this rule, as for instance the case of *Anantha Lakshmi Ammal v. Kunan Chankurath Sankaram Nair* (1) of the Madras High Court, where the learned Judge took the view that the subsequent purchaser, if I may so call him

(Harendra Lal Das in this case) would be qualified to apply under Or. XXI, r. 89; the case of *Ishwar Das v. Asaf Ali Khan* (2) of the Allahabad High Court, where the learned Judges took a contrary view to that which was taken by the Madras High Court. Again, in the case of *Musst. Dhanwanti Koer v. Shco Shankar Lall* (3), a contrary view to that of the Madras High Court was taken by the learned Judges of the Patna High Court. The last case to which I need refer to is the case of *Pandurang Laxman Uppade v. Govind Dadh Uppadhe* (4) of the Bombay High Court. In some of those cases there was a discussion as to the effect of the auction sale—as to whether by reason of the auction sale the judgment-debtor was divested of all his interest in the property sold. The High Court at Patna seems to have taken the view that he was; on the other hand, the learned Judges of the Bombay High Court seem to have taken the view that the judgment-debtor was not divested of all his interest in the property by reason of the auction sale, at all events until it was confirmed. That point was raised during the argument on this Rule but I do not intend to express any opinion upon it, for, I do not think it necessary for the purpose of my judgment. I base my judgment upon what I consider to be the true interpretation of Or. XXI, r. 89, so far as it is applicable to the facts of this case. The rule runs as follows: “(1) where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court”—then follow the particular sums to be deposited, which are specified in the section.

(1) I. L. R. 34 All. 186 (1911).

(2) 4 P. L. J. 340 (1919).

(4) I. L. R. 40 Bom. 557 (1916).

(1) 24 Mad. L. J. 205; [1918] Mad. W. N. 101.

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The view which was taken by the Bombay High Court in *Pandurang v. Govind* (4) as appears from the head-note was that a judgment-debtor, whose property had been sold at a Court-sale in execution of a decree against him, had a right to apply to have the sale set aside as a person owning the property sold in execution of the decree within the meaning of r. 89, Or. XXI of the Civil Procedure Code of 1908, in spite of the fact that he had transferred his interest in the property after the Court-sale. This is not a decision expressly on the point now under consideration but there are some observations in the judgments, which are applicable: Bachelor, J., at page 561 said: "I am not able to adopt the view that it is open to the subsequent purchaser to apply under this rule, for as it seems to me he is excluded by the terms of the rule" and later, on the same page: "for myself I can see no serious difficulty in holding that for the purpose of this rule the judgment-debtor in the position of the present applicant is still the owner of the property in the eye of the law, the auction sale being still unconfirmed," and Shah, J., at page 563 said: "It seems to me that a person owning the property or holding an interest therein by virtue of a title acquired before the sale is within the rule provided he owns it or holds an interest therein at the date of the sale by the Court."

In this case I have only to deal with the application by Harendra Lal Das, who purported to purchase the property from the judgment-debtor two days after the execution sale by the Court and before the sale was confirmed and to decide whether he was entitled to make the deposit under Or. XXI, r. 89 and to apply to have the sale set aside.

In my judgment, Harendra Lal Das, "the subsequent purchaser" as he has

been called, is excluded by the express terms of the rule. The interest, if any, which he held in the property was not by virtue of a title acquired by him before the execution sale: his interest, if any, was by virtue of a title acquired after such sale and consequently in my judgment he is precluded by the very terms of the rule from applying under Or. XXI, r. 89. That is the only point which I decide upon the application and in my judgment it is sufficient to justify one in holding that the rule should be made absolute.

It was agreed by the two learned Vakils who argued this case that there is no decision of this Court upon the point. Reference was made to the case of *Dulhin Mathura Koer v. Bangshidhari Singh* (5). In that case the point, which is now before us, did not arise and was not dealt with by the learned Judges. For the above-mentioned reasons, in my judgment, this Rule should be made absolute. The result is that the order of the learned Officiating Subordinate Judge is set aside and the order of the learned Munsif is restored. We make no order as to costs.

CHOTZNER, J.—I agree.

H. C. S. Rule made absolute.

PRIVY COUNCIL

[APPEAL FROM THE CHIEF COMMISSIONER, AJMER-MERWARA.]

LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMER ALI.
.1921,
9, March.

RAI BAHADUR SETH NEMICHAND, since deceased (now represented by Seth Teekam Chand), Appellant,
v.
SETH RADHA KISHEN, since deceased, and ors, Respondents.

Debt due with interest—Indefinite payment—
Right of creditor to appropriate towards interest—
Position when debtor makes specific appropriation—

RAI BAHADUR SETH NEMICHAND v. SETH RADHA KISHEN.

Entry in creditor's book as evidence of acceptance of debtor's appropriation.

A creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest. A debtor might in making a payment stipulate that it was to be applied only to principal. If he did so, the creditor need not accept the payment on these terms, but then he must give back the money or cheque by which the money was proffered.

MEKA VENKATADRI APPA ROW BAHADUR ZEMINDAR GARU v. RAJA PARTHASARATHY APPA ROW BAHADUR ZEMINDAR GARU (1) referred to.

Entries in the books of creditors may be taken as indicative of agreement to a proposed appropriation by the debtor.

This was an appeal from a judgment and decree, dated the 15th April 1916, of the Chief Commissioner, Ajmer-Merwara, which modified a judgment and decree, dated the 12th April 1915, of the Additional District Judge of Ajmer-Merwara, which had modified a judgment and decree, dated the 30th May 1913, of the Court of the Subordinate Judge, First-Class of Beawar (Merwara).

On the 21st December 1906, the Appellant, Seth Nemichand (since deceased), instituted the present suit in the Court of the said Subordinate Judge, First-Class, of Beawar, to recover the balance due under a mortgage bond, of the 12th December 1890, executed by the Defendants-Respondents in favour of the Plaintiff.

The Defendants-Respondents executed the mortgage bond in suit on the 12th December 1890, for Rs. 44,000, promising to repay the principal amount within one year, with interest at the rate of 10 per cent. per mensem. In default of payment within one year, the agreed rate of interest

was to be paid till the discharge of the debt. The principal was not paid as promised, but certain payments were made, and an account was settled between the parties on the 12th August 1893. The settled account was duly signed by Defendant, Radha Kishen, on behalf of the Defendants, and the principal amount due on that date was found to be Rs. 23,318. Subsequently the Defendants made several other payments which were credited by the Plaintiff towards the discharge of the interest due from the Defendants. These payments towards interest were endorsed by Defendant, Radha Kishen, on behalf of all the Defendants on three dates, namely, 14th April 1896, 17th January 1902 and 12th August 1904. The Plaintiff claimed to recover the balance of the principal Rs. 23,318, after giving credit for the payments made and appropriated towards the discharge of the interest as per details specified in the endorsements mentioned above, and he also claimed interest and costs and future interest at the agreed rate till the date of realization.

The Defendants filed separate written statements and put forward several pleas. Musammat Sheo Kunwari contended that the mortgage in suit was not binding on her, as she had not executed it after fully understanding its terms and the effect thereof. Radha Kishen pleaded that the endorsement relating to the settlement of account made by him on the 11th August 1893, and the remaining three endorsements mentioned above, were made by him under undue influence exerted by the Plaintiff. All these pleas were negatived by the findings of the lower Appellate Courts.

The Defendants further pleaded that the Plaintiff had improperly appropriated the payments towards the discharge of the interest, and contended that those payments ought to be taken to reduce the principal

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amount. On the pleadings the said Subordinate Judge framed a number of issues.

After examining evidence the Subordinate Judge delivered judgment on the 30th May 1913. He found that all the four endorsements relating to the settlement of account, and the payments towards interest that were made by Defendant, Radha Kishen, were induced by undue influence. He held that "the amount of principal and interest was properly settled up to Sawan Sudi 1st, Sambat, 1920=12th August 1893," and that "the balance of principal on that date was Rs. 23,318 due to Plaintiff," but he held that there was no proof that the Defendants had agreed that the payments made by them after the 12th August 1893, should be appropriated by the Plaintiff to the discharge of the interest and not the principal. He accordingly held that the payments should be credited to the reduction of the principal, that is, Rs. 23,318, and made a decree in favour of the Plaintiff as follows :—

Principal due to	
Plaintiff	Rs. 6,572 10 0
Total interest up to	
30th May 1913	Rs. 19,849 0 0
<hr/>	
Total	Rs. 26,421 10 0

He also decreed *post diem* interest at 6 per cent. from the date of the decree to the date of payment, and made the usual decree for sale of the mortgaged property, and a personal decree for payment of the decretal amount against the Defendants, Radha Kishen and Musammat Sheo Kunwari.

From the said decree of the Subordinate Judge, the Plaintiff appealed, and the Defendants filed cross-objections. The Additional District Judge who heard them, delivered judgment on the 12th April 1915. He stated the points for decision as follows :—

(1) Whether the endorsements on the

back of the document were made by Radha Kishen under undue influence in Sambat 1963.

(2) Whether the amounts paid by Defendant have been properly appropriated towards payment of interest and principal in accordance with the terms of the bond.

(3) Whether the interest allowed by the Court below is contrary to the principle laid down in sec. 33 of Ajmer Reg. III of 1877.

(4) Whether the Court below was right in allowing interest on sums paid by the Defendant.

(5) Was the Court below right in not allowing interest at contract rate from the date of decree to the day fixed for payment into Court.

(6) Have the costs of Salig Ram been properly awarded against the Plaintiff.

(7) Should "*chhut*" have been allowed to the Defendants by the Court below.

(8) To what relief is the Plaintiff entitled.

He found the second, sixth and seventh points in the affirmative, and the first, third, fourth and fifth points in the negative. He held that all the endorsements made by Defendant, Radha Kishen, on behalf the Defendants were true, and that they were not the result of undue influence. He also held that on the date of settlement of account (*i.e.*, 11th August 1893) the principal due was Rs. 23,318, and that the payments thereafter made by the Defendants were properly appropriated by the Plaintiff to the discharge of interest. He observed as follows :—

"The entry in the Defendant's own account books (Khata Bahi for the years 1947-50) showing that after settlement of accounts in the presence of the parties, the balance due to Plaintiff up to 12th August 1893, was Rs. 23,318, clearly proves that the first endorsement on the back of the document showing the very same result

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was made in Sawan Sambat 1950 (12th August 1893), and not in Sambat 1963 (1906 A. D.), as alleged by the Defendant. If it had not been made in Sawan Sambat 1950, there could possibly have been no entry in the Defendant's Khata Bahi for the years 1947-50 on page 52, embodying the same result.

"Entries in Plaintiff's account books, such as Rokar, Roznama Khata and Lekha Par Bahis, show that payments made by Defendants after 12th August 1893, were appropriated towards interest, as the sums paid at the time did not exceed the amount then due on account of interest. The entries in the account books of the Defendant himself do not show that the various items were paid towards principal or interest. As interest was to be paid monthly and the amount of each payment was not sufficient to cover the interest then due, the Plaintiff, in the absence of any directions from the Defendant to the contrary, was certainly entitled to appropriate the items towards interest (*vide* sec. 60 of the Contract Act). When the debtor does not make any appropriation at the time when he makes the payment, the right of application devolves on the creditor, and he may exercise the right until the very last moment and need not disclose his intention in express terms (Pollock on Law of Contracts, page 259, second edition). Therefore, irrespective of the endorsements made by the Defendant on the back of the document, the Plaintiff could exercise his right to apply the amounts to interest until the last moment. It was for the Defendant to show that he had acted in such a way in respect of the amounts paid as to limit the discretion of the creditor."

The result was that the Additional District Judge allowed the appeal of the Plaintiff, and made a decree modifying the decree of the Subordinate Judge as follows :—

Principal	Rs. 23,318	0	0
Interest at 10 per cent.			
up to 12th April			
1915	Rs. 21,077	1	6

Total decreed . Rs. 44,395 1 6

The Defendants were further ordered to pay the decretal amount by the 30th June 1915, with interest on the principal sum at 10 per cent., and to pay interest at 6 per cent. on the decretal amount after the 30th June 1915, up to the date of realization.

From the said decree of the Additional District Judge, the Defendants appealed to the Chief Commissioner of Ajmer-Merwara, who delivered judgment on the 15th April 1916. He held that the settlement of account was made by the parties on the 12th August 1893, and that the principal then found due to the Plaintiff amounted to Rs. 23,318. He observed as follows :—

"But at any rate the facts in one respect appear to corroborate the story of the Plaintiff rather than the Defendant. The working up to this figure of Rs. 23,318 in Sambat 1961, appears to prove that the figure existed on the bond in Sambat 1950. Ex. P. 19, also confirms this. The Appellants allege that all the entries were made on the back of the bond at one time under undue influence. But to my mind there can be no doubt that the figure Rs. 23,318 was struck in Sambat 1950."

The learned Chief Commissioner further held that the payments made by the Defendants after the 12th August 1893, were appropriated by the Plaintiff to the discharge of interest, and that the endorsements confirming the appropriation were made by Defendant, Radha Kishen, "with his eyes open, and with consent" and without any undue influence. But the learned Chief Commissioner was of opinion that it was not open to him to grant relief to the Plaintiff in accordance with his

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findings, because in one of the Plaintiff's account books, namely, a Khata, Ex. 24, the principal due was shown as Rs. 6,572-0-9. He therefore held that the Plaintiff was entitled to Rs. 6,572-0-9 only as principal, and to interest at the rate of 10 per cent. up to the date of the suit, and to $3\frac{1}{2}$ per cent. per annum on the principal amount from the date of the suit till realization. He accordingly allowed the appeal of the Defendants, and made a decree modifying the decree of the Additional District Judge as follows :—

Principal . . .	Rs. 6,572	0	9
Interest up to 15th April 1916 . .	Rs. 18,874	12	11
Total . .	Rs. 25,446	13	8

The Appellant applied to the said Chief Commissioner for review of judgment which was refused on the 20th September 1916, and from the said decree of the Chief Commissioner the Plaintiff appealed to His Majesty in Council.

Mr. L. DeGruyther, K. C. (with *Mr. B. Dubé*) for the Appellants.—The point for determination is precisely the same as was before your Lordships a couple of days ago in *Meka Venkatadri Appa Row Bahadur Zemindar Garu v. Raja Parthasarathy Appa Row Bahadur Zemindar Garu* (1), whether payments should be appropriated towards interest or capital first.

[**LORD DUNEDIN.**—It is for the other man to shew that, when he paid you, he made a condition that the amount should be appropriated towards the principal.]

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—This is a suit upon a mortgage. The mortgage was of date the 12th December 1890, for Rs. 30,000, with interest at 10 annas per cent. per mensem,

(1) 26 C. W. N. 33 (P. C.) (1921).

executed by three persons carrying on business as bankers in favour of the Plaintiff. On the back of the mortgage deed there are certain endorsements signed by the debtor, who was the manager of the firm. These show that up to the 11th August 1893, there had been paid Rs. 11,334-6-6. This was accordingly, as also shown, credited to the extent of Rs. 4,652-6-6 to interest, being the total amount of interest due as at that date, the balance of Rs. 6,682 being credited to principal, thus reducing the principal due as at that date to Rs. 23,318. After that there are successive credits to interest only at the 14th April 1896, the 17th January 1902, and the 12th August 1904, the payments which each of these credits represents being admittedly less than the amount of interest due at the respective dates.

The present suit was raised on the 12th December 1906, for payment of the balance outstanding. Two of the Defendants contested liability, but this was decided against them, and there is now no question of liability. The only question before the Board is as to how the account is to be stated. The Plaintiff contends that the account should be stated as it is in the endorsements, i.e., that the payments made should all be credited to interest. The Defendants contend that they should be credited to principal as at each date at which they were made, and interest calculated only on the balance as so brought out. The Defendants allege that the endorsements before referred to were executed under undue influence. This view, although upheld by the Subordinate Judge, without direct proof but upon what seems a quite unsatisfactory inference, was negatived by the District Judge to whom appeal was taken, and his view was confirmed by the Chief Commissioner on appeal from the District Judge. This makes a

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concurrent finding so far as this Board is concerned.

Now the law as to payments being applied to principal or interest was laid down by the Board in the case of *Meka Venkatadri Appa Row Bahadur Zemindar Garu v. Raja Parthasarathy Appa Row Bahadur Zemindar Garu* (1) decided only a few days ago. Shortly re-stated, it is this: A creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest. A debtor might in making a payment stipulate that it was to be applied only to principal. If he did so, the creditor need not accept the payment on these terms, but then he must give back the money or the cheque by which the money is proffered. If he accepts it, he would then be bound by the appropriation proposed by the debtor. The learned District Judge correctly stated the law in his judgment and accordingly gave decree for the outstanding principal of Rs. 23,318 and interest at the agreed rate from the 12th August 1893, to the date of the suit, under deduction of the sums paid to credit of interest.

The Chief Commissioner recalled this judgment. He held that, inasmuch as in one of the Plaintiff's books there were certain entries as credits to principal with interest at 8 per cent., then, although in the other books the payments were credited to interest, yet the entry in the one book could not be disclaimed by the Plaintiff, and he drew the inference that the parties agreed that the payments should be to capital and should only be credited to interest if interest was reduced to 8 annas simple.

Now that entries in the books of the creditor may be taken as indicative of agreement to a proposed appropriation by

the debtor need not be denied and is in accordance with the law as above stated. But the learned Chief Commissioner has omitted to notice a fact which in their Lordships' opinion prevents the inference to be drawn as he drew it. It is this: Both parties came into Court with opposing views as to an alleged verbal agreement made after the partial settlement of the 11th August 1893. The Plaintiff averred that it was arranged that thereafter the interest was to be 8 annas per mensem compound with yearly rests instead of 10 annas simple. The Defendant averred that the interest was to be 7 annas 9 pies simple. At the trial neither party pursued his contention, and the interest therefore falls to be paid as per the mortgage. But on the Plaintiff's belief it was quite natural that payments should in a book be treated as payments to principal, because if the interest is compound and the payment is credited at the time of the rests, it makes no difference whether the payment is credited to principal or to interest. Apart from this inference, which is fallacious and confounds simple with compound interest, there is no trace of an appropriation to capital proposed by the debtor and acceded to by the creditor. And once the idea of undue influence is gone, the markings signed by the debtor on the back of the mortgage and the entries in all the other books of the Plaintiff prove all the other way.

The other point raised by the Appellant is as to the rate of interest up to the date of the decree. The Chief Commissioner has reduced this to $3\frac{3}{4}$ per cent., but in the view taken on the main question by the Board the interest must be at contract rate, i.e., 10 annas per mensem simple, up to the date of the decree. After that the rate is in the discretion of the Court.

The appeal must, therefore, be allowed, and the case must go down that the ac-

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count may be stated in accordance with the view above expressed. The Respondents will pay the costs of the appeal and in the Court of the Chief Commissioner. Their Lordships will humbly advise His Majesty accordingly.

Solicitors : Messrs. Barrow, Rogers and Nevill for the Appellant.

No one appeared for the Respondents.

R. M. P.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD SHAW.
LORD PHILLIMORE.
MR. AMEER ALI.
1921,
7, July.

A. S. VEDACHELA
MUDALIAR, Appellant,
v.
K. I. RANGANATHAN
CHETTIAR, since
deceased, and ors.,
Respondents.

Hindu Law—Mitakshara (Southern school)—Succession, order of, amongst atma-bandhus—Division into ex parte paterna and ex parte materna, and preference of former to latter, if justifiable—Doctrine of spiritual benefit, if determines preference—Propinquity alone, if ground of preference—The rule in Mitakshara, if open to question as spurious or as incomplete—Enumeration of heirs, illustrative—Viramitrodaya, authority of, in Southern India—Maternal uncle's place in the order of succession.

The passage in the Mitakshara, Chap. II, sec. 6, para. 1, laying down the order of succession amongst the bandhus has been accepted by a series of Commentators and by eminent Hindu Judges in the British Indian Courts, and any doubt at this stage as to its character or authority will lead only to perplexity and confusion. The enumeration of bandhus in the passage being intended, by way of illustration only, the rule is not open to objection on the ground of incompleteness.

The question being whether according to the law of the Mitakshara as recognised in the Dravira Country, the maternal uncle or the son of the paternal aunt's son (both

of whom are atma-bandhus) should succeed as the preferential heir :

Held—That there is nothing in para. 598 of the Sarasvati Vilasa, to justify the division of the atma-bandhus in two sub-classes, viz., ex parte paterna and ex parte materna or the preference of the former to the latter.

That, in the absence of express authority varying the rule, the propositions enunciated in MUTTUSAMI v. MUTTUKUMARASAMI (3), furnish a safe guide, and the maternal uncle, who was undoubtedly nearer in degree and who offered oblations to the father and grandfather of the deceased whilst the son of the paternal aunt's son offered none, was the preferential heir.

The place assigned by Sarbadhikary and Mayne to the maternal uncle in their tables of succession questioned.

Although the Smriti Chandrika in the Southern Presidency is regarded as the most authoritative commentary on Vijnaneshwara's work, the Viramitrodaya holds, as in Western India, a high position.

These were consolidated appeals from a judgment of the High Court of Judicature at Madras.

The facts of the case will appear from their Lordships' judgment.

The contest in this appeal was between the maternal uncle and father's sister's son's son of one Sankaramurthi Mudaliar deceased.

The Subordinate Judge decided that both the claimants were atma-bandhus of the deceased, but the maternal uncle being nearer in degree and also conferring greater spiritual benefit on the propositus was entitled to succeed in preference to the father's sister's grandson.

The High Court was of opinion that the

(3) I. L. R. 16 Mad. 23 (1892); affirmed on P. C. : I. R. 23 I. A. 83 : s. c. I. L. R. 19 Mad. 405 (1896).

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maternal uncle being related to the deceased through the mother's side was to be postponed to the father's sister's grandson who was related to the deceased through the mother's side. The High Court thought the case was covered by *Sundaramal v. Rangasami* (7) and *Balusami v. Narayana* (8) and applying the distinction of *ex parte paterna* and *ex parte materna* they said that the father's sister's son's son was the preferential heir.

Mr. B. Dubé (with Mr. J. C. Hazra) for the Appellant contended that the distinction of *ex parte paterna* and *ex parte materna* ought not to be applied to the case.

The text of Yajnavalka simply says in default of the gentiles (agnates) the cognates (*bandhus*) come.

In *Giridhari Lal Roy v. The Government of Bengal* (2), it was laid down for the first time that the succession amongst the *bandhus* is to be governed in the following way: First come the *atma-bandhus*, next the *pitri-bandhus* and last the *matri-bandhus*. It was not decided in that case in what order succession will be governed amongst persons of the same class.

The principle amongst persons of the same class ought to be the *nearer in degree* and ought to exclude the more remote. Applying that test the maternal uncle is nearer in degree.

The maternal uncle is not mentioned in the text quoted by Yajnavalka—but his position as an *atma-bandhu* was first recognised in *Guru Gobinda v. Anand Lal* (9) and *Buddha Singh v. Lattu Singh* (10) lays down the principle of succession according to Mitakshara. A recent Full Bench of the Patna High Court has ex-

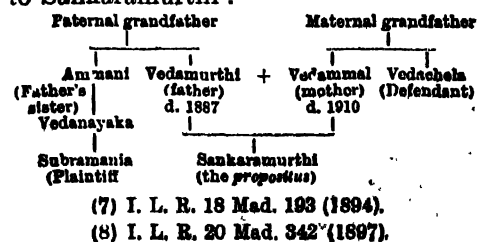
pressed di-approval of the cases in *Sundaramal v. Rangasami* (7) and *Balusami v. Narayana* (8) referred to above.

[Mr. AMEER ALI stopped Mr. Dubé observing that the text of Vrihaspati was quite clear as to the Mitakshara law of succession which says we must apply the text of nearness of relationship to the *propositus* and that concludes the case.]

Their LORDSHIP'S JUDGMENT was delivered by

MR. AMEER ALI.—The two actions which have given rise to the present consolidated appeal relate to the inheritance of one Sankarmurthi Mudaliar, a Hindu inhabitant of the Tinnevely District in the Madras Presidency, subject to the law of the Mitakshara as recognised in the Dravida country. The question for determination is of considerable importance and their Lordships cannot help regretting that, owing to the non-appearance of the Respondents, it has been heard *ex parte*. Sankaramurthi died in 1900 without leaving any male issue or a widow. Consequently, on his death his mother, Vedammal, who was alive at the time, succeeded to his estate. She held the property until her own demise in 1910. Thereupon the two claimants, Subramania (since deceased) and Vedachela, came forward alleging title as *bandhus* to Sankaramurthi's inheritance, each claiming by virtue of his relationship to be preferentially entitled.

The following table will show the position in which they stand to each other and to Sankaramurthi:—



(2) 12 M. I. A. 448 (1888).

(7) J. L. R. 18 Mad. 193 (1894).

(8) I. L. R. 20 Mad. 342 (1897).

(9) 5 B. L. R. 15, 28 (F. B.) (1900).

(10) L. R. 42 I. A. 208, 227 (1915).

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Subramania brought his action on the 27th January 1911, in the Court of the Subordinate Judge of Tinnevely in which Vedachela was impleaded as the tenth Defendant. The other Defendants appear to be mainly assignees from Vedammal. Vedachela brought his suit shortly after, Subramania being the principal Defendant.

The two suits were numbered respectively 6 and 15 of 1911, and were tried together before the Subordinate Judge. The primary question for him to determine was which of the two claimants, *viz.*, the son of the paternal aunt's son, or the maternal uncle was entitled to the inheritance in preference to the other. The Subordinate Judge after examining the authorities came to the conclusion that the maternal uncle, Vedachela, had the superior title. He accordingly dismissed Subramania's suit and decreed Vedachela's claim. From his decrees there were two appeals to the High Court of Madras. The learned appeal Judges differed from the Subordinate Judge as to the respective rights of the parties, and accordingly reversed his decision in both the suits, the result being that Subramania's claim was allowed and Vedachela's was rejected. The present consolidated appeal before the Board is from the judgment and decrees of the High Court.

The point for determination turns on the construction of the rule laid down in the Mitakshara as to the succession of *bandhus*, for which the English word "cognate" has been used as a synonym in English translations and treatises on Hindu law and in a long series of judgments. The history of the law relating to *bandhus*, and the principles governing their right to inherit have been explained at considerable length in the case of *Ramchandra Martand Waikar v. Venayak Venkatesh Kothiekar* (1). It is

sufficient to observe here that under the Mitakshara the right of inheritance depends on sapinda relationship, in other words, "community of blood." Sapinda relations are divided into two groups, *viz.*, samana-gotra sapindas (blood relations of the same gotra or stock) and bhinna-gotra sapindas (consanguineous relations belonging to another gotra), in other words blood relations connected through females who have passed into other families or gotras. The bhinna-gotra sapindas on whom the law confers the right of inheritance are the inheriting *bandhus*.

The rule in the Mitakshara as to the succession of these *bandhus* is rendered into English by Mr. Colebrooke in the following words, Mitakshara, Chap. II, sec. 6, para. 1 :—

"(1) On failure of agnates, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother as is declared by the following text. 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred.'

"(2) Here, by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance; on failure of them, his father's cognate kindred; or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

Mr. Colebrooke's rendering of the first part of para. 1 is a paraphrase of the original terms, *atma-bandhu*, (*pitri*) *pitru-bandhu* and (*matri*) *matru-bandhu*. Then what follows has been judicially construed to be merely illustrative of what the three classes severally mean. It will be noticed

(1) L. R., 41 I. A. 290; S. C. 19 C. W. N. 1154 (1914).

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that in the enumeration of *bandhus* in this illustration, several important *bandhus*, such as the maternal uncle and sister's son, are omitted. The maternal uncle's position as an inheriting *bandhu* was established so early as the sixteenth century by Mitra Misra, whose well-known commentary on the Mitakshara, named the Viramitrodaya is regarded as a high authority wherever the law of that school is in force. Mitra Misra gives first an exposition of the rule enunciated in the Mitakshara :—

"On failure of the samanadakas the 'cognates' or '*bandhus*' are heirs. The cognates are of three descriptions; the cognates of a man himself, the cognates of the father, and the cognates of the mother. To this effect is the following passage of the Smriti: 'One's father's sister's sons, one's mother's sister's sons and one's maternal uncle's sons are known to be one's own cognates; the father's father's sister's sons, the father's mother's sister's sons and the father's maternal uncle's sons are known to be the father's cognates; the mother's father's sister's sons, the mother's mother's sister's sons and the mother's maternal uncle's sons are known to be the mother's cognates.' "

"Amongst these also the order is that, by reason of greater propinquity, first one's own cognates, after them the father's cognates, and after them the mother's cognates."

He then goes on to add :—

"The term *bandhus* in the text of Vijnaneswara and Yajnavalkya must comprehend also the maternal uncles and the rest, otherwise the maternal uncles and the rest would be omitted, and their sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity; a doctrine highly objectionable."

The Judicial Committee in *Giridhari Lall Roy v. The Government of Bengal* (2) recognised the authority of the Viramitrodaya, and acting upon its exposition held that the maternal uncle, although not men-

tioned specifically in the illustration, was an inheriting *bandhu*. In that case the contest was between the father's maternal uncle and the Crown claiming the property by escheat. The Board held that as the maternal uncle was a *bandhu* of the deceased, the father's maternal uncle was a *bandhu* of the father. The maternal uncle's place, however, among the *bandhus* of his own class was not defined, and he has had many battles to fight in consequence.

The Subordinate Judge in the present case has held that both the claimants are no doubt *atma-bandhus*, but that the maternal uncle, both on the ground of nearness of blood as well as superior efficacy of oblations, was the preferable heir. One part of his judgment deserves notice. Referring to the decision in *Giridhari Lall Roy's* case (2) he says as follows :—

"Their Lordships relied on the passages quoted from the Viramitrodaya in that case as well as on the passage in the Mitakshara dealing with the property of a trader dying abroad. The reference here is to Vignaneswara's commentary on Sloka 264. Chap. 11 of Yagnavalka. It occurs in the *perkaranam* (section) called *Sambooya Samuthanam* (concerns between partners). The sloke says that the property of a trader dying abroad goes to his (1) *dayadas*; (2) *bhandhavas*; (3) *gnatis*; (4) returning partners, and on failure of these in order, to the king. Vignaneswara explains *dayadas* as 'sons and the rest,' *bhandhavas* as 'on the mother's side the maternal uncle and the rest,' and the *gnatis* as 'gotraja sapindas as distinguished from the descendants.' It is clear from this that among the *bandhus* related through the mother, the *mathula* or maternal uncle takes the first place."

The learned Judges of the High Court on appeal proceeded on a different line. Mr. Justice Miller felt himself constrained to follow certain previous decisions of his

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own Court in holding that the maternal uncle's claim must be overruled. Whilst his learned colleague, Sadasiva Ayyar, J., considered the passage in the Mitakshara laying down the order of succession among *bandhus* as "spurious" and "non-Shastraic." His view should be given in his own words :—

"As I pointed out in the course of the arguments, the text is illogical, incomplete and inconsistent. However, it has to be accepted though, in my opinion, it is not a Shastraic text, for, I am bound by the authority of the Privy Council not to rely upon the more ancient and authoritative Shastras where the Law has been settled by the Courts according to the custom and practice of the Hindu community resident in a certain Province, even though the custom is based upon less authoritative treatises. (The mother's sister's son is unconditionally stated to come under the term 'bhinna-gotra sapinda,' though very frequently he is of the same gotra as the propositus, that is when the mother and her sister have married husbands of the same gotra.) Though the *bandhus* are classified as *atma-bandhus*, *pitru-bandhus* and *matru-bandhus*, all three come in as heirs because they are *bandhus* of the propositus himself though the first class alone is technically called *atma-bandhus* (or own *bandhus*). With the greatest deference the fourth proposition laid down by Sir T. Muthuswami Aiyer, J., viz., that between *bandhus* of the same class the spiritual benefit they confer on the propositus is a ground of preference, does not commend itself to me, though guarded *obiter dicta* to the same effect are found in other learned judgments also both earlier and later in date than *Muthusami v. Muttukumarasami* (3). Some of the *pitru-bandhus* and *matru-bandhus* mentioned in the text itself confer no spiritual benefit whatever on the propositus, and I fully agree with those judicial observations which hold that according to the Mitakshara (and ignoring the Benares branch of that school) the question of spiritual benefit or of death pollution, or of the right of performance of obsequial ceremonies, should

(8) I. L. R. 16 Mad. 23 (1892).

not be introduced when considering the question of heirship. I go further and say that the introduction of such questions would lead only to inextricable confusion."

And the learned Judge went on to add :—

"The enumeration in the Vridha Sata-tapa's text being clearly not exhaustive, several *bandhus* have been brought in by the decisions of the Courts even in precedence of the three *atma-bandhus* specially mentioned in the text (the said three being the father's sister's son, the mother's sister's son, and the mother's brother's son). When we once bring in others, *atma-bandhus* before *pitru-bandhus* it seems logical to hold that all *atma-bandhus* (lower in status to the three specially mentioned) should also be exhausted before even the first *pitru-bandhu* could come in. The only convenient and logical principle seems to me to so bring in all the *atma-bandhus*, though removed to the extreme limit of 5 degrees from the propositus, before bringing in a *pitru-bandhu*, though the latter may be removed by a less number of degrees from the propositus and (by the same analogy) to bring in all the *pitru-bandhus* even up to the fifth degree before a *matru-bandhu* though the latter is removed by less than 5 degrees."

It is hardly possible for their Lordships to pronounce an opinion on the authenticity of the passage condemned in such strong terms by a Hindu Judge. They can only observe that it appears to have been accepted by a series of commentators and by eminent Hindu Judges in the British Indian Courts. Any doubt at this stage as to its character or authority will, in their Lordships' opinion, lead only to perplexity and confusion. As regards the incompleteness of the rule, it is obvious that if the enumeration of *bandhus* was only intended by way of illustration the difficulty disappears, and the omission of such important *bandhus* as the mother's brother and the sister's son becomes easily intelligible, as both must have held in the social and religious system of the Hindus, a position which did not require a jurist's pronouncement to elucidate.

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Respecting the learned Judge's view in the latter part of the passage quoted above, their Lordships do not consider they are called upon to express an opinion by the facts of the present case. Both the contestants are found to be *atma-bandhus*, and the sole question is who among the two is preferentially entitled to Sankaramurthi's inheritance. Recent writers on Hindu law have divided each class of *bandhus* into two sub-classes respectively designated as cognates *ex parte paterna*, and cognates *ex parte materna*. This subdivision is evidently based on an inference from the order in which the several *bandhus* are mentioned in the illustrative enumeration. For instance, among the *atma-bandhus* enumerated, the name of the father's sister's son is first given; then comes the mother's sister's son; and after him, the son of the mother's brother. Similarly, among the specifically named (*pitri*) *pitru-bandhus* first comes the son of the father's paternal aunt, and among (*matri*) *matru-bandhus* the son of the mother's paternal aunt. From this it has been inferred that the expounder of the rule in question intended that each class should be divided into two sub-classes according to the side of relationship, and that in every case preference should be given to the father's side. Their Lordships, again, in the view they take of the rights of the parties in the present case, do not think it necessary to express an opinion how far this proposition is in conformity with the express rule that in each class propinquity should be the governing factor. Assuming, however, the inference to be well-founded, the question arises, what is the place of the mother's brother among the *atma-bandhus*? He is not specifically named; his sons are. He is unquestionably the nearest sapinda; and according to the ancient rule relating to sapinda descent, "to the nearest sapinda, the inheritance next

belongs," he would undoubtedly be entitled to Sankaramurthi's estate, unless he is cut out, as the learned Judges of the Madras High Court have cut him out in favour of the paternal aunt's grandson, by the inferential application of a rule of preference in each class to a person not named at all in the text, but who certainly stands nearest to the deceased by sapinda relationship.

The earlier decisions of the Madras High Court throw no light on the question at issue. In *Narasimma v. Mangammal* (4), where the contest was between the mother's brother and the father's sister, preference was given to the maternal uncle. Again in *Chinnamal v. Venkatachala* (5), where the contest was between the maternal grandfather of the deceased on one side and his paternal aunt on the other, the mother's father was preferred to the father's sister. In *Muttusami v. Muttukumarasami* (3), the contest was between a maternal uncle of the half-blood and the father's paternal aunt. Mr. Justice Muttusami Ayyar and Mr. Justice Parker held in favour of the maternal uncle, and their view was affirmed by the Judicial Committee [*Muthuswami v. Muthukumarasami* (6)].

It was in this case that the learned Judges laid down four broad principles for determining preferability among contending *bandhus*. (To one of these propositions Mr. Justice Sadasiva Ayyer, in the present case, has taken exception). They say as follows:—

"The conclusions we have come to are (1), that those who are bhinnagotra-sapindas or related through females born in or belonging to the family of the propositus are *bandhus*; (2) that as stated in the text of

(3) I. L. R. 16 Mad. 23 (1892).

(4) I. L. R. 18 Mad. 10 (1893).

(5) I. L. R. 15 Mad. 421 (1892).

(6) L. R. 28 I. A. 83; s. c. I. L. R. 18 Mad. 405 (1893).

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Vridha Satatapa or Baudhayana they are of three classes, viz., *atma-bandhus*, *pitru-bandhus* and *matru-bandhus*, and succeed in the order in which they are named; (3) that the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained; and (4) that as between *bandhus* of the same class, the spiritual benefit they confer upon the propositus is, as stated in Viramitrodaya, a ground of preference."

In *Sundaramal v. Rangasami* (7), there was a triangular contest. The third Defendant was the deceased's mother's sister's son, the fourth and fifth Defendants were the daughters of his two sisters, whilst the Plaintiffs and two other Defendants were the sons of the daughters of the deceased's paternal uncle. The learned Judges overruled the claim of the sisters' daughters, and of the mother's sister's son. In rejecting the latter's claim the learned Judges used the following terms:—

"As between Plaintiffs and the third Defendant the latter is a *bandhu ex parte materna*, whilst the former are *bandhus ex parte paterna*. The decision in *Muttusami v. Muttukumarasami* (3) is not in point. There the competition was between a maternal uncle and the father's paternal aunt's son, both of whom were *bhinna-gotra sapindas* and *bandhus*."

In *Balusami v. Narayana* (8) on which the decision of the High Court mainly rests, the contest was between the deceased's maternal uncle's son on one side, and the son of his sister's son on the other. The learned Judges of the High Court held that the latter was nearer in degree to the propositus than the maternal uncle's son. Among other reasons for this conclusion they state at the end of the judgment, "another fundamental principle of the law, in favour of the third Defendant's

preferable right is that among *bandhus* of a class, those who are *ex parte paterna* take before *bandhus ex parte materna*."

It is to be noticed that in *Balusami v. Narayana* (8), the learned Judges do not exclude from consideration in determining the question of preferability the fact of superior religious efficacy. They also recognise the high authority of the Viramitrodaya in the Mitakshara school.

The passage in the Mitakshara (Chap. II, sec. 6, paras. 1 and 2), which lays down the rules relating to the succession of *bandhus* has already been quoted in a previous part of this judgment. It is expressly declared that among the classes, each takes precedence according to the order mentioned, viz., the deceased's *atma-bandhus* come first, the (*pitri*) *pitru-bandhus* (the father's *bandhus*) come next, and the (*matri*) *matru-bandhus* come last. The ground on which the rule is based is stated in express terms to be "nearness" of blood. "Here," the text says, "by reason of nearness the *atma-bandhus* are his successors in the first instance," and so on.

In Southern India the Smriti Chandrika of Devananda Bhatta holds a parallel position to the Mayukha in the Bombay Presidency. Devananda Bhatta flourished before Mitra Misra the author of the Viramitrodaya for the latter frequently quotes Devananda. Although the Smriti Chandrika in the Southern Presidency is regarded as the most authoritative commentary on Vijnaneswara's work, the Viramitrodaya holds, as in Western India, a high position. It supplements many gaps and omissions in the earlier commentaries, and illustrates and elucidates with logical preciseness the meaning of doubtful prescriptions.

The Smriti Chandrika (Chap. XI, sec. 5, paras. 13-15) states the rule as to the suc-

(8) I. L. R. 20 Mad. 842 (1897).

(7) I. L. R. 13 Mad. 198 (1894).

(3) I. L. R. 16 Mad. 23 (1892).

(8) I. L. R. 20 Mad. 842 (1897).

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cession of *bandhus* in the following terms :—

"13. Brihaspati bearing in mind all the above principles declares:—'Where there are many relatives (*jnatayah*), or remote kindred (*sakulyah*) or cognate kindred (*bandhavah*), whoever is nearest of kin, shall take the wealth of him, who dies without male issue.'

"14. (*Jnatayah*) *sapindas*, or kinsmen connected by funeral oblations of food (*sakulyah*) *samanodakas* or distant kinsmen connected by libations of water (*bandhavah*) cognate kindred. A description of these is given, as follows, in a different *Smriti*, according to their order of relationship.

"The sons of his own father's sister, and the sons of his own mother's sister, and the sons of his maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred."

"15. Of the kinsmen, distant kinsmen, and cognate kindred, in default of one that stands nearest in the order expressly given, he that may be somehow viewed to stand on a par with him may be selected; it being generally declared by Gautama:—'Let those take the inheritance who give the funeral cake (*pinda*) who are the descendants from the same *gotra*, or who are sprung from the same *Rishi*.'"

The *Sarasvati Vilasa*, according to the editor of the *Vivada Chintamani*, is another work of authority in Southern India. It frequently refers to the *Smriti Chandrika*, and, consequently, its author must have flourished later than Devananda Bhatta. In the *Sarasvati Vilasa*, the principle relating to the succession of *bandhus* is thus given :—

"Para. 595. The *bandhus* are mentioned in another *Smriti* in the order of their propinquity. The sons of one's father's sister, the sons of one's mother's

sister, and the sons of one's mother's brother should be known as one's *atma-bandhus*. The sons of one's father's father's sister, the sons of one's father's mother's sister, and the sons of one's father's mother's brother should be known as one's *pitru-bandhus*. The sons of one's mother's father's sister, the sons of one's mother's mother's sister, and the sons of one's mother's mother's brother should be known as *matru-bandhus*."

"Para. 596. These have a claim upon the wealth in default of the *gotrajas*."

"Para. 597. Even there, one's *atma-bandhus* take the wealth first by reason of their propinquity. In default of them, the *pitru-bandhus* take the wealth, and in default of them the *matru-bandhus*. This order should be known." Setlur's Collection of Hindu law Books on Inheritance. p. 183.

And then comes the passage on which the Judges in *Balusami v. Narayana* (8) relied in their division of *atma-bandhus* in two sub-classes, viz., *ex parte paterna* and *ex parte materna*. That passage runs thus :—

"Para. 598. Nor could it be urged here that the mother being nearer than the father, the *matru-bandhus* take the wealth before the *pitru-bandhus*. From the text, 'of these the mother is more important than the father'; (2) the mother's precedence alone is stated and not that of the mother's *bandhus*. Therefore, we think it sound that the *matru-bandhus* should take the wealth only after the *pitru-bandhus*."

A very small consideration would show that that passage has nothing to do with the members of the same class *inter se*. It only explains why *pitru-bandhus* are to be preferred to *matru-bandhus*, the mother's position being special to herself under an express rule.

The passage in the *Viramitrodaya* bearing on the subject has already been referred to, but attention may once more be directed to the words of Mitra Misra in which he declares the position of the maternal uncle as an heir—"otherwise the exclusion of

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the maternal uncle and the like would be the result. And it would be extremely improper that their sons are heirs, but they themselves though nearer are excluded."

Among modern writers both Golap Chandar Shastri, p. 296, and Raj Coomar Sarbadhikary, p. 726, affirm that nearness of blood is the governing principle in the succession of *bandhus*. The Shastri lays down the rule in the following words: "(1) The nearness in degree on whichever side is to be preferred to one more remote: (2) of those equal in degree, one related on the father's side is to be preferred to one related on the mother's side; (3) when the side is the same, the circumstance of one being related through a male and another through a female makes no difference." And Professor Raj Coomar Sarbadhikary states that in a case of a contest between two members of the same class and of the same degree or equally remote, the question of efficacy of oblations "determines the preferable right." The tables of succession in Professor Sarbadhikary's lectures, and in Mr. Mayno's and Mr. Bhattacharji's erudite works are very valuable in judging of the *bandhus* belonging to each class. But their Lordships are not satisfied that the place they have suggested for the maternal uncle in their respective tables of succession is correct.

Their Lordships think that, in the absence of any express authority varying the rule, the propositions enunciated in *Muttusami v. Muttukumarasami* (3), which on appeal was affirmed by the Judicial Committee, furnish a safe guide.

In the present case before their Lordships, the Appellant and the deceased were sapindas to each other; and he (the Appellant) is undoubtedly nearer in degree to the deceased than Subramania. He also

offers oblations to his father and grandfather to whom the deceased was also bound to offer *pinda*. The deceased thus shares the merit, resulting from the Appellant's oblations to the manes of his ancestors, whereas the father's sister's son's son offers no *pinda* to the deceased's ancestors. On all these grounds their Lordships think the view taken by the Subordinate Judge was well founded. They will therefore humbly advise His Majesty to reverse the judgment and decrees of the High Court and restore those of the first Court with costs.

Solicitors: Messrs. Douglas, Grant for the Appellant.

Solicitor: Mr. John Josslyn for the Respondents.

R. M. P.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 154 of 1921.

SANDERSON, C. J. CHOTZNER, J. 1921, 22, July.	}	MOHENDRA NATH NANDA and ors., Petitioners, v. BAIDYA NATH TRIPATHI and ors., Opposite Party.
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Bengal Tenancy Act (VIII of 1885), sec. 170 (3)
— Execution of decree for rent obtained against Hindu widow—Reversionary heir, if may deposit to prevent sale—Revision—Civil Procedure Code (Act V of 1908), sec. 115.

The words "an interest in the tenure or holding voidable on the sale" in sec. 170 (3) of the Bengal Tenancy Act mean "an interest which is in existence at the time of the sale and which will become liable to be avoided on the sale taking place at the option of some one."

Where a decree for rent put into execution was one obtained against a Hindu widow, the reversionary heir expectant of her husband on her death did not have

(*) I. L. R. 16 Mad. 23 (1892); affirmed on P. Q.; L. R. 23 I. A. 83; a. c. I. L. R. 19 Mad. 405 (1896).

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an interest in the tenure or holding voidable on the sale within the meaning of sec. 170 (3) of the Bengal Tenancy Act.

Where the Court of execution allowed the reversioner to make a deposit under that section, he exercised a jurisdiction not vested in him by law or was acting in the exercise of his jurisdiction illegally or with material irregularity within the meaning of sec. 115 of the Civil Procedure Code.

This was a Rule granted on the 1st March 1921 against an order of the Munsif of Contai (Babu Bishnupada Roy), dated the 7th October 1920, an appeal from which order was dismissed by the District Judge of Midnapur (M. Yusuf, Esq.), on the 17th November 1920 as incompetent.

The facts of the case will appear from the judgment.

Babu Sitaram Banerjee for the Petitioners.

Babu Apurba K. Mukherjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is a Rule which was granted by my learned brothers Mr. Justice Chatterjea, and Mr. Justice Suhrawardy, calling upon the Opposite Party to show cause why the order complained of should not be set aside. The order complained of is an order of the learned Munsif sitting at Contai, and the matter arose in this way : The Petitioners in this Court, at whose instance the rule was granted, are the landlords. They obtained a decree against a *purdanashin* widow for arrears of rent, and an execution case was instituted for the purpose of putting the property up to sale. The Opposite Parties are admittedly the reversioners, and they applied to the learned Munsif to be allowed to deposit the decretal amount under sec. 170 sub-sec. (3) of the

Bengal Tenancy Act. The learned Munsif allowed the application and there was an appeal to the learned District Judge who held that the appeal did not lie. The learned Vakil, who supported this Rule, agreed that there was no right of appeal to the learned District Judge. By reason of the appeal proceedings, considerable delay took place in making the application for this Rule : but that matter was taken into consideration by the learned Judges who granted this Rule, and, in my judgment it is not necessary for us to deal further with that part of the case. The learned Vakil's argument was based upon the words of sec. 170 (3). His argument was that inasmuch as sec. 170 (3) provided that "the judgment-debtor or any person having in the tenure or holding any interest voidable on the sale, may pay money into Court under this section" the Opposite Parties, who are merely holders of a reversionary interest in the property, were not persons entitled to make the deposit.

The whole question depends upon whether the reversioners can be said to be *persons having an interest in the tenure or holding voidable on the sale*. In my judgment those words must mean an interest, which is in existence at the time of the sale and which will become liable to be avoided on the sale taking place at the option of some one. The question is whether the interest of the reversioners is such an interest. In my judgment it is not. Assuming, for the sake of argument that the reversionary interest would be an existing interest at the time of the sale, when it took place, in my judgment it could not be said to be an interest which would become liable to be avoided on the sale taking place : consequently in my judgment the reversioners have not within the meaning of the words of the section *an interest in the tenure or holding voidable on the sale*.

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It was argued by the learned Vakil who showed cause against the Rule that we should not make this Rule absolute, because this was not a case which would entitle the Court to exercise the powers of revision conferred upon the Court by sec. 115 of the Code of Civil Procedure. The learned Munsif by his judgment held that the reversionary heirs were persons, who were entitled to deposit the money, within the meaning of sec. 170 (3) of the Bengal Tenancy Act. In my judgment, as I have already said, the reversioners were not persons who were entitled to pay money into Court under that sub-section. Consequently the learned Munsif in allowing the reversioners to deposit the decretal amount, was exercising a jurisdiction not vested in him by law, or he was acting in the exercise of his jurisdiction illegally or with material irregularity. Consequently the provisions of sec. 115 of the Code of Civil Procedure apply to this case. In my judgment therefore this Rule must be made absolute.

The objection, which the Petitioners took may or may not be a purely technical one. I do not know whether the reversioners in applying to make the deposit were acting entirely in their own interest or whether they were acting partly in their own interest and partly in the interest of the widow. I mention this, because it was admitted by the learned Vakil who appeared in support of the Rule, that even now it is not too late for the widow, who is the judgment-debtor and who clearly comes within sec. 170 (3), to pay the money into Court in accordance with the provisions of that sub-section, if she can provide the money out of her own pocket or if she can induce the reversioners or other persons to advance the money to her.

For the above mentioned reasons in my judgment this Rule should be made absolute. Having regard to the facts of the

case, we do not make any order as to costs.

CHOTZNER, J.—I agree.

N. G.

Rule made absolute.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 763 OF 1920.

RICHARDSON, J.
1921,
21, June.

GHISULAL AGARWALLA,
Petitioner,
v.
TODARMULL AGARWALLA,
Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 73 and Or. 38, r. 5, money deposited by sureties for release of an attachment before judgment, whether can be treated as "assets held by Court"—Rateable distribution of such money among different decree-holders, if allowable—Sec. 115, High Court's power of revision.

In a money-suit certain property belonging to the Defendant was attached before judgment and then released on two persons standing sureties for the amount of the claim. The suit was ultimately decreed and the decree-holder applied for execution, whereupon the sureties deposited the decretal amount in Court. On that very day just before the deposit was made, the Petitioner who also held a money-decree against the same judgment-debtor, applied for execution of his decree and prayed for rateable distribution of the amount deposited. The application was refused by the Trial Court and the money paid out to the attaching creditor on the latter giving an undertaking to refund the amount in case the High Court reversed the order rejecting the Petitioner's application for rateable distribution:

Held—That the amount deposited was subject to rateable distribution under sec. 73, C. P. Code. The natural interpretation of the wide language of the section would include any asset in the possession of the Court and at the disposal of the Court for the purpose of satisfying a decree

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against a judgment-debtor. There is no reason why it should be restricted to what is paid in by virtue of a process taken in execution. Besides, the assets in the present case though not strictly speaking realised in process of execution were realised by a process in the nature of an anticipatory execution.

HARAI SAHU v. FAZLUR RAHAMAN (1) and **SORABJI v. KALA RAGHUNATH** (2) referred to.

THIRAVIYAM v. LAKSHMANA (3) discussed.

In cases like these where no appeal is allowed, it has been the practice of the High Court to interfere under the powers conferred by sec. 115, C. P. Code.

This was a Rule granted on the 19th November 1920 against an order of the Munsif of Dhubri (Mr. P. Singh), dated the 18th August 1920, refusing the application for rateable distribution presented by the Petitioner.

The material facts of the case are as follows:—In a money-suit brought by Todarmull Agarwalla and another against Hazarimull Todi, certain property of the latter was attached before judgment and then released on two persons standing sureties for the amount of the claim. A decree was ultimately passed in the suit on the 30th July 1920, and on the 4th August execution was applied for, whereupon the sureties deposited the decretal amount in Court on the 7th August. The Petitioner Ghisulal Agarwalla also had a money decree against the same judgment-debtor, Hazarimull Todi, and applied for execution of his decree on the same date just before the said money was deposited by the sureties. The Petitioner Ghisulal prayed for rateable distribution of the amount under sec. 73, C. P. C., which was

refused by the Munsif on the ground that the "assets" contemplated by the section referred to what came to the hands of the Court by virtue of a process taken in execution, and that the present assets not having been realized by a process taken in execution, were not subject to rateable distribution under sec. 73, C. P. C. Against that order the present Rule was granted.

Babu Giriya Prasanna Sanyal for the Petitioner.—The question is whether the money held by the Court answers the description of "assets" within the meaning of sec. 73 of the Civil Procedure Code. That section has undergone a considerable change in the Code of 1908. The provision in the old Code was "Whenever assets are realised by sale or otherwise in execution of a decree" and it has been replaced by a simple phrase "assets held by the Court."

[**RICHARDSON, J.**—Which is the section that refers to attachment before judgment?]

Or. XXXVIII, r. 5. The Rule requires that the security furnished for resisting an attachment before judgment is to be produced and placed at the disposal of the Court. The Code nowhere limits the discretion of the Court to applying it exclusively to the benefit of the attaching creditor or perhaps because it would be giving a preference as between one creditor and another—a preference that frustrates the policy of law and stultifies the provision in sec. 73. (Reads sec. 73 of the Civil Procedure Code).

The section places all creditors on the same footing provided they satisfy the two conditions of being holders of money decrees and of having applied for execution thereof prior to the receipt of the assets in question. It is not disputed that the said conditions want fulfilment in this case. (Reads sec. 145).

Sec. 145 restricts the liability of the

(1) I. L. R. 40 Cal. 619 (1913).

(2) I. L. R. 36 Bom. 156 (1911).

(3) I. L. R. 41 Mad. 618 (1917).

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surety to the sum for which he has furnished security.

[RICHARDSON, J.—Is there any decision on the point?]

The case seems to be one of first impression but I do not stand absolutely unsupported by authorities in that the proposition of law I contend for has been endorsed inferentially in certain decisions.

Refers to *Harai Sahu v. Fazlur Rahman* (1).

It was conceded on both sides and accepted by the Court in its judgment that the term "assets" would include any money held by the Court to the credit of the judgment-debtor. But an exception to this rule was found on the special provision of the law as embodied in Or. XXI, r. 89 on which the current of authorities lay uniformly in one direction.

The decision in *Thiraviyam v. Lakshmana* (3) raises the very same issue now before your Lordship. (Refers to Mulla, 7th Edn., pp. 198 and 199—Illustration C) and *Murugappa v. Palaniyappa* (4).

Babu Bhupendra Kumar Ghosh for the Opposite Party.—The money was deposited by the surety with a view to securing the claim of my client and could be applied solely for that purpose. It has not been paid in process of execution and cannot be called *assets*. Refers to *Sorabji v. Kala Raghunath* (2).

The money has besides been paid out to my clients.

Babu Giriya Prasanna Sanyal in reply.

The decision in *Sorabji v. Kala Raghunath* (2) seems to dote upon the corpse of the old law which was given a burial in 1908 and it has been rightly dissented from in *Thiraviyam v. Lakshmana* (3). The construction put upon the term "*assets*"

is beyond cavil too narrow in view of the language used in sec. 73. . .

My client applied for the retention of the money by the Court pending the decision of this Hon'ble Court. But it was paid out to the Opposite Party on condition of his depositing it upon requisition by the Court.

The JUDGMENT OF THE COURT was as follows :—

This Rule raises a question under s. 73 of the Civil Procedure Code.

On the 7th August 1920, the Petitioner filed an application for the execution of a decree for money which he had obtained against Hazarimull Todi, the Opposite Party No. 3, referred to hereafter as the judgment-debtor.

Meanwhile in another suit brought against the judgment-debtor by the Opposite Parties Nos. 1 and 2, certain property belonging to him had under Or. XXXVIII been attached before judgment and then released on the Petitioner furnishing security for the sum of Rs. 250, representing the amount of the claim in the suit and costs. Two persons stood as sureties for the judgment-debtor for the payment of that amount.

On the 30th July 1920, the Opposite Parties Nos. 1 and 2 obtained a decree. On the 4th August they applied for execution and on the 7th August 1920, the sureties deposited the amount of Rs. 250 in Court.

The Petitioner's application for execution was also made on the 7th August, as I have said the Munsif says that the application was made just before the money was paid in or in other words before the receipt of the assets by the Court.

The question which arises is whether the decree so deposited is "*assets* held by a Court" within the meaning of sec. 73, and therefore liable to be rateably dis-

(1) I. L. R. 40 Cal. 619 (1913).

(2) I. L. R. 36 B.C.M. 156 (1911).

(3) I. L. R. 41 Mad. 616 (1917).

(4) 42 I. C. 507 (1917).

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tributed under that section. The learned Munsif answered this question in the negative and refused the Petitioner's application for rateable distribution. The order was out on the 18th August 1920. On the 28th September 1920 the amount deposited was paid out to the Opposite Parties Nos. 1 and 2 on the condition that they would refund the amount in the event of the order rejecting the Petitioner's application for rateable distribution being reversed by the High Court. The Petitioner obtained this Rule on 19th November 1920 on the re-opening of the Court after the long vacation.

The effect of sec. 73 of the Code has been considered in more than one case. In *Harai Sahu v. Fazlur Rahman* (1), Stephen and D. Chatterjee, JJ., held that money paid into Court under Or. XXI, r. 89 for the purpose of setting aside a sale in execution could not be rateably distributed inasmuch as the Rule expressly requires the deposit to be made for payment to the purchaser and the decree-holder. The learned Judges, however, took occasion to observe that the scope of sec. 73 was far wider than that of the corresponding provision contained in sec. 295 of the old Code.

The learned Pleader for the Opposite Parties Nos. 1 and 2 has relied on the decision of the Bombay High Court in *Sorabji Coovarji v. Kala Raghunath* (2), where it was held that property having been attached in execution of a decree, money paid in under Or. XXI, r. 55, for the purpose of removing the attachment by satisfying the decree was not subject to rateable distribution. The learned Judges were of opinion that sec. 73 was only applicable to "assets held in the process of execution."

For the Petitioner reference was made to

Thiraviyam v. Lakshmana (3). There judgment-debtor had been authorized under Or. XXI, r. 83 to make a private alienation of property attached in execution of a decree and had paid in the money under that Rule to satisfy the decree. The Court allowed rateable distribution and Sheshagiri Ayyar, J., speaking for himself and Napier, J., said this:—"A significant change has been made in the language of sec. 73 of the present Civil Procedure Code. In the old Code, the words were 'when- ever assets are realised by sale or otherwise in execution of a decree.' In the present Code, the words are 'where assets are held by a Court.' The change was apparently intended to set at rest the question whether the word realization should not be restricted to what is paid in by virtue of process taken in execution, but apparently the legislature has not succeeded in the object. There can be no question that the language of the present Code is wide enough to cover cases where monies are in the hands of the Court by whatever process the same has been realized. It is true that the learned Judges of the Bombay High Court held that even under the new Code, the money to be held by the Court must have reached its hands in execution." The learned Judge then referred to the case of *Sorabji v. Kala Raghunath* (2) and another case, and continued:—"It is not necessary to express an opinion on this question as we are of opinion that when permission is granted under Or. XXI, r. 83 to raise money by private alienation, the money is paid under a pending execution application."

The Bombay ruling therefore was distinguished rather than dissented from but the view which the Court was disposed to take is sufficiently indicated by the observations which I have quoted and by the

(1) I. L. R. 40 Cal. 619 (1913).

(2) I. L. R. 36 Bom. 156 (1911).

(2) I. L. R. 36 Bom. 156 (1911).

(3) I. L. R. 41 Mad. 616 (1917).

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further observations which occur later in the judgment. "The policy of the legislature," it was said, "seems to be to bring all monies realized at least in process of execution to the hotchpot to be shared by all the decree-holders. It is analogous to distribution on an insolvency." Then after referring to Or. XXI, r. 72, where sec. 73 is expressly mentioned, the judgment goes on:—"The intention of the legislature is to afford every creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-debtor."

These observations encourage me to adopt what I regard as the natural interpretation of the wide language of sec. 73. I see no reason why the words "assets held by a Court" should receive a narrow or limited construction, or—speaking generally and apart from any express provision applicable to a particular case—why the words should not apply to any assets in the possession of the Court and at the disposal of the Court for the purpose of satisfying a decree obtained against a judgment-debtor.

The assets in question in the present case may not strictly speaking have been realized in process of execution, but they were realized by a process in the nature of an anticipatory execution. Or. XXXVIII, r. 7 states in terms that "save as otherwise expressly provided, the attachment (before judgment) shall be made in the manner provided for the attachment of property in execution of a decree." Or. XXXVIII, r. 10 shows that, the legislature did not intend that attachment before judgment should restrict the rights of persons holding decrees against the Defendant.

The result is that, in my opinion, the learned Munsif erred in refusing to allow rateable distribution in respect of the money here in question.

I have considered whether this is a case in which I ought to interfere under sec. 115 of the Code. The rule was obtained on the footing that the learned Munsif declined to exercise a jurisdiction vested in him. The Code confers no right of appeal from the Munsif's order and it has been pointed out at the bar that the practice of this Court has been to deal with cases such as the present under the powers conferred by sec. 115. I am not, therefore, in any way initiating a new practice when I reverse the order of the learned Munsif and substitute therefor an order that the application for rateable distribution should be allowed and the case sent back to the Munsif for the purpose of doing what further may be necessary. It may be that, if the money had been paid out to the Opposite Parties Nos. 1 and 2 without any undertaking on their part to refund it in whole or in part, I should not have interfered. But as they gave the undertaking and as I am told that the property which was attached before judgment is not now available, I have the less hesitation in making the rule absolute in the sense I have indicated.

The parties will bear their own costs.

J. N. R.

Rule made absolute.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

No. 2645 OF 1919

AND

No. 232 OF 1920.

KUMAR MONMATHRA

NATH MITRA, Plaintiff,

Appellant,

v.

CHUNI LAL GHOSE and

anr., Defendants,

Respondents.

NEWBOULD, J.
SUHRAWARDY, J.

1921,

28, April.

Covenant in a kabulyat for payment of selami at every transfer in respect of a tenure, if enforced.

KUMAR MONMATHA NATH MITRA v. CHUNI LAL GHOSE.

able after a sale in execution of a money decree—Involuntary sale and voluntary sale, difference in cases of.

A *kabuliyat* stipulated that at every transfer a certain *salami* should be paid. The tenure in respect of which this *kabuliyat* was given was sold in execution of a money decree. The landlord subsequently sued for recovery of the stipulated *salami* :

Held—That the covenant did not cover an involuntary sale. A condition in a lease restraining transfer is not applicable to a case of involuntary transfer unless there are words in the covenant which clearly make it applicable to such a transfer.

The transfer in execution of a money decree cannot be treated as on the same footing as a voluntary sale.

DWARIKA NATH ROY CHOUDHURY v. MATHURA NATH ROY CHOUDHURY (1) distinguished.

DAYAMAYI v. ANANDA MOHUN ROY CHOUDHURY (2) followed.

These were two second appeals, one against the decree of E. Panton, Esq., Additional District Judge of Zillah 24-Perganas, dated the 11th September 1919, affirming the decree of Babu Khetra Nath Banerji, Additional Subordinate Judge of that District, dated the 30th of July 1918 and the other, against the decree of Babu Aparajit Prosad Mukherji, Subordinate Judge, third Court of Zillah 24-Perganas, dated the 29th of October 1919, affirming the decree of Babu Romesh Chandra Burdhan, Munsif, Second Court at Baruaipur, dated the 1st of October 1918.

The facts will appear from the judgment.

Dr. Dwarka Nath Mitter and Babus Norendra Chunder Bose and Satyendra Nath Mitra for the Appellant.

Babus Jogesh Chandra Roy and Rajendra Chandra Guha for the Respondents.

(1) 21 C. W. N. 117 (1916).

(2) I. L. R. 42 Cal. 172; s. c. 18 C. W. N. 971 (F. B.) (1914).

The JUDGMENT OF THE COURT was as follows :—

NEWBOULD, J.—These two appeals have been heard together as the point on which they both depend is the construction of a clause in a *kabuliyat* which is common to both the suits. This clause has been translated in the judgment of the learned Additional District Judge of the 24-Perganas against whose decision Appeal No. 2645 of 1919 is preferred as follows :—

“ If at every transfer, in any way, of the lands under this *kabuliyat* one-fourth of the proper value of the land be not deposited in the office of yourself, your heirs and successors-in-interest, such transfer will not be recognised and to this no sort of plea or objection by any of us will be allowed. If we, the vendor and the vendee both, jointly or each of us separately and our heirs and legal representatives do not pay amicably that amount to you, your heirs and representatives, you will be entitled to take *khas* possession of the land under this *kabuliyat* or if you so desire, you can realise the money by suing the transferor or the transferee either jointly or separately.” The tenure in respect of which this *kabuliyat* was given was sold in execution of a money decree and was purchased by the second Defendant in each of these suits. In his suits in addition to other reliefs the Plaintiff claimed different sums as due as *chouth salami* under this clause. Both the Courts in each of these suits have held that this clause gives the lessor no right to *chouth salami* after a sale in execution of a decree.

On behalf of the Appellant two points have been taken. The first is that the words of the *kabuliyat* are wide enough to cover an involuntary sale; and secondly that the sale in execution of a decree stands on the same footing as a voluntary sale.

As regards the first point, the lower Courts in interpreting the document have

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given great weight to the Bengali words used for "transferor" and "transferee." These words are *বিত্ত* and *বিত্তী*, and it appears that these are the words commonly used in documents of voluntary sales. Each of these suits was heard by different Munsifs and each appeal was heard by different Judges. Three of these four officers are Hindu gentlemen and I am not prepared to hold that they have wrongly interpreted the meaning of the Bengali words in the *kabuliyat*. Further it has been repeatedly held by this Court that a condition in a lease restraining transfer is not applicable to a case of involuntary transfer unless there are words in the covenant which clearly make it applicable to such a transfer. We therefore hold that so far as the first point of the Appellant's argument is concerned, the lower Courts were right and the words in the *kabuliyat* are not wide enough to cover an involuntary sale.

As regards the second point, the argument is based on a remark of the learned Chief Justice in the case of *Dwarika Nath Roy Choudhury v. Mathura Nath Roy Choudhury* (1). But in that case the covenant especially provided for the case of a sale by auction and also what is more important in connection with the point now in consideration, the transfer in that suit was by sale in execution of a mortgage decree. A sale in execution of a mortgage decree stands on a different footing from a sale in execution of a money decree. In the Full Bench case of *Dayamayi v. Ananda Mohun Roy Choudhury* (2), it has been decided that "a sale is made involuntarily, where it is in execution of a money decree but not of a decree founded on a mortgage or charge voluntarily made." Other authorities might be cited, if necessary, in

support of the same view. Here the transfer was in execution of a money decree, and it cannot be treated as on the same footing as a voluntary sale.

We therefore hold that the lower Courts were right and dismiss both these appeals with costs.

SUHWARDY, J.—I agree.

J. N. R.

Appeal dismissed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 37 OF 1921.

TEUNON, J.

ABDUL LATIFF YUSUFF,

GHOSH, J.

Accused, Petitioner,

1921,

v.

Heard, 4, March.

ABU MAHAMED KASSIM,

Judgment,

Complainant, Opposite

10, March.

Party.

Criminal Procedure Code (Act V of 1898), sec. 181, sub-sec. (2)—Penal Code (Act XLV of 1860), sec. 406—Criminal breach of trust, in respect of monies received at Singapore for which the accused was liable to account in Calcutta—Court in Calcutta, if has jurisdiction to take cognisance of the complaint—Jurisdiction.

Where a firm carrying on business in Calcutta employed A as agent at Singapore, and prosecuted him in Calcutta for criminal breach of trust in respect of monies received at Singapore for which, he was to render accounts in Calcutta:

Held—That the Court in Calcutta had jurisdiction to take cognisance of the complaint.

COLVILLE v. KRISTO KISHORE (2) followed.

SIMHACHALAM v. EMPEROR (1) distinguished.

This was a Rule granted upon a petition praying that the proceedings in Case

(1) I. L. R. 44 Cal. 912 : s. c. 21 C. W. N. 578 (1916).

(2) I. L. R. 26 Cal. 746 : s. c. 3 C. W. N. 598 (1899).

(1) 21 C. W. N. 117 (1916).

(2) I. L. R. 42 Cal. 172 : s. c. 18 C. W. N. 971 (1914).

ABDUL LATIFF YUSUFF v. ABU MAHAMED KASSIM.

No. P. R. 559/20, now pending against the Petitioner in the Court of the 4th Presidency Magistrate of Calcutta, may be quashed.

The facts of the case will appear from the judgment.

The petition of complaint was as follows :—

The complainant was the manager of the firm of Sulaman Daud Mahamed, carrying on business as general merchants on a big scale at 6, Amratala Street, Calcutta and also at Colombo.

About five months ago, the accused entered into an agreement to serve in the complainant's firm for a period of one year and after he took up service in the complainant's firm, the complainant sent him to Singapore, his duties being to carry out orders of the complainant, by sending to different places goods he would purchase with money sent by the complainant and to render accounts to the complainant at Calcutta for all monies he would receive.

The complainant alleged that between the 1st February 1920 and 19th April 1920, the accused drew money from the complainant's firm to the extent of Rs. 80,000, besides taking ghee worth Rs. 2,536 annas 13 for sale but he accounted for Rs. 67,621 only by sending goods to Colombo twice, once of the value of Rs. 35,889, and again of the value of Rs. 24,500, and by sending goods to Calcutta once of the value of Rs. 7,232.

Upon these allegations the accused was charged with committing criminal breach of trust in respect of cash Rs. 12,379 and ghee of the value of Rs. 2,536-13.

Mr. Meghnad Mitter and Babu Santosh Kumar Bose for the Petitioner.

Babu Narendra Kumar Bose (for Babu Manmatha Nath Mukherjee) and **Babu Satindra Nath Mukherjee** for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

In this case the allegations made in the complaint against the accused-Petitioner are that while the accused was in the service of the complainant's firm at Singapore he committed criminal breach of trust in respect of a sum of Rs. 12,379 and goods to the value of Rs. 2,386-13. The complaint was made to the Presidency Magistrate of the Northern Division on the 17th of June and the accused obtained the present rule on the 10th of January 1921. His contention is that on the allegations made by the prosecution the offence complained of, if any, was committed and completed in Singapore and that the Courts in Calcutta have no jurisdiction to try the case. In support of this contention reliance is placed on the provisions of sec. 181 (2) of the Code of Criminal Procedure and the decision of this Court in *Simhachalam v. Emperor* (1).

But here the further case of the prosecution was that for all monies received the accused was to account at Calcutta. Thus the decision directly in point is that in *Colville v. Kristo Kishore* (2). Following that decision we must hold that on the allegations made the Courts in Calcutta have jurisdiction.

We therefore discharge this rule.

H. C. S.

Rule discharged.

(1) I. L. R. 44 Cal. 912 : s. c. 21 C. W. N. 573 (1916).

(2) I. L. R. 26 Cal. 746 : s. c. 3 C. W. N. 598 (1899).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 195 OF 1919.

SATISH CHANDRA
GHOSE, Defendant,
Appellant,
v.
KALIDAS DASI,
Plaintiff, Respondent.

MOOKERJEE, J.
BUCKLAND, J.
1921,
15, July.

Pardanashin lady, suit for cancellation of document executed by—Rules by which Court should be guided to determine validity of document—Rule that case of fraud must depend strictly on proof of fraud alleged, how far applicable to action brought by pardanashin lady.

The Plaintiff, a pardanashin lady, sought to have a deed of partition executed by her in favour of her husband's brother immediately after her husband's death cancelled:

Held—That it is well settled that the Court when called upon to deal with a deed executed by a pardanashin lady must satisfy itself upon the evidence first that the deed was actually executed by her or by some person duly authorised by her with a full understanding of what she was about to do; secondly that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly that she had independent and disinterested advice in the matter.

In cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence, the Court will act with great caution and will presume confidence put and influence exerted and in cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length, the Court will require the confidence and influence to be proved intrinsically.

In the former class of cases, the principle formulated in sec. 111 of the Indian

Evidence Act applies, viz., that where there is a question as to the good faith of a transaction between parties one of whom stands to the other in a position of active confidence the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. It is an elementary principle that whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, over-reaching, undue influence or unconscionable advantage.

Independent and competent advice which it is necessary that a pardanashin lady should have does not mean independent and competent approval; it simply means that the advice shall be removed entirely from the suspected atmosphere and that from the clear language of an independent mind free from taint of interest the party acting should know precisely the nature and consequences of the transaction.

The fairness of the bargain is the crucial test, and the Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate, and to have possessed a capacity to judge for herself.

That in the present case the Defendant in whose favour the document was executed stood towards the Plaintiff in a relation of personal confidence and the document was executed under circumstances which according to the rules applicable to the execution of documents by pardanashin ladies rendered it liable to be cancelled.

Every variance between pleading and

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proof is not fatal. The Court must carefully consider whether the objection is one of form or of substance.

Per BUCKLAND, J.—The rule that a case of fraud can succeed only on proof of the fraud specified in the plaint may be applicable in cases between man and man but where a pardanashin lady is involved other and equally well known rules have to be applied and conformity with them has to be established.

That a pardanashin lady must have independent legal advice is not necessary as an inflexible rule. But, excluding such rare cases where the experience and attainments of the lady or the circumstances of the case render such advice superfluous, a pardanashin lady must have advice, the adviser should have no adverse interest and should be such a person as is capable of explaining to her fully her rights in general and in particular under the document which she intends to sign, if necessary contrasting them with her rights should the intended document not be executed by her; if the circumstances are such that unless he has a knowledge of law he is not competent to advise her, then and in that case independent legal advice is essential.

This was an appeal against the decree of Babu Shyama Charan Ukil Banerjee, Subordinate Judge of Zillah Hooghly at Howrah, dated the 15th of July 1919.

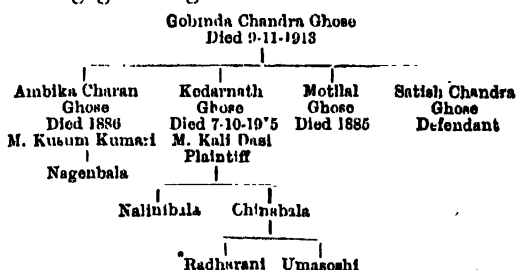
The facts of the case will appear from the judgment.

Mr. T. C. P. Gibbons, Advocate-General, Babu Jogendra Nath Mukherjee, Dr. Sarat Chandra Basak and Babu Parash Nath Mookerjee for the Appellant.

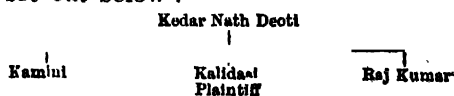
Dr. Dwarka Nath Mitter and Babus Manindra Nath Banerjee, Narendra Krishna Bose and Rama Prosad Mookerjee for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—The subject-matter of the litigation which has culminated in the present appeal is an estate of considerable value left by one Kedarnath Ghose who died intestate on the 7th October 1915. The foundation of the fortune of the family was laid by his father Govinda Chandra Ghose who executed a Will on the 21st August 1905 which was registered, but was not probated after his death on the 9th November 1913. The relationship of the members of the joint family composed of the descendants of Govinda Chandra Ghose will appear from the following genealogical table:—



Govinda Chandra Ghose had four sons, Ambika Charan and Matilal, who died in his life-time, and Kedarnath and Satish Chandra who survived him. When Kedarnath died, he left him surviving his brother, Satish Chandra, his widow Kalidasi, his widowed daughters Nalinibala and Chinabala, and two grand-daughters, Radharani and Umasoshi. The widow Kalidasi had two brothers, Kamini and Raj Kumar, and was the daughter of a family of Deotis whose genealogical table is set out below:—



Shortly after the death of Kedarnath Ghose, a partition deed was executed on the 4th November 1915 between his brother Satish Chandra and his widow

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Kalidasi, and the document was registered on the 8th December 1915. On the 28th June 1916, the widow instituted the present suit for cancellation of the partition deed on the ground of fraud and unfairness, for declaration of exclusive title to a hardware business, its assets and the properties acquired from its income, for declaration of joint title to other properties, for partition and accounts, and for incidental reliefs. The Defendant denied all the material allegations in the plaint, repelled the imputation that the partition deed had not been fairly obtained, asserted that the properties claimed as exclusively owned by the husband of the Plaintiff really formed part of the joint family estate, and repudiated all liability to render accounts. On these pleadings, the following issues were framed and set down for trial :—

1. Has the Plaintiff any cause of action?

2. Can the suit proceed without *ad valorem* court-fees being paid on the value of the entire properties in suit?

3. Is the suit bad for non-joinder of parties?

4. Was the deed dated the 4th November 1915 read over and explained to the Plaintiff and was it understood by her? Was it executed by her with free will and consent? Or was it obtained from her by fraud as alleged in the plaint?

5. Was Kedarnath Ghose the sole owner of the *Karbar* at 78, Clive Street, Calcutta? Or, did it belong to his father Govinda Chandra Ghose, and was it inherited, on his death, by his two sons Kedar and Satish? Was it their joint property?

6. Was the house at Benares the joint property to Kedar and Satish? What is the Plaintiff's share in it?

7. Did the Plaintiff's husband purchase the garden at North Bantra from the

widow of Bellilios in *benami* of the Defendant?

8. Is the suit barred by the principles of estoppel, acquiescence and waiver?

9. Was the manufactory at Bantra an independent *Karbar*? Or, did it form one *karbar* with the *karbar* at 78, Clive Street?

10. Is the Defendant liable to render accounts of the *karbar* at Bantra and of the *karbar* at 78, Clive Street, if so, for what period?

After a protracted trial, the Subordinate Judge decreed the suit in part. He held on the fourth and eighth issues that the deed had been executed by the Plaintiff under circumstances which made it inoperative against her as an illiterate *pardanashin* lady, and that there was no question of estoppel, acquiescence or waiver. He also held, upon the fifth, sixth, seventh and ninth issues that the hardware business at 78, Clive Street which stood in the name of Kedarnath Ghose was an ancestral joint family concern, that the smithy and manufactory in the family dwelling-house at South Bantra in the District of Howrah was not an independent business, that the lands and houses in Calcutta and Benares had been acquired with joint funds and formed part of the family estate, and that the garden at North Bantra purchased from Bellilios must be included in the same category. He further held, on the tenth issue, that the Defendant who was in charge of the business at 78, Clive Street, and at South Bantra was bound to render accounts from the date of the death of Kedarnath Ghose. On these findings, the Subordinate Judge has set aside the partition deed, declared that all the properties in suit were jointly owned and possessed in equal shares by Kedarnath Ghose and Satish Chandra Ghose, and directed partition and accounts; he has

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also ordered the parties to bear their respective costs. Neither the Plaintiff nor the Defendant is satisfied with this decision, as the latter has appealed and the former has preferred a memorandum of cross-objections. The substantial question argued on the appeal relates to the validity of the partition deed; the principal point raised in the memorandum of cross-objections refers to the true character of the properties claimed by the Plaintiff as the separate acquisitions of her husband. Neither the memorandum of appeal nor the memorandum of cross-objections bore adequate court-fees, and the Court was called upon to decide the point during the course of the arguments. Each memorandum bore a court-fee of Rs. 10 only; this was plainly inadequate. The Defendant-Appellant had obviously anticipated the objection and had made a note on his memorandum at the time of presentation to the following effect. "The suit was valued at Rs. 1,21,360. The appeal is for a declaration." This note must have been recorded in view of cl. 17 (iii) of Sch. II of the Court Fees Act, 1870, which provides that the plaint or memorandum of appeal in a suit to obtain a declaratory decree where no consequential relief is prayed must bear a court-fee of Rs. 10. But the plaint in the present case was unquestionably not a plaint in a suit of this description and bore a court-fee of Rs. 1,187-8. The memorandum of appeal also could not be treated as a memorandum in a suit of that nature; indeed, the appeal itself was not in essence for a pure declaration. The trial Court had cancelled the partition deed, had determined the question of title to the properties, had directed partition of all the properties in suit, and had rendered the Defendant liable for accounts. An appeal directed against a decree so comprehensive in scope, can, by no stretch of

language or recourse to legal fiction, be described as an appeal for a declaration, even if we were to assume that an appeal, which really seeks nothing beyond a declaration, in a suit other than a suit for a pure declaratory decree without consequential relief, was ever intended to be included within cl. 17 (iii) of Sch. II of the Court Fees Act, 1870. Similar remarks were applicable to the memorandum of cross-objections. The Appellant and Respondent were consequently called upon to value the reliefs sought in the appeal and by way of cross-objections respectively. It is not necessary to set out the details of the calculations made for the purpose of valuation; suffice to state that, as a result of this investigation, it was found that the Appellant and Respondent were liable to pay Rs. 1,105 and Rs. 825 respectively, as deficit court-fees on the memorandum of appeal and the memorandum of cross-objections. It was also found that the fee paid *ad valorem* on the plaint in the Court below was insufficient and that an additional sum of Rs. 155 was leviable on that account from the Plaintiff-Respondent. The Appellant duly paid the deficit court-fee and thus regularised the memorandum of appeal. The Plaintiff-Respondent paid the additional sum leviable on the plaint, but not the deficit court-fees required to validate the memorandum of cross-objections. There is, consequently, no valid cross-objection which may be considered by the Court, and the memorandum must be rejected. The arguments on both sides have thus centered round what is the root-question in this case, namely, the validity of the partition deed taken by the Appellant from the Respondent. Before, however, we investigate the circumstances which led up to the execution of the deed we may usefully recall the well-established cardinal principles now recognised as

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applicable to a case of this description where the Court is called upon to throw a protective cloak upon a *pardanashin* woman who is unable to protect herself.

It is well-settled that the Court, when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. The leading judicial decisions which recognise these principles are collected in the judgment of this Court in *Mariam Bibi v. Ibrahim* (1), and on examination they will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. This is a fundamental distinction which does not appear to have been always kept in view, with the result that observations made in the one class of cases have been applied without scrutiny to the other class of cases. Illustrations of the conclusion which has resulted from this failure to discriminate between the two classes of cases, are furnished by the decisions in *Rani Usmat Koowa v. Tayler*

(2), *Soondur Kumari v. Kishori Lal* (3), *Ram Prosad v. Ranee Phulpatee* (4), *Kanai Lal v. Kamini* (5), *Monohar v. Bhagabati* (6), *Asmatunnessa v. Alla Hafiz* (7), *Rup Narain v. Gungadhar* (8), *Pannalal v. Bama Sundari* (9), *Dooleechand v. Oomda Khanun* (10), *Bibi Rukhun v. Sheikh Ahmed* (11), *Khas Mehal v. Administrator-General* (12), *Nistarini v. Nandalal* (13), *Keshab Lall v. Radha Raman* (14), *Badiatannessa v. Ambika Charan* (15), *Bhuban Mohini v. Gajalakshmi* (16), *Behari Lal v. Habiba Bibi* (17), *Achhan Kuar v. Thakurdas* (18), *Hakim Md. Ikramuddin v. Najiban* (19), *Shamsuddin v. Abdul* (20), *Tamarasheri v. Maranat* (21), *Mahadevi v. Neelamani* (22), *Latchemy v. Lewcock* (23), *Chillumul v. Garrow* (24) and *Narsammal v. Lutchmana* (25). Reference may also be made in this connection to the two decisions of the Judicial Committee in *Bazlur Rahim v. Shamsunnessa* (26) and *Gerish*

(2) 2 W. R. 307; 4 W. R. 86 (1865).

(3) 5 W. R. 246 (1866).

(4) 7 W. R. 98 (1867).

(5) 1 B. L. R. (O. C. J.) 31 (1867).

(6) 1 B. L. R. (O. C. J.) 28 (1867).

(7) 8 W. R. 468 (1867).

(8) 9 W. R. 297 (1868).

(9) 6 B. L. R. 732, 741 (1871).

(10) 18 W. R. 238 (1872).

(11) 23 W. R. 443 (1874).

(12) 5 O. W. N. 505 (1901).

(13) I. L. R. 26 Cal. 891, 918 (1899).

(14) 17 O. W. N. 991 (1912).

(15) 18 O. W. N. 1133 (1914).

(16) 19 O. W. N. 1139 (1915).

(17) I. L. R. 8 All. 267 (1886).

(18) I. L. R. 17 All. 125 (1895).

(19) L. R. 25 I. A. 137; s. c. I. L. R. 20 All. 447; 2 O. W. N. 545 (1898).

(20) I. L. R. 31 Bom. 165 (1906).

(21) I. L. R. 3 Mad. 215 (1881).

(22) I. L. R. 20 Mad. 269, 272 (1896).

(23) 1 Strange N. C. 30.

(24) 2 Strange N. C. 159.

(25) 2 Strange N. C. 14.

(26) 11 M. I. A. 551, 555; 8 W. R. P. O. 3; (1867).

(1) 28 C. L. J. 306, 367 (1916).

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v. Bhuggobutty (27). In the former case, where the transaction was between a husband and a wife, their Lordships observed that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him. In the latter case, which was one of a death-bed gift in favour of the donor's brothers in their wives' names to the exclusion of her husband's adopted son, their Lordships pointed out that the Judicial Committee and the Courts in India had always been careful to see that deeds taken from *parda* women had been fairly taken and that the party executing them had been a free agent and duly informed of what she was about. The substance of the matter then is that the fairness of the bargain is the crucial test. This principle runs through the later decisions of the Judicial Committee, though the rule is more specially enforced in cases where a fiduciary relation involving trust and confidence is shown to exist; *Fuzzul Hossein v. Amjud Ali* (28), *Ashgar v. Delroos* (29), *Azezunnessa v. Baur Khan* (30), *Taccordin v. Syed Ali* (31), *Sudhistlal v. Sheobarat* (32), *Mahomed Buksh Khan v. Hosseini Bibi* (33), *Lala Amarnath v. Achan Kuar* (34), *Deo Kuar v. Man Kuar* (35), *Hakim Md. Ikramuddin v. Najiban* (36),

(27) 13 M. I. A. 419, 421; 14 W. R. P. C. 7 (1870).

(28) 17 W. R. 523 (1872).

(29) 15 B. L. R. 167; on P. C.; 1 L. R. 3 Cal. 321 (1877).

(30) 10 B. L. R. 205; 17 W. R. 393 (1872).

(31) L. R. 1 I. A. 192; 13 B. L. R. 427 (1874).

(32) L. R. 8 I. A. 39; s. c. I. L. R. 7 Cal. 245 (1881).

(33) L. R. 15 I. A. 81; s. c. I. L. R. 15 Cal. 684 (1888).

(34) L. R. 19 I. A. 196; s. c. I. L. R. 14 All. 420 (1892).

(35) L. R. 31 I. A. 148; s. c. I. L. R. 17 All. 1 (1894).

(36) L. R. 25 I. A. 137; s. c. I. L. R. 20 All. 447; 2 C. W. N. 545 (1898).

Annoda v. Bhuban (37), *Shambati v. Jago* (38), *Ismail v. Hafiz* (39), *Kishori Lal v. Chuni Lal* (40), *Muhammud Kamil v. Imtaiz Fatima* (41), *Sajjad Husan v. Wazir Ali* (42), *Kali Baksh v. Ramgopal* (43), *Mahabir Prasad v. Taj Begum* (44), *Azima Bibi v. Shamalanand* (45), *Mahomed Ali v. Ramzan Ali* (46), *Sunitibala v. Dhara Sundari* (47) and *Matilal Das v. Eastern Mortgage and Agency Co.* (48). The essence of the matter was tersely put by Lord Buckmaster in *Sunitibala v. Dhara Sundari* (47), when he stated that the circumstances under which a *parda-nashin* woman agrees to transfer property in which she is interested must be carefully examined, in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation. The principle thus enunciated was adopted as the basis of the judgment pronounced by Sir John Edge in *Matilal Das v. Eastern mortgage and*

(37) L. R. 29 I. A. 71; s. c. I. L. R. 28 Cal. 546; 5 C. W. N. 489 (1901).

(38) L. R. 29 I. A. 127; s. c. I. L. R. 29 Cal. 749; 6 C. W. N. 682 (1902).

(39) L. R. 33 I. A. 86; s. c. I. L. R. 33 Cal. 773; 10 C. W. N. 570 (1906).

(40) L. R. 36 I. A. 9; s. c. I. L. R. 31 All. 118; 13 C. W. N. 370 (1908).

(41) L. R. 36 I. A. 210; s. c. I. L. R. 31 All. 557; 14 C. W. N. 59 (1909).

(42) L. R. 39 I. A. 156; s. c. I. L. R. 34 All. 455; 16 C. W. N. 889 (1912).

(43) L. R. 41 I. A. 23; s. c. I. L. R. 36 All. 81; 18 C. W. N. 282 (1913).

(44) 19 C. W. N. 162 (P. C.) (1914).

(45) I. L. R. 40 Cal. 378; s. c. 17 C. W. N. 121 (P. C.) (1912).

(46) 24 C. W. N. 977 (P. C.) (1920).

(47) L. R. 46 I. A. 272; s. c. I. L. R. 47 Cal. 175; 24 C. W. N. 297 (1919).

(48) L. R. 47 I. A. 265; s. c. 25 C. W. N. 265 (1920).

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Agency Company (48). It will be observed that the Court must thus have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself; *Sunitibala v. Dhara Sundari* (47), *Matilal Das v. Eastern Mortgage and Agency Co.* (48), *Mahomed Ali v. Ramzan Ali* (46), *Kali Baksh v. Ramgopal* (43), *Sajjat Hussein v. Wazir Ali* (42), *Mahomed Baksh v. Hosseini* (38), *Mohabir Prosad v. Taj Begum* (44), *Azima Bibi v. Shamalanand* (45), *Ismail v. Hafiz* (39), *Hodges v. Delhi and London Bank* (49), *Lindubashini v. Giridhari* (50), *Alikjan v. Rambaran* (51) and *Bhuban Mohini v. Gaja Lakshmi* (16). These, however, are only general principles, and it cannot be too strongly emphasised that there is a grave risk of failure of justice, if they are moulded into inelastic formulas or crystallised into inflexible rules, and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

(16) 19 C. W. N. 1330 (1915).

(38) L. R. 15 I. A. 81; s. c. I. L. R. 15 Cal. 684 (1888).

(39) L. R. 33 I. A. 86; s. c. I. L. R. 33 Cal. 778; 10 C. W. N. 570 (1906).

(42) L. R. 39 I. A. 156; s. c. I. L. R. 34 All. 455; 16 C. W. N. 889 (1912).

(43) L. R. 41 I. A. 23; s. c. I. L. R. 36 All. 31; 18 C. W. N. 282 (1913).

(44) 19 C. W. N. 162 (P. C.) (1914).

(45) I. L. R. 40 Cal. 378; s. c. 17 C. W. N. 121 (P. C.) (1912).

(46) 24 C. W. N. 977 (P. C.) (1920).

(47) L. R. 46 I. A. 272; s. c. I. L. R. 47 Cal. 175; 24 C. W. N. 297 (1919).

(48) L. R. 47 I. A. 265; s. c. 25 C. W. N. 265 (1920).

(49) L. R. 27 I. A. 168; s. c. I. L. R. 23 All. 137; 5 C. W. N. 1 (1900).

(50) 12 C. L. J. 115 (1909).

(51) 12 C. L. J. 367 (1910).

The case before us belongs to the first class mentioned above, where the person who seeks to hold the lady to the terms of her deed is one who stands towards her in a relation of personal confidence. Here, he is the younger brother of her husband; the two brothers had lived jointly in amity, and Kalidasi who was some years older than Satish, was on the best of terms with her brother-in-law. On the death of her husband, Satish though younger in age, became *ipso facto* the head of the joint family; she would thenceforth have to live under his care, look upon him as his natural protector and continue to repose confidence in him properly to safe-guard her rights. This position is in absolute conformity with the normal structure of a joint Hindu family and is recognised by ancient texts of Hindu law, such as the text of Nārada XIII, pp. 28, 29 cited by Jimutavahana in his *Dayabhaga* Chap. XI, sec. 1, para. 64 which provides that when the husband is deceased, his kin is the guardian of his childless widow, and it is only when the husband's family becomes extinct or contains no male or is helpless, that the kins of her own father are entitled to be her guardians. This is not archaic and obsolete law, but has been recognised in modern decisions; *Khudiram v. Banawari* (52). In such circumstances, the principle formulated in sec. 111 of the Indian Evidence Act applies, *viz.*, that where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. It is an elementary principle that whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties,

(52) I. L. R. 16 Cal. 584 (1889).

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the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, over-reaching, undue influence, or unconscionable advantage (Story on Equity Jurisprudence, secs. 308-323; referred to in Taylor on Evidence, sec. 151). As Story puts it, Courts of Equity do not arrest or set aside an act or contract merely because a man of more honour would not have entered into it; there must be some relation between the parties which compels the one to make a full discovery to the other or to abstain from all selfish projects. But when such a relation does exist, Courts of Equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance, for it is founded in a breach of confidence. The general principle which governs in all cases of this sort is that if a confidence is reposed and that confidence is abused, Courts of Equity will grant relief. Equity demands in such circumstances the most abundant good faith (*uberrima fides*) in the transaction between the parties. There need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of material fact, any failure to disclose material information or any just suspicion of artifice, equity will interpose and pronounce the transaction void and as far as possible restore the parties to their original rights; *Baker v. Bradley* (53), *Bank of Montreal v. Stuart* (54) and *In re Coomber* (55). We must not lose sight, however, of the fact that

the question is one of substance and not merely one of burden of proof, and where, as in the present case, evidence has been adduced by both the contestants in support of their respective cases and the relevant facts are before the Court, the question of burden of proof is immaterial, and importance should not be attached to the question on whom the initial onus lay; see the observations of Viscount Haldane in *Kundunlal v. Begumun-nessa* (56) and of Sir Lawrence Jenkins, in *Sethu Ratnam v. Venkatachela Gouden* (57). We must now determine, how the case before us stands when tested in the light of these principles.

Kedarnath Ghose, as previously stated, died on the 7th October 1915. The partition deed now in controversy was executed on the 4th November 1915, that is, as the Subordinate Judge points out, twenty seven days after the death of Kedarnath Ghose and three days before his *Sradh* ceremony had been performed, but the deed was based on a draft which had been prepared ten days earlier, on the 25th October, when the parties were about the middle of the period of mourning. The provisions of the partition deed have been correctly summarised by the Subordinate Judge. The document recites that the hardware business at 78, Clive Street as well as the house at Benares belong jointly to Kedarnath and Satish Chandra in equal shares and that the widow gave up her claim to those properties as also to the remainder of the joint estate in consideration of the benefits granted to her, which may be enumerated as follows: (a) Kalidasi would become absolute owner of the house at Benares as also the house at Howrah; No. 8, Kali Prosad Chakravatty Lane; (b) that Satish would pay to

(53) [1856] 25 L. J. Ch. 7; 7 DeG. [M. & G.

597.

(54) [1911] App. Cas. 120.

(55) [1911] 1 Ch. 723.

(56) 22 C. W. N. 937. (1918).

(57) L. R. 47 I. A. 76; a. & J. L. R. 43 Mad. 567; 25 C. W. N. 436 (1919).

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Kalidasi Rs. 20,000 by annual instalments of Rs. 2,000 each, the entire sum to be charged on the ancestral dwelling-house at 3 and 4, Kali Prosad Chakravartty Lane; (c) that Satish would pay, within three months from the date of execution of the deed, Rs. 2,000 to Nalinibala and Rs. 4,000 to Chinabala; (d) that Satish would pay Rs. 2,500 on the occasion of the marriage of each of the two daughters of Chinabala, named Radharani and Umashoshi; and (e) that Satish would maintain Kalidasi, her two daughters, and the two grand-daughters, in the family dwelling-house, and if Kalidasi should live apart, Satish would pay her Rs. 10 per month for her maintenance and after her death Rs. 10 per month for the maintenance of her two daughters, Nalinibala and Chinabala. The deed recites, on the face of it, that this distribution of the family estate gave effect to the intentions of Kedarnath Ghose as expressed immediately before his death. The case for the Plaintiff is that this allegation, which goes to the root of the entire transaction, is unfounded. It is, consequently, necessary to investigate the incidents which actually happened before the death of Kedarnath Ghose. The evidence makes it abundantly clear that Kedarnath Ghose did intend to make a testamentary disposition of his properties during his last illness. He gave instructions for the preparation of a draft Will, which was drawn up by one Aghorenath Maiti. A fair copy was then made by one Akhsoy Kumar Ghose. The intended Will was, however, never executed; for when the document was taken to Kedarnath Ghose for signature, it was found that he had lost consciousness. He never regained consciousness and the end came immediately afterwards. While he was on his death-bed, thus lying unconscious a discussion took place among the persons present as to what steps might be

taken to carry out the projected disposition of the estate. One Badal Chandra Ghose, a pleader, suggested that after the death of Kedarnath Ghose a deed of family arrangement might be executed between Satish Chandra Ghose and Kalidasi, and forthwith prepared a draft for such a deed. No further steps appear to have been taken for some days after the death of Kedarnath Ghose, but on the 25th October 1915 the draft of a partition deed was drawn up by one Nilmoni Bose and was executed as well by Kalidasi as by Satish Chandra Ghose. On the basis of this draft, a fair copy was subsequently prepared, and the partition deed in its final form, which is the subject matter of this litigation, was executed on the 4th November 1915. It may be stated here that as Kalidasi was illiterate, her name was, at the request of Satish, signed on the draft as well as on the final deed by her daughter Chinabala who, as the evidence shows, is a half-crazy girl and herself writes Bengali very imperfectly, as may be seen from an inspection of the original signatures on the record. The draft of the intended Will made by Aghorenath Maiti, the draft of the partition deed made by Nilmoni Bose, and the partition deed as executed and registered, have been produced; but the fair copy of the intended Will and the draft of the deed of family arrangement prepared by Badal Chandra Ghose have not been produced; there can be little doubt, as will presently be seen, that they have been designedly withheld by the Defendant, because they would have materially weakened his case. The draft of the Will is full of alterations and interlineations; these were not indicated in the paper-book placed before the Court, and the hearing had to be adjourned, so that the Court might be supplied with a fresh translation of the deed, indicating the draft in its original form as also the

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various alterations and interlineations. As inspection of the draft in this form makes manifest the vital changes introduced into the deed. This inevitably raises the question, whether the draft in its original form or the draft as altered corresponded to the actual instructions given by Kedarnath Ghose. The Subordinate Judge has held that the draft in its original form contained the instructions given by Kedarnath Ghose before his death, and that the changes introduced into the draft did not form part of those instructions. I feel no doubt that the view taken by the Subordinate Judge is correct. It is needless to determine, how far the instructions given by Kedarnath Ghose were voluntary, or how far, in the precarious state of his health, he acted under the influence of his brother. The fact remains that to some at any rate of the persons present, the terms seemed ungenerous, and one of them Asutosh Banerjee, pressed for liberal treatment of his wife and children. Let it be assumed, however, for our present purpose, that the instructions were voluntarily given; these were correctly represented by the contents of the draft as drawn up by Aghore Nath Maiti. The changes in the draft were, in my opinion, no part of the instructions; indeed, it has not been definitely disclosed by the Defendant when and by whom the changes were made. It was rather doubtfully suggested that they were in the handwriting of Asutosh Banerjee, who was present in Court at one stage but was not examined. If, now, we compare the draft Will in its original form, as representing the last wishes of Kedarnath Ghose, with the partition deed in its final form, which purports to give effect to those intentions, what is the result? In original draft Will, we find that Rs. 20,000 was to be paid to Kalidasi, in one instalment; in the partition deed, we

find that the payment was to be spread over ten years; this accords with the interlineation. Again, according to the original draft Will, Kalidasi was to take an absolute right in the two houses at Benares and Howrah; by the partition deed, a life estate is conferred on Kalidasi and her two daughters; this also accords with the interlineation. There is another significant alteration which cannot be overlooked; wherever in the draft Will, the singular word *amar* (my) occurred, it has been altered into the plural *amader* (our). In my opinion, there is ample indication that the draft Will was so altered, after the death of Kedarnath Ghose, that it might serve as a draft for a partition deed to be executed by two persons, namely, Kalidasi and Satish Chandra Ghose. This also explains why the fair copy of the Will made by Akshoy Kumar Ghose and the draft deed of family arrangement made in accordance therewith by the pleader Badal Chandra Ghose, have both been withheld; those two documents were in agreement with the draft Will in its original form, and if they had been produced, they would have completely demolished the theory that the draft Will with alterations represented the last intentions of Kedarnath Ghose. This fits in further with the significant circumstance, emphasised by the Subordinate Judge, that the intended Will of Kedarnath Ghose was never shown to the Plaintiff. We may also observe that the partition deed in its final form departs, in at least one particular, from its draft which also contains alterations and interlineations, namely, that the maintenance for Kalidasi and her two daughters at Rs. 20 per month is reduced to Rs. 10 for herself and nothing for her daughters until her death. There is no explanation on whose authority, the alterations in the draft deed of partition was made by Nil-

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moni Bose who has not been examined on the plea of absence at Waltair. In my view, there is no escape from the conclusion that the partition deed, as executed, departs in very material particulars from the true intentions of Kedarnath Ghose as expressed shortly before his death, and that as the assent of Kalidasi thereto was secured on the untrue representation that its provisions carried out the last wishes of her husband, the deed was in essence obtained from her by false pretences and must on this ground alone be set aside. But there are other grounds, equally weighty, which destroy the operative character of the deed.

The schedule to the partition deed sets out the values of the properties. The Subordinate Judge has held it conclusively proved, by local investigation and the other evidence adduced in the case, that the properties reserved for Satish were grossly undervalued, while the two houses given to the Plaintiff were overvalued. This conclusion of the Subordinate Judge is amply sustained by the evidence and he is undoubtedly right in his view that the properties taken by Satish are the cream of the estate while those assigned to the Plaintiff are the worst of all. It is further important to note that inasmuch as Satish takes under the deed the entire joint estate, with the exception of what is expressly given to Kalidasi, it is an obviously damaging circumstance that some valuable properties are not mentioned at all in this deed of partition. Upon the question of undervaluation, the most flagrant instance is the value of the stock-in-trade of the hardware business and the workshop appurtenant thereto, which is stated in the schedule to the deed to be only Rs. 31,000, but is now shown to be at least Rs. 60,442. Another instance, equally striking, is that of premises Nos. 10 and 12, Raja Woodmunt Street, and

No. 72-2, Clive Street, which are described as worth Rs. 1,001 only; this ignores what was well known to Satish, namely, that the price had been fixed at Rs. 20,000 and that Kedar had paid Rs. 15,000 in part payment to the vendor to satisfy a mortgage on the property. A third instance, in no way less impressive, is that of the ancestral dwelling-house, which was valued Rs. 21,000 but has now been found to be worth Rs. 35,746. It is significant that all these instances of under-valuation relate to properties taken by Satish; on the other hand, the value of what has been assigned to Kalidasi has been demonstrated to be in fact much less than the estimated amount. As an instance of total omission, mention may be made of an incident which is by no means creditable to Satish. It appears, that after the death of Kedar, he signed the name of Kedar and on the 18th October 1915, withdrew from the National Bank of India, a sum of Rs. 11,200 which stood in the name of Kedar, and deposited the sum in his own name in the Mercantile Bank of India. No mention was made of this amount in the partition deed. In the face of these circumstances it is impossible to hold that the Defendant observed that "utmost degree" of good faith which his sister-in-law was entitled to expect from him in his dealings with her, on well-recognised equitable principles. This by itself would manifestly justify the cancellation of the deed.

But it has been strenuously argued by the Defendant that the lady had the benefit of independent advice and cannot consequently impeach the transaction. In my opinion, there is no solid foundation for this contention. There is no satisfactory evidence to show that Raj Kumar Deoti, the brother of Kalidasi, did in fact advise her in this matter, or was able and willing to give her the requisite assistance.

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To enable us to appreciate the situation of the parties at the time, the successive events may be conveniently set out in chronological order :—

7th October 1915.—Kedarnath Ghose died.

25th October 1915.—Draft partition deed signed.

4th November 1915.—Partition deed executed.

6th November 1915.—*Sradh* ceremony of Kedarnath Ghose performed.

22nd November 1915.—Rajkumar borrowed Rs. 1,001 from Satish.

8th December 1915.—Partition deed registered.

23rd January 1916.—Rajkumar took certified copy of partition deed from Registration Office.

26th January 1916.—Rajkumar borrowed Rs. 2,000 from Satish.

31st January 1916.—Kalidasi applied for succession certificate in respect of Insurance Policy on life of her husband (not included in partition deed).

23rd February 1916.—Kalidasi applied to include in succession certificate G. P. Notes for Rs. 7,500 (not mentioned in partition deed).

11th March 1916.—Proposed supplementary deed of family settlement drawn up by Satish.

8th April 1916.—Satish objected to grant of certificate to Kalidasi for G. P. Notes.

10th April 1916.—Satish applied for G. P. Notes.

12th May 1916.—Satish sued Raj Kumar to recover the sums advanced to him (Suit No. 103 of 1916).

13th May 1916.—Properties of Raj Kumar attached before judgment at the instance of Satish.

16th May 1916.—Rajkumar obtained power of attorney from Kalidasi.

20th May 1916.—Applications for succession certificate made by Satish and Kali-

dasi heard. Satish produced partition deed. Satish granted certificate for G. P. Notes; Kalidasi granted certificate for Life Insurance Policy.

28th June 1916.—Kalidasi instituted present suit.

12th July 1916.—Satish appointed Receiver of hardware business.

11th July 1917.—Order for grant of certificate to Satish in respect of G. P. Notes set aside on appeal.

It is by no means clear from the evidence on the record that Kalidasi acted under the advice of her brother. Raj Kumar was one of the executors named in the Will intended to be executed by Kedarnath Ghose. He was no doubt aware of the terms of the Will, and it is improbable that he should have been a party to variations therefrom to the prejudice of his sister. This is confirmed by the significant fact that as early as 23rd January 1916, Raj Kumar took a certified copy of the partition deed from the Registration Office, evidently with a view to take steps to secure to his sister her full rights in the estate left by her husband. It is further remarkable, if Raj Kumar was really present throughout and advised his sister, that he should not have read over the deed and explained it to her, become an attesting witness thereto, or even identified her before the Registering Officer. Nor can we overlook the fact that Kamini Kumar, the eldest brother of Kalidasi and Raj Kumar, is conspicuous by his absence from the scene. It has moreover been suggested on behalf of the Plaintiff that Rajkumar was perhaps more anxious to improve his own prospects than to safeguard the interests of his sister. There is no direct evidence to prove this hypothesis; though it must be conceded that the circumstance that Rajkumar was able to borrow Rs. 3,000 from Satish shortly afterwards, is calculated to

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excite suspicion. On the other hand, it has been suggested on behalf of the Defendant that the present suit has been engineered by Raj Kumar to wreak his vengeance on Satish who had enforced his claim for recovery of the loan. This theory is not improbable; but even if true, it does not justify the inference that Kalidasi has made an unfounded claim against Satish, who might perhaps have postponed the evil day for a while, if he had been diplomatic enough to keep Raj Kumar under obligation for a longer period. I am not unmindful that as observed by Fletcher Moulton, L. J., in *In re Coober* (55), independent and competent advice does not mean independent and competent approval; it simply means that the advice shall be removed entirely from the suspected atmosphere and that from the clear language of an independent mind, free from taint of interest, the party acting should know precisely the nature and consequences of the transaction. I see no reason to doubt the correctness of the conclusion of the Subordinate Judge that Kalidasi had not the benefit of such independent advice from Raj Kumar or any other person. It is, I think, also clear that even if Raj Kumar be assumed to have been entirely beyond the sphere of influence of Satish, he was really not able to give the requisite advice. To secure a fair transaction, a full appreciation by the lady of the value and nature of her rights was essential. No doubt, as pointed out by Lord Buckmaster in *Sunitibala v. Dhara Sundari* (47), it is not necessary to insist in such cases upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities; it is sufficient that the general result of the com-

promise should be understood and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed. Tested from this point of view, the evidence does not show that Raj Kumar himself was fully acquainted with the facts, duly appreciated the effect of the transaction and was able to advise his sister. To mention one aspect only; the deed as executed might well raise the point whether the transaction was a device for division of the estate between a limited owner and a reversioner and whether Satish could validly transfer to Kalidasi, as he did, his reversionary interest in two of the properties, indeed, the question involved was precisely such as required consideration by a lawyer, in view of the recent pronouncements of the Judicial Committee in *Khumni Lal v. Gobind Krishna* (58), *Amrit Narain v. Gaya Singh* (59), *Rangaswami v. Nachiappa* (60) and *Sureswar v. Mahesrani* (61) and other cases reviewed in *Annada Mohan Roy v. Gour Mohan Mullick* (62). Although it may be conceded that, as pointed out in *Buchi v. Jagapathi* (63), the presence of a professional adviser cannot be deemed necessary in every case, the Subordinate Judge has properly commented on the fact that while a pleader was called to witness the execution of the intended Will of Kedar-nath Ghose and two pleaders were called

(47) L. R. 46 I. A. 272 : s. c. I. L. R. 47 Cal. 175 : 24 C. W. N. 297 (1919).

(55) [1911] 1 Ch. 723 (730).

(58) L. R. 38 I. A. 88 : s. c. I. L. R. 38 All 356 : 15 C. W. N. 545 (1911).

(59) L. R. 45 I. A. 35 : s. c. I. L. R. 45 Cal. 590 : 22 C. W. N. 409 (1917).

(60) L. R. 46 I. A. 72 : s. c. I. L. R. 42 Mad. 523 : 23 C. W. N. 777 (1918).

(61) L. R. 47 I. A. 233 : s. c. 25 C. W. N. 194 (1920).

(62) 25 C. W. N. 496 : s. c. 33 C. L. J. 457 (1920).

(63) I. L. R. 8 Mad. 304 (319) (1884).

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to witness the registration of the partition deed, not a single pleader, not even a competent disinterested person, was called to advise Kalidasi in a matter of such vital moment to her, either at the time when her assent was obtained to the draft partition deed or at the time when the deed was executed. No doubt, as pointed out by Jenkins, C. J., in *Keshab v. Radha Raman* (14), the absence of advice would not have by itself necessarily vitiated the transaction, if it had been otherwise established to be righteous, that is, such as a right-minded person might be expected to do. All the indications in the present case, however, point to a contrary conclusion; and from this point of view, much weight cannot be attached to the evidence which shows that the draft partition deed was read over and explained to Kalidasi by one Fakirchand Ghose, who himself, as is clear from his testimony, did not fully appreciate the nature and effect of the transaction. On the other hand, there is abundant indication that full advantage was taken by Satish of the deeply distressed condition of his sister-in-law, who had shortly before lost both her sons-in-law, and had hardly recovered from the shock, when she lost her husband. Before the period of mourning was over, her brother-in-law expedited the execution of the deed with what cannot but be characterised as indecent haste. During this period of mourning, arrangements had to be made for the performance of the prescribed ceremonies on a suitable scale. The lady was anxious that the poor of the locality and the adjoining villages should be fed in a proper style. This request, somewhat insistently made, was refused to put pressure upon her and to make her agree to terms which her brother-in-law considered advantageous to himself. This furnishes an illustration of

(14) 17 C. W. N. 991 (1912).

what is felicitously described by Lord Macnaghten in *Mahomed Baksh v. Hossaini Bibi* (33) as "a subtle form of undue influence." There can be little doubt that Satish himself must have realised that the deed had been taken by him from his sister-in-law under circumstances which made it open to successful attack; this alone affords a plausible explanation of his conduct in the succession certificate cases, where he did not set up the partition deed till a very late stage of the proceedings. But weightier than all these circumstances put together, we have the outstanding fact that Satish, on his own initiative, took steps to prepare, at his expense, a supplemental deed of family settlement to rectify to some extent the unfairness of the partition deed he had taken from his sister-in-law; the attempt, however, came too late. It is difficult to conceive what more convincing proof could have been brought forward to establish the true character of the deed challenged by the Plaintiff.

It has finally been urged on the merits that the partition deed was in essence a deed of family settlement and should consequently be supported, even though there were no rights actually in dispute at the time of making it; in such cases, as was said in *Upendranath v. Bindeswari* (64) and *Mariam Bibi v. Ibrahim* (65), the Court should not scan with much nicety the quantum of consideration. The principle invoked may be conceded and is, as pointed out in *Helan v. Durgadas* (66) and *Satya Kumar v. Satyakripal* (67), supported not only by the authority

(33) L. R. 15 I. A. 81 at p. 91: s. c. I. L. R. 15 Cal. 684 (1888).

(64) 20 C. W. N. 210: s. c. 22 C. L. J. 452. (476) (1915).

(65) 28 C. L. J. 308-369 (1916).

(66) 4 C. L. J. 323 (1906).

(67) 10 C. L. J. 508 (1909).

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of *Williams v. Williams* (68) and *Lucy's* case (69), but also by the decision of the Judicial Committee in *Gajapati v. Gajapati* (70), *Mantapa v. Baswant* (71), *Mewa Kuwar v. Hulas Kuwar* (72), *Greender v. Trailakshaya* (73), *Mahomed Imam Ali v. Husain* (74) and *Khunni Lal v. Govind Krishna* (58). But it is equally well-settled that, as James, L. J., puts it in *Moxon v. Payne* (75), to make a compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection; one side must not know more about the matter than the other, unless what he knows could not possibly have affected the other party's decision; *Gilbert v. Endean* (76) and *Maynard v. Eaton* (77). This accords with the rule enunciated in *Gordon v. Gordon* (78), which was repeatedly argued before Lord Eldon, namely, that a family arrangement to be operative must be without fraud; it would not be supported if founded in mistake of either party to which the Opposite Party was an accessory; or, if either party has been misled by the concealment of material things, for the essence of the matter is mutual communication of all relevant circumstances. To the same effect are the

decisions in *Hoghton v. Hoghton* (79), *Lawton v. Campion* (80) and *Bentley v. Mackay* (81), which show that a Court of Equity will not permit a family arrangement to bind the parties when the transaction has been unfair and founded upon falsehood or misrepresentation. Tested in the light of these principles, the position of the Defendant is full of insoluble difficulties from which no ingenuity on the part of the most skilful legal adviser can extricate him.

As a last resort, it has been contended, on behalf of the Defendant that no relief should be granted to the Plaintiff in the present suit as framed, inasmuch as the Plaintiff who alleged fraud can succeed only on proof of the fraud, specified in the plaint, and no variation between pleading and proof can be allowed. In support of this position, reference has been made to the following passage from the judgment in *Bansiram v. Panchami* (82). "Two principles, it is well settled, are applicable in these circumstances. In the first place, as pointed out by the Judicial Committee in *Ganga Narain v. Tiluck Ram* (83), where reliance was placed upon the observations of Selborne, L. C., in *Wallingford v. Mutual Society* (84), when a Plaintiff impeaches a transaction on the ground of fraud, the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated; *Gilbert v. Lewis* (85), for, in the language of Fry, J., in *Redgrave v. Hurd* (86), it is only fair play between man and man

(58) L. R. 28 I. A. 88; a. c. I. L. R. 33 All. 856; 15 O. W. N. 545 (1911).

(68) L. R. 2 Ch. App. 294 (1867).

(69) [1853] 4 DeG. M. & G. 356; 102 R. R. 163.

(70) 13 M. I. A. 497 (512); 14 W. R. P. C. 33; 13 B. L. R. 202 (1873).

(71) 14 M. I. A. 24 (36); 15 W. R. P. C. 32 (1871).

(72) L. R. 1 I. A. 157 (1874).

(73) L. R. 21 I. A. 35; a. c. I. L. R. 20 Cal. 373 (1892).

(74) L. R. 25 I. A. 161; a. c. I. L. R. 26 Cal. 81; 2 O. W. N. 737 (1898).

(75) L. R. 8 Ch. App. 381 (1873).

(76) 9 Ch. Div. 259 (1878).

(77) L. R. 9 Ch. App. 414 (1874).

(78) [1816-1821] 3 Swan 460; 19 R. R. 230.

(79) [1852] 15 Beav. 278; 92 R. R. 421.

(80) [1854] 18 Beav. 87.

(81) [1862] 31 Beav. 143; on app.: 4 DeG. F. & J. 278.

(82) 20 O. W. N. 638, 1914.

(83) L. R. 15 I. A. 119; a. c. I. L. R. 15 Cal. 533 (1888).

(84) 5 App. Cas. 685 (1880).

(85) 1 DeG. J. & Sm. 38, 40 (1862).

(86) L. R. 20 Ch. Div. 1 (1881).

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that the Defendant should know what is charged against him. (*Clydesdale Bank v. Paton* (87) and *Lawrence v. Norreys* (88). In the second place, a charge of fraud must be substantially proved as laid, and, when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it [*Abdul Hossein v. Turner* (89)]. The rule that the Court will grant only such relief as the Plaintiff is entitled to upon the case made by his pleadings, is strictly enforced when the Plaintiff relies upon fraud. *Wilds v. Gibson* (90) and *Hickson v. Lombard* (91)." But there is plainly no real substance in the contention in the circumstances of the present litigation. The essence of the case for the Plaintiff is that the Defendant, who was her trusted brother-in-law, took advantage of her helpless situation as an illiterate *parda-nashin* Hindu widow and obtained her assent to a deed, the true effect whereof was not appreciated by her as she had no competent independent advice. It cannot thus be seriously maintained that there has been an infringement of the rule formulated by Lord Westbury in *Eshan Chunder v. Shyama Churn* (92), by Sir Barnes Peacock in *Mylapore v. Yeckay* (93) and by Sir Lawrence Jenkins in *Malraju v. Venkatadr* (94), that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made; nor can it be sug-

gested that there has been any violation of the elementary rule of procedure laid down by Sir Barnes Peacock in *Abdul Hossein v. Turner* (95) and by Lord Shaw in *Bal Gangadhar Tilak v. Srinivas Pandit* (96), that a charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof be substituted for it. We must further bear in mind that every variance between pleading and proof is not fatal: the Court must carefully consider whether, in the words of the Judicial Committee in *Radha-Mohan v. Jadumoni* (97), the objection is one of form or of substance. The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, first, to apprise the Defendant distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise, and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. Tested from these points of view, the objection urged by the Defendant proves to be groundless. There is no room for doubt that the contending parties fully appreciated the real points in issue and have adduced all the material evidence. The fundamental point in controversy was really of a very simple character, namely, what were the circumstances under which the partition deed was executed; Each side had full opportunity to give in minute detail its own version of the incidents, and the Court was called upon to determine the true state of things from the conflicting

(87) [1896] A. C. 381.

(88) 18 A. C. 210, 221 (1890).

(89) L. R. 14 I. A. 11: s. c. I. L. R. 11 Bom. 620 (1887).

(90) 1 H. L. C. 605 (1848).

(91) L. R. 1 H. L. 324 (1866).

(92) 11 M. I. A. 7 (1866).

(93) L. R. 14 I. A. 168: s. c. I. L. R. 14 Cal. 801 (1887).

(94) 25 O. W. N. 654: s. c. 33 C. L. J. 171 (P. C.) (1920).

(95) L. R. 14 I. A. 11: s. c. I. L. R. 11 Bom. 620 (1887).

(96) L. R. 43 I. A. 135 (1911): s. c. I. L. R. 38 Bom. 441 (1907); 19 O. W. N. 729 (1915).

(97) 23 W. R. 369 (1875).

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narratives. There is plainly no question of surprise. But if it were necessary to adhere to matters of form with the strictest accuracy, the plaint could well have been amended to enable the Court to do that substantial justice between the parties for which alone Courts exist; *Mahommed Zahoor Ali v. Rutta Koer* (98), *Sunitibala v. Dhara Sundari* (47), *Charandas v. Amir Khan* (99) and *Ma Shwe Mya v. Maung Mo* (P. C. decided 25th January 1921). In this connection a well-known passage from the judgment of James, J., in *Moxon v. Payne* (75) may be usefully re-called. "A great part of the argument which was addressed to us on behalf of the Defendant Payne was that the case alleged against him by the bill was one of gross and premeditated fraud, and that unless the actual fraud as alleged was proved, the bill must fail. It was contended that the Plaintiffs were bound to make out, and had failed to make out, the case alleged in the tenth paragraph of the bill. It is true that when a case is based on fraud, the fraud must be proved, and no relief could be given in this suit on any different ground. But the obtaining of property, or of any benefit, through the undue and unconscientious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in such a suit. It is at most a rhetorical exaggeration, which a person who commits the frauds has no right to

(47) L. R. 46 I. A. 272; s. c. I. L. R. 47 Cal. 175; 24 O. W. N. 297 (1919).

(75) L. R. 9 Ch. App. 881 (887) (1887).

(98) 11 M. I. A. 488 (485) (1887).

(99) L. R. 47 I. A. 255; s. c. 35 O. W. N. 289 (1920).

complain of. If a man robs his fellow-traveller, and is indicted for so doing, the allegation that he became the companion of his victim with a pre-conceived design to rob him is wholly immaterial. Much the same line of defence was taken in the case of *Huguenin v. Baseley* (100) and it may be worth while to quote what Lord Eldon said in that case: "I agree, further, that the relief must proceed upon what is alleged and proved by the persons complaining, that their complaints must be treated as effectual or ineffectual according to what they have, not what they could have, represented . . . I have, therefore looked through this bill with reference to the frame of it, and I have no doubt this case might have been more clearly reached if the situation of the parties had enabled them to go through all the difficulties as to amendment; also that many circumstances might have been brought forward on behalf of the Defendants, which I am bound not to look at. But, taking the case as it stands, though there is in this bill much foul allegation which, if not true, ought not to be there and a great deal of which is denied and clearly disproved, there is enough upon the bill and in evidence to shew that this deed cannot stand, if the whole transaction taken together cannot stand."

In my judgment, the Subordinate Judge was unquestionably right in his conclusion that the Defendant obtained the partition deed from the Plaintiff by an untrue representation that its terms were in conformity with the last wishes of her husband, as well as by a concealment of the true extent of the assets of the family business and the value of the family properties; he also took advantage of her distressed condition during the period of mourning immediately after

(100) 14 Ves. 272, 290 (1797).

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she had lost her husband; she had further no competent independent advice as to the nature, value and extent of her rights in the estate left by the deceased and the true effect of the deed upon her position as his heiress. In these circumstances, she was entitled substantially to the reliefs granted by the decree of the Subordinate Judge.

The result is that the decree of the trial Court must be affirmed and this appeal dismissed with costs. The memorandum of cross-objections is rejected without costs.

BUCKLAND, J.—This appeal is against the judgment and decree in a suit brought by one Srimati Kalidasi Dasi to have it declared that a deed described in the plaint as a partition deed, executed by her on the 4th November 1915 in favour of the Appellant Satish Chandra Ghose, is fraudulent and void and to have it cancelled and for partition of the immoveable property mentioned in the schedule to the plaint and to recover a hardware business in Calcutta to which she alleges she is entitled as widow of her deceased husband. One Gobinda Chundra Ghose who died in November 1913 left two sons—Kedarnath Ghose and Satish Chandra Ghose. The latter is the Appellant. Kedarnath was the husband of the Plaintiff and by her he had two daughters—Chinabala and Nalinibala. The Plaintiff has two brothers called Kamini Kumar and Raj Kumar and this completes the list of the relatives of the parties whose names have been introduced into the case. The learned Subordinate Judge has found that the hardware business was the property of Gobinda Ghose on whose death his two sons inherited it jointly. The Respondent who claimed the whole of this business has abandoned her cross-objections on this point and it is not

necessary further to consider the question.

The Respondent's case is that shortly after the death of her husband Kedarnath Ghose which took place on the 7th October 1915, the Appellant came to her and asked her to entrust him with the management of the hardware business. To this she says that she agreed. The deed of the 4th November 1915 was prepared; it was signed by the Respondent by the pen of her daughter Chinabala; no explanation of its terms was given, nor was the deed read over to her. On the 8th December it was registered, again without explanation. After registration the Respondent disclosed the existence of the deed to her brother Raj Kumar who took her to task and said that he would obtain a copy of it and see her about the matter. This Raj Kumar did and told her that Satish had defrauded her of everything. Subsequently on the 28th June 1916 she filed this suit. This is the broad outline of the Respondent's story as told by her and her witnesses. It is not necessary to analyse this case in detail because the Subordinate Judge himself has paid very little attention to it. It is not possible to say from his judgment what view he takes of it, for he deals exclusively with the case made by the Appellant. He has refused to accept the Appellant's case in all its details, but he has treated it as representing more or less what took place, and he finds in language admitting of no ambiguity that taking the case made by the Appellant substantially to represent what occurred, fraud was practised on the Respondent in whose favour he has made a decree setting aside the deed of the 4th November 1915.

It has been argued by the learned Advocate-General on behalf of the Appellant that in a case of fraud, it will not suffice to find fraud otherwise than as alleged on

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behalf of the Plaintiff, and that even should the Court find that fraud was practised, if such fraud is other than the fraud alleged the Defendant is entitled to have the suit dismissed. This is a proposition which may be applicable in cases between man and man, or, stated more appropriately to this case, where a *pardanashin* lady is not concerned. But where a *pardanashin* lady is involved, other and equally well-known rules have to be applied and conformity with them has to be established. As I read the judgment of the learned Subordinate Judge, it is according to these rules that he has found that the Appellant fails even assuming his case to be true. I propose therefore to state the history of the matter and examine it from this point of view.

For some years before his death Kedar-nath Ghose had been an invalid and at the time of his death he was bed-ridden. He had spoken to his wife some two or three days before his death about a Will and on or about the 28th or 30th September a draft Will was prepared for him. The materiality of the Will which Kedar-nath intended to execute arises from the circumstance that the case put forward by the Appellant in his written statement and in the evidence is that it was in order to give effect by deed to the wishes of her deceased husband, which the intervention of death prevented him from carrying out by Will, the Respondent executed the instrument which is the occasion of these proceedings. The draftsman of the Will was Aghorenath Maity a man who describes himself as a trader, dealing in building materials and also with deeds, who has been called as a witness for the Appellant. Aghore Maity's evidence is that he was summoned by one Ashutosh Banerjee to write out the Will: that Kedar Babu stated his intentions at some of which Ashutosh Banerjee protested and

after discussion with Asutosh Banerjee he wrote out the terms. This draft has been produced. It contains a number of alterations but it has not been proved by whom these alterations were made. Aghore Maity did not make them though he says they were made on the same day as the draft was written, but he cannot say by whom. The suggestion is that the alterations were made by Asutosh Banerjee who, however, has not been called by either side though present at the trial of the suit. The importance of these alterations will appear later. The Will was fair copied on the 6th October. This appears from the evidence of the Appellant, and of a witness named Boloram Ganguly, an attesting witness to the deed in suit. This man says that on the day preceding the death of Kedar he went to Kedar's house where he saw Akhoy Ghose, Jotin Ghose, Shyama Charan Bhaduri, Asutosh Banerjee and Raj Kumar Deoti. The document was being dictated by Akhoy Ghose to his son Jotin who was writing a fair copy. This fair copy has not been produced and no explanation of the omission to produce it is forthcoming. On the 7th October Kedar-nath Ghose died without having executed the Will though on the morning of that day the several persons whom I have named, a pleader called Badal Chandra Ghose, the doctor Sarat Chandra Das, and a person of the name of Pulin Behary Mondal had collected, most of them for the purpose of being present at the execution of the document. But nothing could be done as Kedar had become unconscious. Kedar died and did so intestate. The Appellant and also Asutosh Banerjee and Jharilal Bhaduri then asked what was to be done. Whereupon a suggestion was made by Badal Chandra Ghose that as the Will could not be executed a deed which in his evidence he called a

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deed of family arrangement might be executed in its terms. This suggestion was made in the absence, it is to be observed, of the Respondent. All of this is most significant: It suggests the thought that the death of Kedarnath Ghose intestate was regarded by these persons as a catastrophe. So far as he could do ought to remedy it, Badal Chandra Ghose lost no time and he then and there as he says dictated a draft to Akhoy Ghose's son Jatindra. This draft too is not forthcoming nor is its absence explained. Some few days later the Appellant suggested to the Respondent that a deed should be executed. He made the suggestion at a time when expenses to be incurred for the *Sradh* of Kedarnath Ghose were under discussion. The Respondent was most anxious that a feeding of the poor should take place. This appears to have afforded to the Appellant the opportunity which he desired, for he demurred and said he would consent if the Respondent would execute what he called a family arrangement. A number of persons whom it is unnecessary to specify, their names recur throughout the evidence at each stage of the incidents leading up to the final conclusion, also met and discussed the matter with the Appellant and Respondent. As regards this discussion, suffice it to say, that it related to arrangements regarding the immoveable property and that according to the witness Fakir Chandra Ghose the Respondent intimated that if the *Sradh* would only cost Rs. 5,000 or Rs. 6,000 she would execute a deed in accordance with the terms of the Will which her husband had proposed to execute. There appears to have been more than one such interview with the Respondent as the Appellant says that terms were discussed in his presence, while Fakir Chandra Ghose says: "We came back and told

Satish that Kalidasi had agreed." It is not a simple matter to disentangle the evidence as to these several interviews, but on each occasion the Appellant's adherents were present and the impression on my mind, whether or no she was alive to her own interests, or advised as to them, a point I shall deal with hereafter, is that the Respondent was being importuned in the interests of the Appellant to put her hand to the document which he was anxious to obtain. The Appellant says that the Respondent agreed to certain terms and accordingly in furtherance of the project on the following day a draft of the Will of Kedar and the draft deed prepared by Badal Babu and "perhaps also the fair copy of the Will" were made over to an individual of the name of Nilmony Bose to prepare a "partition deed" in the terms arranged. Nilmony Bose has not been called as a witness and the explanation given for his absence from the witness box, that he was travelling to Waltair, is wholly insufficient. His evidence might have thrown some light upon the failure to produce the draft prepared by Badal Chandra Ghose and the fair copy of the Will. The importance of the omission to produce these papers lies in the fact that as already stated it is the Appellant's case that subject to such alterations as were agreed upon between him and the Respondent the object of the deed was merely to give effect to the wishes of Kedarnath Ghose which the deceased had not been able to carry out before his death. The learned Subordinate Judge has found that the alterations in the draft of the Will were interpolated subsequently in order to bring the Will into conformity with the partition deed. The alterations in the draft in various respects are not such as one would expect to find in a Will but are such as might well find a place there if

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the draft Will had been used as a rough draft for the purpose of engrafting upon it the deed of partition. This does not improve the position for the Appellant and it is not necessary to come to any definite conclusion one way or the other. But the Appellant's case being what it is, that the draft Will as altered and the deed in suit represent the testamentary wishes of the deceased, the omission to produce the fair copy of the Will and the draft prepared by Badal Chandra Ghose suggests the inference that were they produced they would show that neither the fair copy of the Will nor the draft partition deed were in accordance with the Will which Kedarnath Ghose intended to execute. This omission and the failure fully to explain their non-production throw the gravest suspicion on the Appellant's case.

About the time when Nilmoni Bose had been told to prepare a draft, in particular on the 19th October, the Appellant, who had charge of the hardware business in Calcutta drew from the National Bank of India practically the whole of the cash balance of the business which stood in Kedar's name amounting to Rs. 11,000 and transferred it to an account in his own name at the Mercantile Bank of India. At that time, of course, the Respondent knew nothing about this. It came to light in circumstances to which I shall presently refer. Four or five days after receiving instructions Nilmoney produced a draft which according to the Appellant was read over and explained to the Respondent on the 25th October 1915 in presence of some ten persons by Fakir Chandra Ghose, who also explained it. The draft was approved and executed by the Respondent through her daughter Chinabala. Fakir again lent his services in the same manner some days later when the fair copy was executed by the parties

in similar fashion as regards the Respondent. That took place on the 4th November 1915. On the 8th December the deed was registered. A Vakil of the name of Bhupendra Nath Bose has been called to support this part of the case and he produced a diary in which he had made a note as to his presence on the occasion and the reading over of the document to the Respondent by one Shyama Charan Bhaduri. There is nothing in the note to show that the document was explained to the Respondent on the occasion in the manner in which that should have been done and this witness's evidence does not carry the case for the Appellant very far.

Raj Kumar having been informed by his sister of what had occurred, obtained a copy of the deed, which he says he procured on the 22nd or 23rd January 1916. On the 26th January he borrowed a sum of Rs. 2,000 from the Appellant the significance of which will have to be considered in dealing with his connection with this affair. On the 31st January, the Respondent made an application to the Court of the Subordinate Judge for a succession certificate to enable her to realise a sum of Rs. 2,825 for which her late husband had been insured in the Phoenix Insurance Company, Ltd. On the 23rd February she filed a further petition asking that Government promissory notes of the total approximate value of Rs. 7,500 should be included in the application. Raj Kumar Deoti signed this application on behalf of the Respondent. The need for the application according to Raj Kumar was that his sister was going to bring a suit to set the deed aside which would cost a good deal of money, and in order to raise funds he made enquiries and from these made at the Bank it came to his knowledge that the Appellant had withdrawn Rs. 11,000

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and was about to withdraw the Government Promissory Notes. From the Insurance Co., he learnt that a succession certificate would be necessary before the money could be paid. While this application was pending, events took a singular turn, for Raj Kumar, who professes to have been interested in securing for his sister her just rights, entered into negotiations with the Appellant for the preparation and execution by the Respondent of a deed to supplement the partition deed by making provision as regards items of property not comprised in it; in particular the items which were the subject of the application for the succession certificate. Raj Kumar says he asked Satish to make a draft but at no time did he consult his sister in the matter. The Appellant's evidence as to this is that Raj Kumar asked him whether a supplemental deed should be executed with regard to the Government Promissory Notes and the life policy which had been omitted from the partition-deed. A draft was accordingly prepared and made over to Raj Kumar. Then, according to the Appellant, Raj Kumar told him that if he would discharge him from a debt of Rs. 3,500 which Raj Kumar owed him he would allow the Respondent to execute it, otherwise he would prevent her from so doing. This statement, considered in the light of all the evidence, has the ring of truth about it. But as will be seen when I discuss Raj Kumar's position in relation to his sister and the deed in suit, so far from helping the Appellant it militates against his success. Our attention has been drawn at some length to the details of the supplemental deed and errors in and omissions from the original deed which, an examination of the supplemental deed discloses. For instance the valuation of the hardware business in Calcutta is given in the deed of the 4th

November as Rs. 31,000 while from the supplemental deed the net value appears to be 56,851 rupees. It is admitted by the supplemental deed that mistakes have been made in incorporating certain matters in the deed of the 4th November; and in his evidence the Appellant admitted the incorrectness of the valuation of the properties mentioned in the first deed. The supplemental deed was never executed. On the 8th April 1916 the Appellant objected to the Respondent obtaining a succession certificate and himself filed a petition to the Subordinate Judge for a succession certificate in respect of the Government Promissory Notes. In that petition he stated that he was the reversionary heir and claimed the sums in question as such, making no mention either of the partition deed or of the agreement only recently entered into for a supplemental deed. On the 16th May, the Appellant filed a suit against Raj Kumar Deoti to recover Rs. 3,668-4-0 borrowed by him which sum included the Rs. 2,000 borrowed on the 26th January 1916. On the 18th of May according to the Appellant's deposition in the proceedings for a Succession Certificate the Respondent executed the *am-mukhtearnama* in favour of Raj Kumar. On the 20th May the applications for succession certificates were disposed of and the Court ordered that succession certificate should issue to the Appellant as regards the Government Promissory Notes and as regards the insurance money to the widow. On the 28th June of the same year the suit which has resulted in this appeal was filed. This is the case which the Subordinate Judge has considered and which he says is a fraud on the Respondent.

The rules laid down by a long series of decisions for the protection of *purdanashin* ladies are well-established and it is unnecessary that I should repeat them.

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It is with their application that we are concerned and we have to consider whether or not those rules were observed in the circumstances in which the deed in question was executed. In my opinion, they were not. I have already indicated what the course of events suggests to my mind with reference to the Will. That the Appellant was aware of the contents of the proposed Will I have no doubt, nor that his disappointment that it had not been executed was intense. But there was no need for the execution of a deed such as this immediately after the death of the husband of the Respondent. There was no dispute and no "family arrangement" was necessary. But immediately her husband had died the Respondent was importuned by the Appellant and his adherents to execute this deed. That he saw his opportunity when she wanted a considerable sum to be spent in feeding the poor I feel convinced. The business which was the source of her income was in his hands. The *shradh* ceremony had to be performed. Whatever her rights may have been money had to be forthcoming at once for the purpose. Accordingly she agreed to the proposal, thinking that she was but giving effect to her husband's wishes. That she was doing so is extremely doubtful, either on the view taken by the Subordinate Judge as to the draft Will, or in the view to which I inclined. But in any event she was entitled to be held by the Appellant at arm's length and to receive independent advice and this is the point upon our view as to which the decision of the appeal must depend. There is nothing to show that the Respondent ever had independent advice. That a *pardanashin* lady must have independent legal advice is not necessary as an inflexible rule. But what I conceive to be the effect of the decisions is that, excluding those rare cases where the ex-

perience and attainments of the lady or the circumstances of the case render advice superfluous, a *pardanashin* lady must have advice, that the adviser should have no adverse interest, and should be such a person as is capable of explaining to her fully her rights in general and in particular under the document which she intends to sign, if necessary contrasting them with her rights should the intended document not be executed by her; if the circumstances are such that unless he has a knowledge of law he is not competent to advise her, then and in that case independent legal advice is essential. Considerable argument has been addressed to us on behalf of both parties as to the need for independent legal advice in this case. I am not prepared to say that it was not necessary. But inasmuch as I am of opinion that the lady had no independent advice at all, it is unnecessary to consider that aspect of the matter. All that has been proved, assuming the evidence to be true, is that the document was read to her for I cannot give any weight to bald assertions that the document was explained without details of what such explanation consisted of. It has not been proved that she was aware what her rights were apart from the document, or that she was giving up any rights for what she obtained. It has been argued by the learned Advocate-General that she knew her rights, and that the discussions with her prior to the execution of the draft establish this. But this I do not think is the case. She was undoubtedly aware that the source of her income was the hardware business in Calcutta, but it has not been established that she knew what her rights were as a Hindu widow either with reference to the business or with reference to the immoveables; or that she knew what she was giving up or what she was to obtain in return or the legal con-

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sequences of what she was doing. Yet these were matters of which she was entitled to be, and ought to have been made fully cognisant. Who would naturally have been the people to explain matters to the Respondent? The document which she was executing was for the benefit of her husband's brother. Ordinarily he would be the person whose duty it would be to protect her interests. In the circumstances she would turn to her own nearest male relatives. These are Kamini and Raj Kumar. But Kamini hardly comes into the case. It has not been suggested that he took the slightest interest in his sister's affairs and he may be ignored—What was Raj Kumar's position in the matter? He says that he heard about the deed from his sister. He obtained a copy of it from the Registration Office. He says that he brought it and told her that she had been defrauded. Taking those statements as an index to his state of mind in January, how is it to be explained that in March he was entering into negotiations with the Appellant for the execution by the Respondent of a supplemental deed with reference to which he never consulted his sister at any time? He was a man who, it must be borne in mind, was in debt to the Appellant. It would have been a matter for surprise had he advised his sister to execute the supplemental deed. At the same time as he was thus negotiating he was lending his sister his support in her application for a succession certificate. His attitude with regard to the supplemental deed and the succession certificate cannot be reconciled with his conduct with reference to the deed as soon as he had obtained a copy of it. In May the Appellant filed a suit against Raj Kumar who responded by obtaining *ammuktearnama* from his sister for the purpose of filing this suit. From that time onwards Raj Kumar sided with

the Respondent. It is quite impossible to regard Raj Kumar as a disinterested person. So far from being disinterested. I think that it is abundantly clear that throughout the whole period till the 18th May he was actuated solely by self-interest. Raj Kumar is stated by the Appellant and his witness to have been present on the various occasions when the matter was discussed with the Respondent. In the view that I take of Raj Kumar's connection with and attitude towards this matter, it is quite possible that he was there. But that he was advising his sister and acting in her interests, I do not think, is in the least degree probable. So far from that being the case I think that the inference which may very fairly be drawn from the facts and circumstances is that he was furthering the interests of the Appellant for his own advantage in the first instance and that he eventually sided with his sister when the institution of the suit for Rs. 3,668-4-0 showed him that the Appellant was not prepared to treat him favourably. It is impossible, on a view of the evidence most favourable to the Appellant, to take the view that Raj Kumar Deoti is a person who can be regarded as an independent adviser of the Respondent.

I concur in the order to be made.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER,
CENTRAL PROVINCES.]

LORD BUCKMASTER.

LORD CARSON.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

1921,

Heard, 27 and

28, October.

Judgment, 28, October.

PANDURANG

KRISHANAJI,

Appellant,

v.

MARKANDEYA

TUKARAM and

Jors, Respondents.

Hindu joint family estate—Losses in management—Agreement providing for surrender of share—Subsequent letter affirming agreement, not registered—Registration Act (XVI of 1908), secs. 17 (b) and 49—Mere attestation, if operates as estoppel—Indian Evidence Act (I of 1872), sec. 115.

Where the manager of a Hindu joint family estate entered into an agreement with his co-sharers that on proof of losses in the management of the estate they should pay their share of such losses and in case the losses be not paid when demanded, their shares in the estate would pass to the former:

Held—That the agreement by itself was sufficient to transfer the shares upon the event happening as contemplated, and that a subsequent letter to the manager admitting the loss and surrender was not an operative conveyance which required registration.

Held also—That the fact that the manager had been an attesting witness to a conveyance by which his co-sharers subsequently purported to transfer the property did not estop him from denying their title.

Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the documents. To operate as estoppel, the signature must be shown by independent evidence to have been meant to involve consent to the transaction.

Appeal from a judgment and decree of the Court of the Judicial Commissioner, Central Provinces, dated the 28th April 1917, reversing a decree of the District Judge, East Berar, dated the 21st October 1915.

The Plaintiff-Respondent claimed to recover possession by partition of an eight annas share in a village called Khandal. His title rested on two conveyances which were not challenged but it was denied that the original vendors Kanhoba and Vishwanath had power to convey the property.

Pandurang, the present Appellant, resisted the claim on the ground that the property had passed to him under an agreement with Kanhoba and Vishwanath which was further evidenced by a letter passed by them. The Plaintiff-Respondent replied that the letter alone could have passed the title, and that being unregistered it was invalid: and further he alleged that as Pandurang was an attesting witness of one of the conveyances on which the Plaintiff relied, he was estopped from denying the latter's title.

The facts are fully set out in the judgment of their Lordships.

Mr. B. Dubé for the Appellant.—A loss was incurred while Pandurang was manager of the property and Kanhoba and Vishwanath were liable for their share. On their failure to pay the property *ipso facto* passed to Pandurang under the provisions of the deed of compromise of September 1916. The letter of April 1910 would be useless as a document of title but my contention is that it is not a document of title but merely evidence of the fact that a relinquishment had taken place.

The letter is admissible in evidence but even without it my title is good.

He referred to Indian Registration Act, XVI of 1908, secs. 17 (b) and 49,

PANDURANG KRISHANAJI v. MARKANDEYA TUKARAM.

Jhamplu v. Kutramani (2) and *Parasharampant v. Rama* (3).

.. Mr. L. DeGruyther, K. C. (with Mr. J. M. Parikh) for the Respondent No. 1.—

The registration certificate is conclusive of the facts it contains, therefore the sale to Damle was good and *bond fide*. Pandurang was only manager but not merely of Khandal but of all three villages. It has not been shown that there were losses in all three villages. [Lord Buckmaster. This point was never taken before and there is no evidence on it]. Pandurang's evidence shows that Vishwanath and Kanhoba were not able to pay the amount due so they agreed to pass a letter or give a conveyance. No title passed under the deed of agreement, and but for the second document there would be no interest in land. Moreover the agreement refers to all three villages, if there was to be a forfeiture under the agreement there would be a forfeiture of all three villages. The surrender of a single village was a new contract.

As to estoppel, Damle had notice from the sale deed itself that Pandurang was manager and that there was some agreement in connection with it. Damle asked Pandurang if he consented and he did consent, so Pandurang is now estopped from denying that the vendors had power to sell.

[LORD CARSON.—Not one word of this was put to Pandurang and the burden of proving estoppel rests on you.

LORD BUCKMASTER.—The only estoppel raised in the issues is from Pandurang's attestation of the deed. The estoppel you are raising is not pleaded.]

Referred to Indian Evidence Act, I of 1872, sec. 115, Indian Registration Act, XVI of 1908, sec. 60 and Transfer of

(2) I. L. R. 39 All. 696 (1917).

(3) I. L. R. 84 Bom. 202 (1909).

Property Act, IV of 1882, sec. 5. *Sarat Chunder Dey v. Gopal Chunder Laha* (4).

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—The Plaintiff in the suit out of which this appeal has arisen is the first Respondent. His plaint asked that a joint estate in certain property known as Mauza Khandal should be partitioned, and that it might be declared that he was entitled to an 8-anna share in the property. The suit was dismissed by the District Judge of East Berar, but was granted in the Court of the Judicial Commissioner. The Respondent's title rested on two deeds, the first, dated the 2nd February 1914, by which two grantors, Kanhoba and Bishwanath, the sons of Raghu, purported to convey the property in question to one Hari Gobind Damle for Rs. 9,100, and the second, dated the 26th June 1914, by which Hari Govind Damle conveyed the same parcels to the said Respondent for Rs. 15,000. So far as the documentary title is concerned, it is complete, and if in fact Vishwanath and Kanhoba had the right to convey the two shares covered by the deed of the 2nd February 1914, there could be no answer to the Respondents' claim. The first question that arose in the suit and remains for decision upon this appeal is whether those two signatories possessed that right or no, and the second whether if no such right existed, the Appellant was estopped from setting up the defect. The dispute arises in these circumstances. The village in question was originally part of the joint estate of a joint Hindu family, which had separated before 1906, leaving this village undivided. The joint family had been constituted by the four sons of Raghu. The eldest of these, Krishna, died before

(4) L. R. 19 I. A. 208 at pp. 213, 214 (1892).

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the separation. The Appellant Pandurang was one of the sons of Krishna, and so also were the second and third Respondents. The other Respondents, with the exception of No. 8, were descendants of two of the dead sons of Krishna, and Respondent No. 8 Musumant Sakhubai represented Luxman, the second son of Raghu, who was also dead. The two other sons of Raghu were, as has already been stated, Kanhoba and Vishwanath, who were each entitled to a one-fourth share.

Pandurang was the registered holder of the land. In 1906 disputes, with the exact nature of which their Lordships are unacquainted, had arisen between him and the other joint members. Accordingly on the 8th September 1906, a document was executed which has given rise to the question that has now to be determined. It was stated to be a deed of settlement by Pandurang in favour of Kanhoba and Vishwanath and Sakhubai, the widow of Luxman, and it took the form of a statement made by Pandurang to his two uncles. It sets out their relationship to him, that a partition has been effected between them and him in respect of the ancestral property, and that only certain ancestral izra villages remain, of which Mauza Khandal is one. It continues by referring to the fact that disputes had often arisen and tended to arise between them and himself, and it then proceeds to put forward the terms of the settlement. The effective part of those terms is this, that he, Pandurang, will manage in future all the village affairs and take Rs. 180 per annum as his salary and remuneration for doing it; that he will pay the necessary expenses, and that if the village profits were not sufficient to meet the expenses and there might be a loss, his two uncles should pay on account of the loss in proportion to their shares. It then concludes

in this way: "If you raise contentions in future in respect of the loss, they shall not be heard, and you shall be held to have lost, under this vyavastha patra (deed of settlement), your shares in the villages. The shares shall, however, be lost if the losses are demanded and not paid in the presence of the panch." It finally refers to a suit pending between himself and his uncles in respect of the villages, and states that it has been compromised under the settlement. That document was signed by Pandurang alone, but it was presented for registration by Vishwanath, one of the two uncles of Pandurang, and registered accordingly. Nothing appears to have been contained in the document affecting Sakhubai, and her only defence to the suit is a statement that Pandurang is estopped from disputing the sale deed of the 2nd February 1914. Pursuant to the arrangements made in that agreement, Pandurang continued to manage the estate and to make the payments. It must also be assumed that the civil suit was compromised. It appears that in the course of management there was a loss in respect of this particular village, Mauza Khandal. The other villages, although the exact accounts have not been produced, apparently roughly balanced, but as to Mauza Khandal, there was, in 1910, a loss for the four years of a total of Rs. 1,069. The fact that this loss had been incurred was mentioned to the two uncles of Pandurang, and a letter to him in the handwriting of Vishwanath was drawn up on the 11th April 1910, and signed by both of them in these terms: "You have demanded from us Rs. 533-1-3 pies (rupees five hundred and thirty-three, one anna and three pies) found due on account of loss in Khandal Izara for four years from 1907. But we cannot pay the same. You are therefore liable for the profit or loss which accrued up till now

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and may accrue in future. We are not to take a share and pay the loss. You may make a management as you like."

It was not registered. The arrangements evidenced by those two documents would be sufficient for the purpose of conveying the shares of Kanhoba and Vishwanath to Pandurang, but the real argument that has been brought before this Board against that effect being given to these transactions is that the first document was not formally signed by Vishwanath and Kanhoba and that the second document was not registered and therefore could not be given in evidence. Their Lordships think that both these contentions fail. With regard to the first, the arrangement was a perfectly good one according to Hindu law, if accepted by Vishwanath and Kanhoba and acted upon by Pandurang, even although the document was not in fact signed by the persons to whom it was addressed. That Pandurang did act upon it is beyond dispute. The only question that follows is whether the subsequent letter was an effective instrument necessary for the purpose of transferring the property, or whether it was only a piece of evidence not constituting acceptance of the earlier proposal but showing that it had been accepted and that Vishwanath and Kanhoba admitted that the condition upon which the first agreement was to operate had in fact arisen. Their Lordships think that the latter is the true interpretation. The document itself contains no statement of conveyance or release. It repeats that Vishwanath and Kanhoba are not to take a share and pay the losses because they are unable to do so, and read, as it must be read, as a sequel to their earlier document which had been drawn upon in 1906, it is a recognition that the share will pass as that document provides. There was consequently no need for its registration.

It is then urged that in point of fact the original document dealt with the share in all the villages as one, and the evidence goes to show that the only village with regard to which the accounts were placed before Vishwanath and Kanhoba was the village of Mauza Khandal, to which alone the letter relates. Their Lordships think that there is no weight in this contention. There would be no reason, even on the original agreement, to prevent the parties dealing with the one village instead of the three. The terms are clumsily expressed, and the letter merely shows that all parties accept the interpretation of the earlier document as permitting each share to be dealt with individually instead of all being necessarily grouped together. It is therefore not surprising that this contention does not appear to have been raised at any time prior to the actual hearing before their Lordships.

There remains the matter which, so far as can be gathered from the judgments in the Courts from which this appeal has proceeded, has been the real controversy, and that is that whatever be the true effect of the transaction Pandurang is estopped from setting it up against the Respondent. The first estoppel that is put forward, which was undoubtedly the estoppel upon which the real issue was taken, was said to arise by virtue of the fact that Pandurang had himself attested the first deed which had been executed on the 2nd February 1914, conveying the property to Damle. The issue is framed in these words: "Is Defendant No. 1 (i.e., Pandurang) estopped from questioning the right title and interest of Defendants Nos. 9 and 10 (i.e., Vishwanath and Kanhoba) in the property transferred under the sale deed dated the 2nd February 1914, on account of the fact that he attested that deed." And then a further

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issue is raised as to whether he attested with knowledge and consented to the transfer. Before their Lordships consider the circumstances in which that attestation took place, they think it is desirable to emphasize once more that attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. It is, of course, possible, as was pointed out by their Lordships in the case of *Banga Chandra Dhur Biswas v. Jagat Kishore Acharya Chowdhuri* (1), that an attestation may take place in circumstances which would show that the witness did in fact know of the contents of the document, but no such knowledge ought to be inferred from the mere fact of the attestation. Their Lordships think that a mistake has arisen in this case, not for the first time, from assuming that attestation carries some greater weight. In the present instance the learned District Judge says in his judgment at page 47 :—

My impression is that Pandurang did not understand the nature of the consequences that may accrue from his conduct and what interpretations would be put upon the fact of his signing the deed as an attesting witness. I therefore hold that the Defendant Pandurang is not estopped from raising the question that he was not bound by his mere signature to show that he consented to the result that he was not entitled to them.

That is the wrong way of approaching the question. Pandurang is not estopped by his mere signature unless it can be established by independent evidence that

to the signature was attached the express condition that it was intended to convey something more than a mere witnessing of the execution, and was meant as involving consent to the transaction. The statements made by the learned Judicial Commissioners at page 61 of the record are even more startling; and they appear to show that the error as to the effect of attestation must be very wide-spread. They state there: "The mere attestation of a sale deed does not work an estoppel unless it is pleaded and proved that such attestation has induced a belief followed by action." Estoppel does not arise from any such circumstance. As already stated, attestation itself does not effect it, nor does the belief of other parties as to the meaning of attestation affect the man who has placed his signature as a witness, unless it can be established that he knew that that belief would arise, and signed with that intent. A similar statement is to be found later on in the judgment, where the learned Judges say :—

We think that attestation by a person who has or claims any interest in the property covered by the document must be treated, in the absence of any evidence to show that he was tricked into making the signature, *prima facie* as a representation by him that the title recited in the document is true and will not be disputed by him as against the obligee under the document.

Their Lordships are bound to point out that that is an entire misapprehension of the law of estoppel, and that if that misapprehension be not corrected, much mischief may be done in the administration of justice in India. They think it well to recall the precise words in which estoppel is defined in the Indian Evidence Act of 1872, sec. 115, which is in these terms :—

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing

(1) L. R. 43 I. A. 249; s. c. I. L. R. 44 Cal. 186; 21 C. W. N. 225 (1916).

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to be true, and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

If the clear rule there laid down had been observed, the difficulties which have embarrassed this case would not have arisen. It is then said that attestation in this particular case had greater weight because of the circumstances associated with the execution of the deed. Those circumstances, when they are carefully examined, amount to this: That it is alleged that Pandurang knew of the deed's contents; that he was warned against signing it; that he said he did not mind signing it because he had no objection; and that there were circumstances from which it is possible to infer that he in fact consented to the sale. No one of these suggestions was put to Pandurang himself and their Lordships are unable to draw that inference from the other evidence. There can be no doubt that in 1910 Pandurang had obtained a formal acknowledgment of the fact that the condition under which his title to these two shares arose had in fact taken place. He must be assumed to have known that his right was then established, subject to whatever argument might be raised as to the question of registration, which obviously was not in the mind of either of the parties. He thought that the property was worth some Rs. 4,000, it was to be sold for Rs. 9,100, and the whole of the right and interest that arose to him by virtue of the fact that the Rs. 533 that were owing to him had not been paid was to disappear; he was to get nothing whatever out of it, and he was to relinquish the right to which the non-payment of the monies had given rise. It seems to their Lordships impossible to think that in such circumstances a man could have attested a deed for the purpose

of relinquishing for no consideration whatever a right which, upon the face of the document, would have been one of great value. Their Lordships do not think that the evidence that Pandurang knew of the contents of this deed and attested for the purpose of evidencing his consent can be accepted, and the burden of establishing that contention lay upon the Plaintiff. If in fact there be a practice, as is suggested from the evidence, that when the consent of parties to transactions is required, it can be obtained by inducing them by one means or another, to attest a signature of the executing parties, the sooner that practice is discontinued the better it will be for the straightforward dealing essential in all business matters.

Their Lordships therefore think that this estoppel has not been made out, and for the reasons already given they think that this appeal ought to be allowed. The judgment in the Court of the Judicial Commissioner should be reversed and the suit dismissed with costs, the Appellant to have his costs of this appeal and in the Courts below, and they will humbly advise His Majesty to this effect.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Appellant.

Solicitor: *Mr. Edward Dalgado* for the Respondents.

G. D. M.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 274 of 1919.

JOY NARAYAN SEN

UKIL, Plaintiff,

Appellant,

v.

SRIKANTHA ROY and

ors., Defendants,

Respondents.

MOOKERJEE, J.

BUCKLAND, J.

1921,

14, April.

Specific Relief Act (I of 1877), sec. 42, declar-

JOY NARAYAN SEN UKEL v. BHAKANTHA ROY.

ratory suit without seeking consequential relief, maintainability of—Plaintiff if bound to sue for all the reliefs—Adverse possession against co-owners of joint property—Cause of action, accrual of, for a declaratory suit—Limitation Act (IX of 1908), Art. 120, applicability of.

A declaratory suit was brought for determination of Plaintiff's share in certain joint ancestral lands, on the allegation that he was in joint possession of the share claimed by him, but he did not seek any consequential relief. The Defendants pleaded that the title of the Plaintiff was extinguished by adverse possession on the part of the predecessor of one of the Defendants. The suit was, however, dismissed under the provisions of sec. 42 of the Specific Relief Act, inasmuch as the Plaintiff had omitted to claim further relief:

Held—That the possession by one co-owner is not presumed to be adverse to the others but is ordinarily held to be for the benefit of all. The possession of one joint tenant is the possession of all and there can be no dispossession by one joint tenant, in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy.

BALARAM v. SYAMACHARAN (5), LOKE-NATH v. CHAKESWAR (6) and NARENDRA v. JOGENDRA (7) followed.

COREA v. APPUHAMY (1), MUTTU NAYAGAN v. BRITO (2), HARDIT v. GURMUKH (3) and VARADA PILLAI v. JEEVARATHNAMMAL (4) referred to.

Art. 120 of the Second Schedule to the Indian Limitation Act is applicable to a

suit for declaration of title to immoveable property, which must consequently be brought within six years from the date when the right to sue accrues.

***MAHABARAT v. ABDUL (8), SHYAMANAND DAS v. RAJ NARAIN DAS (9) and KALI v. BHAGABAN (10) and other cases referred to.**

Denials of title, which are not accompanied or followed by overt acts, are not calculated to cast a cloud upon the title of a person, and do not accordingly give rise to a cause of action.

Held, further—That in sec. 42 of the Specific Relief Act, the expression used by the legislature is, not "other relief" but "further relief." A suit for a declaratory decree ought not to be dismissed on the ground that it is barred by the proviso to sec. 42 of the Specific Relief Act, unless it is quite clear that the Plaintiff ought to seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. The proviso to sec. 42 forbids a suit for a pure declaration without further relief, but it does not compel a Plaintiff to sue for all the reliefs which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. Where the Plaintiff is in joint possession of immoveable property, whether such possession be actual possession of his share of the whole or actual possession of a part coupled with a constructive possession of the remainder, he is entitled to maintain a suit for declaratory relief with a view to remove a cloud on his title created by the act of the Defendant disputing his share; in a suit so framed, declaration of title is all that the Plaintiff needs and he is

(1) [1912] App. Cas. 230.

(2) [1918] App. Cas. 895.

(3) 28 O. L. J. 487 (P. O.) (1918).

(4) L. R. 46 I. A. 285; a. c. I. L. R. 43 Mad. 244; 24 O. W. N. 243 (1919).

(5) 24 O. W. N. 1057 (1920).

(6) 20 O. W. N. 51 (1914).

(7) 20 O. W. N. 1258 (1916).

(8) 1 O. L. J. 73 (1904).

(9) 4 O. L. J. 588 (1906).

(10) 1 Ind. Cas. 310.

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consequently not called upon to ask for consequential relief by way of partition.

AISA SIDDIKA *v.* BIDHU SEKHAR (27),
SIVARAMALINGAM *v.* SABHARATHNA (28),
KUNJ BIHARI *v.* KESIVA LAL (34) and
ASMAN SINGH *v.* TULSI SINGH (44) and
other cases referred to.

This was an appeal against the decree of Babu Nagendra Nath Chatterjee, Subordinate Judge of Zillah Bankura, dated the 30th of August 1919.

The facts of the case will appear from the judgment.

Babus Sibchandra Palit and Fanindra Nath Das for the Plaintiff-Appellant.

Babus Jyoti Proshad Sarbadhikari and Panchanan Ghosh for the Defendants-Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the Plaintiff in a suit for declaration of title to a village called Udaipore in the District of Bankura. The Plaintiff and the Defendants are descended from a common ancestor, Jugal Kishore Sen Ukil, who had two sons, Kesab and Matiram. Kesab had three sons, Prasad, Sridhar and Nilmohan; Matiram also had three sons, Damodar, Srinivas and Adwaita. The Plaintiff represents the branch of Nilmohan. The first Defendant is the widow of Prankrishna, the descendant of Prasad. The second and third Defendants represent the branch of Srinivas, while the fourth, fifth and sixth Defendants represent that of Adwaita. The case for the Plaintiff is that in the disputed property, which admittedly belonged to the common ancestor, his share is one-

third, while the first Defendant owns one-twenty-fourth and the remaining Defendants fifteen-twenty-fourth. The first Defendant asserts, on the other hand, that the share of the Plaintiff is one-fourth, her own share is one-fourth and that of the remaining Defendants one-half. The substantial controversy is between the Plaintiff and the first Defendant and the dispute reduces to the devolution of the share of Sridhar, which was inherited by his son Syam and then passed into the hands of Sahachari, the widow of Syam. According to the Plaintiff, this share, after the death of Sahachari, passed into the hands of his father Gopal (the son of Nilmohan) as the sole surviving reversioner at the time. According to the first Defendant, that share was divided equally between the representatives of Prasad as well as Nilmohan. In these circumstances, the Plaintiff instituted this declaratory suit, and, on the allegation that he was in joint possession of the one-third share claimed by him, he did not seek consequential relief. The claim for declaratory relief was resisted on the grounds, amongst others, that it was barred by limitation, and that even if it was well-founded, in fact, the suit was not maintainable under sec. 42 of the Specific Relief Act inasmuch as the Plaintiff had omitted to claim further relief. The Subordinate Judge found on the evidence that the shares of the Plaintiff was one-third as alleged by him, that he was in joint possession of that share and that the claim for declaratory relief was not barred by limitation. The Subordinate Judge held, however, that the Plaintiff might have claimed further relief by way of partition, and in this view he dismissed the suit. The Plaintiff has appealed against the decree and has assailed the reason assigned by the Court below for withholding the declaration justified by

(27) 17 C. L. J. 30 (1912).

(28) 26 Mad. L. J. 624 (1918).

(34) I. L. R. 28 Bom. 587 : s. c. & Bom. L. R. 475 (1904).

(44) [1917] Pat. 131; 2 P. L. J. 221 (1917).

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the facts found. The Respondents have attempted to support the decree of the Subordinate Judge on the ground assigned by him, but they have further contended that the Subordinate Judge came to an erroneous decision on the merits and should have held that the claim was barred by limitation, that the share of the Plaintiff was not one-third but one-fourth, and that he was not in joint possession of the one-third share. The points in controversy between the parties have thus been all re-opened in this Court.

The first point which requires examination is the question of the extent of the share of the Plaintiff in the joint property; the solution depends upon the determination of two factors, namely, the time of the death of Sahachari when the succession opened out to the reversionary heirs of her husband and who were the persons alive at that time competent to take as such reversionary heirs. The Subordinate Judge has found that she died in 1862 and that the share of her husband thereupon passed to the father of the Plaintiff who was then alive, as the grand-father of the husband of the first Defendant had previously died. We see no reason to doubt the correctness of the conclusion of the Subordinate Judge which is amply supported by the evidence on the record. The story that the share was allowed to be enjoyed by other members of the family, although the father of the Plaintiff became entitled thereto as reversionary heir, is not supported by any reliable evidence or intelligible hypothesis. As a last resort, it was argued in the Court below—and the argument has been repeated in this Court—that the title of the father of the Plaintiff was extinguished by adverse possession on the part of the husband of the first Defendant. The requisites essential for the establishment of title by adverse possession as between

co-owners of joint property have not, however, been made out. As has been frequently pointed out in recent years by the Judicial Committee, for instance, by Lord Macnaghten in *Corea v. Appuhamy* (1), by Lord Dunedin in *Muttu Nayagan v. Brito* (2), by Lord Buckmaster in *Hardit v. Gurumukh* (3) and by Viscount Cave in *Varada Pillai v. Jeevarathnammal* (4), the entry and possession of land by one co-owner will not be presumed to be adverse to the others but will ordinarily be held to be for the benefit of all; the difference between the possession of a co-owner and other cases is that acts, which if done by a stranger, would *per se* be a disseisin, are, in the case of tenancies in common, susceptible of explanation consistently with the real title; acts of ownership are not, in tenancies in common, acts of disseisin; the law will not presume that one tenant in common intends to oust another; the facts, if the contrary is asserted, must be notorious and the intent must be established in proof. The position is now firmly settled that the possession of one joint tenant is the possession of all and there can be no dispossession by one joint tenant, in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy. *Balaram v. Syamacharan* (5), *Lokenath v. Chakeswar* (6) and *Narendra v. Jogendra* (7). Tested in the light of these principles, the case for acquisition of title by adverse possession completely breaks down. The Defendant has not adduced satisfactory evidence of exclusive

(1) [1912] App. Cas. 280.

(2) [1918] App. Cas. 895.

(3) 28 O. L. J. 437 (P. O.) (1918).

(4) L. R. 46 I. A. 285; s. c. I. L. R. 43 Mad.

244; 24 C. W. N. 346 (1919).

(5) 24 C. W. N. 1057 (1920).

(6) 20 C. W. N. 51 (1914).

(7) 20 C. W. N. 1268 (1916).

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possession; on the other hand, the Plaintiff has proved that in one instance at least he succeeded in realising a decree from one Imam for an one-third share of the sum at which the latter had purchased a jungle belonging to all the co-sharers. No doubt, the evidence shews that the husband of the first Defendant had asserted, from time to time, title to a larger share than he possessed, but such bare assertion could, in no sense, be deemed to constitute ouster or disseisin. In our opinion, the Subordinate Judge has rightly held that the share of the Plaintiff amounted to one-third but such title was not extinguished by adverse possession, and that he was in joint possession of the disputed property to the extent of his share at the date of the institution of this suit.

The second point which requires examination is, whether the claim for declaratory relief is barred by limitation. It was pointed out in the case of *Mahakarati v. Abdul Hamid* (8) that Art. 120 of the schedule to the Indian Limitation Act is applicable to a suit for declaration of title to immoveable property which must consequently be brought within six years from the date when the right to sue accrues. [*Shyamand Das v. Raj Narain Das* (9), *Kali v. Bhagaban* (10), *Tarak v. Syama* (11) and *Kuloda Prosad v. Kali Das* (12)]. It is plain that if there is a right to sue, it cannot be impossible to define when it originates, but the answer obviously depends upon the circumstances of each case. There has been some divergence of judicial opinion on the question, whether there may or may not be instances of successive

accruals of causes of action for relief by way of declaration. Thus it was ruled in *Thirumala v. Kadeswar* (13), that when a Plaintiff brings a declaratory suit on the ground that the Defendant has denied his title, there is only one cause of action which accrues from the date of knowledge in the Plaintiff that the Defendant denied his title. This view was rested on the decisions in *Akbar Khan v. Turaban* (14) and *Raja of Venkatagiri v. Isakapalli* (15), which, it was explained, could not be reconciled with the opinion expressed in *Anantharazu v. Narayanarazu* (16) and *Sheopher v. Deonarayan* (17). On the other hand, the decision in *Alla Jilai v. Umrab Husain* (18) and *Latafat v. Kalker* (19), furnish instances where the possibility of a fresh cause of action for declaratory relief is recognised, and the doctrine is broadly formulated that a Plaintiff seeking a declaration is entitled to sue upon each successive invasion of his right. Similar instances may be found in *Ilaki v. Harnam* (20), *Skinner v. Sunkarlal* (21), *Brij Bihari v. Sheo Sankar* (22) and *Ramji Ram v. Sadhu Saran* (23). In the case before us, the Subordinate Judge has found that the cause of action arose in 1914, within six years before the date of the institution of the suit, when the first Defendant, in denial of the title of the Plaintiff, mortgaged and sold shares in the disputed property in excess of her lawful interest therein.

(8) 1 C. L. J. 73 (1904).

(9) 4 C. L. J. 568 (1908).

(10) 1 Ind. Cas. 810.

(11) 36 Ind. Cas. 292.

(12) I. L. R. 42 Cal. 538 (1914).

(13) [1914] Mad. W. N. 197.

(14) I. L. R. 31 All. 9 (1908).

(15) I. L. R. 26 Mad. 410 (1902).

(16) I. L. R. 36 Mad. 383 (1911).

(17) 10 All. L. J. 413 (1912).

(18) I. L. R. 36 All. 4 2 (1914).

(19) [1918] Pat. 1225; 3 P. L. J. 361 (1918).

(20) [1898] All. W. N. 215.

(21) I. L. R. 31 All. 102; s. c. 5 All. L. J. 622 (1908).

(22) [1917] Pat. 108; 2 P. L. J. 124 (1916).

(23) 2 P. L. J. 463 (1917).

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But it has been contended on her behalf that a cause of action had arisen in 1898 when her husband filed a written statement and gave his deposition in a suit in which he denied that the Plaintiff had one-third share and himself claimed a one-fourth share. The Subordinate Judge has held that these assertions, which were not accompanied or followed by an overt act, were not calculated to cast a cloud upon the title of the Plaintiff and did not accordingly give rise to a cause of action. This, in our opinion, is a reasonable view. But it is also clear that the present cause of action is entirely distinct from and is in no sense a continuation of a prior cause of action, even if it should be held that a cause of action did arise in 1898. We accordingly affirm the conclusion of the Subordinate Judge that the claim for declaratory relief is not barred by limitation.

The third and final point which requires consideration is, whether the suit has been rightly dismissed under the proviso to sec. 42 of the Specific Relief Act, which is in the following terms:—

“Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the Plaintiff need not in such suit ask for any further relief.

Provided that no Court shall make any such declaration where the Plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

It was successfully contended in the Court below and the same view has been reiterated in this Court on behalf of the Respondent that inasmuch as the Plaintiff could have sought further relief than

a mere declaration of title by way of partition, omission to do so must draw upon him the penalty of the refusal of declaration he seeks. In support of this view, reliance has been placed upon the decision of the Madras High Court in *Suryanarayana v. Tammanna* (24). In the case mentioned, it was ruled that a Plaintiff suing for a declaration that property bequeathed by his father to the Defendant was ancestral and that his father had no power to bequeath it and that he was entitled to it by survivorship along with the Defendant, ought to pray for partition of the property even if it be in the possession of tenants. With regard to this decision, as also the two earlier cases of *Sardar Singh v. Ganapat Singhji* (25) and *Strinivasa Ayyangar v. Strinivasa Swami* (26), Sir Frederick Pollock has remarked in his commentary on the Specific Relief Act that they mark the extreme limits of the application of the proviso to sec. 42. We are inclined to adopt the same view and it appears to us to be fairly clear that assuming that the Plaintiff was in possession in the case of *Suryanarayana v. Tammanna* (24), that decision does not give due weight to the fundamental fact that the expression used by the legislature is, not “other relief” but “further relief.” The further relief must consequently be relief in relation to the legal character or right as to property which the Plaintiff is entitled to and whose title to such character or right the Defendant denies or is interested in denying; it must also be relief appropriate to and necessarily consequent on the right of title asserted. This view is supported by the decision in *Aisa Siddika v. Bidhu Sekhar* (27), which was recently followed

(24) I. L. R. 25 Mad. 504 (1901).

(25) I. L. R. 14 Bom. 395 (1899).

(26) I. L. R. 16 Mad. 31 (1902).

(27) 17 C. L. J. 30 (1912).

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in *Sivaramalinga v. Sabharathna* (28). These cases emphasise the standpoint that a suit for a declaratory decree ought not to be dismissed on the ground that it is barred by the proviso to sec. 42 of the Specific Relief Act, unless it is quite clear that the Plaintiff ought to seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. Thus, when a person is out of possession of the land in respect of which he seeks to have his title declared, possession of the land in dispute is further consequential relief appropriate to the declaration prayed for and should as a general rule be sought. *Basavayya v. Abbas Saheb* (29), *Panga v. Unni* (30) and *Ramaswami v. Muniandi* (31). This is manifestly right on principle, for it would lead to multiplicity of litigation if the Plaintiff were allowed to seek the full measure of relief piecemeal, namely, first, a declaration of title in a suit for declaratory relief, and next, ejectment in a suit for recovery of possession. *Ganpatgir v. Ganpatgir* (32) and *Chokalinga v. Achiyar* (33). The position, however, is different where the Plaintiff is in joint possession of joint property to the extent of the share claimed by him and is driven to ask for declaratory relief, because the extent of his share is disputed by the co-owner. In a case of this description, it is difficult to appreciate on what principle the Plaintiff should be driven to seek for partition as a consequential relief. One of the incidents of joint property is that it may be enjoyed jointly; another incident is that its joint character is liable to be terminated. If

a co-owner is content to enjoy joint property as such, there is no reason why he should be driven to seek for partition, merely because his co-owner chooses to dispute the extent of his share. The proviso to sec. 42 forbids a suit for a pure declaration without further relief, but it does not compel a Plaintiff to sue for all the reliefs which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. It may be that the Plaintiff requires nothing more than a mere declaration and in those circumstances to refuse to make the decree asked for will be a denial of justice. *Kunj Bihari v. Keshva Lal* (34) and *Chinuappa v. Thulsi* (36). On this ground, it has been maintained that if the Plaintiff is only entitled to what is called constructive possession by receipt of rent from the Defendants, a declaration of title is all he needs; *Loke Nath v. Kesiah Ram* (37), *Satis v. Satya* (38) and *Farasram v. Bhimbai* (39). Reference may in this connection be made to the decision in *Velammam v. Vavammal* (40). There the Plaintiff, one of several sharers, sued to have it declared that a decree passed on a hypothecation made by his co-sharers did not affect his share; it was ruled, notwithstanding the decision in *Suryanarayana v. Tammanna* (24) that the Plaintiff need not ask for a general partition, even though he had impleaded those co-sharers as Defendants. This is obvious good sense, but rather difficult to recon-

(28) 38 Mad. L. J. 624 (1918).

(29) I. L. R. 24 Mad. 20 (1900).

(30) I. L. R. 24 Mad. 275 (1900).

(31) 20 Mad. L. J. 709 (1910).

(32) I. L. R. 3 Bom. 230 (1879).

(33) I. L. R. 1 Mad. 40 (1875).

(24) I. L. R. 25 Mad. 604 (1901).

(34) I. L. R. 28 Bom. 567; s. c. 6 Bom. L. R. 475 (1904).

(35) 15 Mad. L. J. 399 (1921).

(36) I. L. R. 13 Cal. 147 (1886).

(37) I. L. R. 26 Cal. 11 (P. O.) (1896).

(38) 14 C. W. N. 575 (1910).

(39) 5 Bom. L. R. 195 (1903).

(40) 20 Mad. L. J. 349 (1910).

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cile with the opinion expressed in *Ganapati v. Butchu* (41) on the authority of the earlier decisions in *Chinna v. Surjya* (42) and *Subramaniya v. Padmannava* (43). The view that in cases of this description it is not obligatory upon the Plaintiff to ask for partition was however maintained by Chamier, C. J., in *Asman Singh v. Tulsi Singh* (44) which is consistent with the view indicated in *Chinnammal v. Varada Rajulin* (45). We hold accordingly that where, as in the case before us, the Plaintiff is in joint possession of immovable property, whether such possession be actual possession of his share of the whole or actual possession of a part coupled with constructive possession of the remainder, he is entitled to maintain a suit for declaratory relief with a view to remove a cloud on his title created by the act of the Defendant disputing his share; in a suit so framed, declaration of title is all that the Plaintiff needs and he is consequently not called upon to ask for consequential relief by way of partition. The conclusion follows that the Subordinate Judge has erroneously held that the proviso to sec. 42 of the Specific Relief Act is a bar to the relief claimed by the Appellant.

The result is that the appeal is allowed and the suit decreed with costs in both Courts payable by the first Defendant. The Plaintiff will have a declaration in terms of the first clause of his prayer in the plaint.

BUCKLAND, J.—I agree.

J. N. R.

Appeal allowed.

(41) 20 Mad. L. J. 759 (1910).

(42) I. L. R. 5 Mad. 196 (1882).

(43) I. L. R. 19 Mad. 267 (1896).

(44) [1917] Pat. 131; 2 P. L. J. 221 (1917).

(45) I. L. R. 15 Mad. 307 (1892).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 256 of 1919.

MOOKERJEE, J.

BUCKLAND, J.

1921,

7, February.

PROSANNA KUMAR ROY,

Plaintiff, Appellant,

v.

NIRANJAN ROY and

ors., Defendants,

Respondents.

Limitation Act (IX of 1908), sec. 19, valid acknowledgment, what is—Endorsement on the back of a mortgage bond stating only that a certain sum on account of the principal was paid, if is a valid acknowledgment saving limitation

In a suit upon a mortgage bond securing an advance of Rs. 5,700, the question was whether an endorsement made on the back of the mortgage bond by the mortgagor in the following terms: "Paid on account of the principal as per separate accounts Rs. 1,751 only" was a valid acknowledgment within sec. 19 of the Limitation Act.

* Held—That the expression "the principal" must be taken to refer to the principal mentioned in the bond on the back whereof the endorsement was made. The examination of the bond shows that the principal advanced being Rs. 5,700, a payment of Rs. 1,751 on account of that principal cannot be taken to wipe out the liability and there was thus an acknowledgment of the right of the mortgagee to recover whatever might be found to be due. Therefore, the endorsement constituted an acknowledgment within the meaning of sec. 19 and consequently saved limitation.

SHEARMAN v. FLEMING (1) and MADHAV RAY v. GULABBHAI (2) distinguished.

MANIRAM SETH v. SETH RUP CHAND (5) referred to.

(1) 5 B. L. R. 619 (1870).

(2) I. L. R. 23 Bom. 177 (1896).

(5) I. L. R. 33 Cal. 1047; s. c. 10 C. W. N. 874 (P. C.) (1906).

PROSANNA KUMAR ROY v. NIRANJAN ROY:

This was an appeal against the decree of Babu Jagadish Chandra Goswami, Subordinate Judge, second Court of Zillah Chittagong, dated the 31st of May 1919.

The facts of the case will appear from the judgment.

Sir B. C. Mitter and Dr. Sarat Chandra Basak and Babus Chandra Sekhar Sen, Probhat Chandra Dutt and Rama Prosad Mookerjee for the Appellant.

Babus Bipin Behari Ghose, Probodh Kumar Dass, Paresb Chundra Sen, Nripendra Nath Das and Surendra Nath Bose for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This is an appeal by the Plaintiff in a suit to enforce a mortgage security executed on the 4th June 1892 by three persons whose representatives are the Defendants in the action. The sum advanced was Rs. 5,700 and carried interest at the rate of Rs. 14 per mensem. The loan was repayable in two years. The present suit was instituted on the 4th June 1918, and consequently the question of limitation arose for consideration. The Plaintiff relied upon sec. 19 of the Indian Limitation Act and based his contention on an endorsement in the following terms, made on the back of the mortgage bond on the 27th May 1906 by two of the mortgagors and the representatives of the third mortgagor: "Paid on account of the principal as per separate accounts, rupees one thousand seven hundred fifty one only." The Subordinate Judge has held that this did not constitute a valid acknowledgment within the meaning of sec. 19 and that the suit is accordingly barred by limitation. On the present appeal, we have been invited to consider one question only, namely, whether the suit is or is not barred by limitation.

Sec. 19 provides that where before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. The question for determination is, whether the endorsement constitutes an acknowledgment of the right claimed by the Plaintiff, namely, the right to recover his dues under the mortgage-bond. In the Court below reliance was placed on behalf of the Defendants upon the decision in *Shearman v. Fleming* (1), and in this Court the argument has been fortified by a reference to the decision in *Madhavrao v. Gulabbhai* (2). On behalf of the Plaintiffs, on the other hand, reference has been made to the decision of the Madras High Court in *Joganadha Sahu v. Rama Sahu* (3) which follows the earlier decision in *Visvanatha v. Sri Ram Chandra* (4) based on the decision of the Judicial Committee in *Maniram Seth v. Seth Rup Chand* (5). Reference has also been made to three later decisions of the Madras High Court in *Ramakrishna v. Venkata Subbiah* (6), *Pamulapati Venkata Krishniah v. Kondamudi Subbarayuddu* (7) and *Reguna Nagendram Chetty v. Kuppusami Aiyen* (8). Whether a particular endorsement does or does not constitute an

(1) 5 B. L. R. 619 (1870).

(2) I. L. R. 23 Bom. 177 (1898).

(3) 17 Mad. L. T. 80 (1914).

(4) 17 Mad. L. T. 78 (1914).

(5) I. L. R. 33 Cal. 1047: s. c. 10 C. W. N. 874 (P. O.) (1906).

(6) 17 Mad. L. R. 189 (1914).

(7) I. L. R. 40 Mad. 698: s. c. 2 M. W. N. 266 (1916).

(8) 4 Mad. L. W. 148.

PROSANNA KUMAR ROY v. NIRANJAN ROY.

acknowledgment of the right claimed by the Plaintiff must obviously depend upon its terms, and no useful purpose can be served by a meticulous examination of other endorsements made under different circumstances and expressed in different phraseology. We may point out, however, that the decision in *Shearman v. Fleming* (1) is plainly of no assistance to the Defendants, because the terms of endorsement in that case, namely, "a remittance to old accounts" do not imply that when credit had been allowed for the sum remitted, any sum would remain due from the remitter. It may also be pointed out that the decision in *Madhavrao v. Gulabbhai* (2) merely shows that a promise to pay, unaccompanied by an acknowledgment of the existence of a debt, cannot save limitation. The endorsement which we are called upon to consider is in our opinion, sufficiently plain and admits of one interpretation only. No doubt it does not specify the principal sum due at the time of the endorsement; but, the expression "the principal" must be taken to refer to the principal mentioned in the bond on the back whereof the endorsement was made. An examination of the bond then shows that the principal advanced was Rs. 5,700. Consequently, a payment of Rs. 1,751 on account of that principal cannot be taken to wipe out the liability and there was thus an acknowledgment of the right of the mortgagee to recover whatever balance might be found to be due. In this connection reference may usefully be made to a passage from the judgment of the Judicial Committee in *Maniram v. Seth Rup Chand* (3): "In a case of very great weight, the authority of which has never been called

in question, Mellish, L. J., laid it down that an acknowledgment to take the case out of the statute of limitation must be either one from which an absolute promise to pay can be inferred, or secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be conditional promise to pay the debt and evidence that the condition has been performed." Then follows the important observation: "An unconditional promise has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do." We feel no doubt whatever that the endorsement relied upon by the Plaintiff in the present case constituted an acknowledgment within the meaning of sec. 19 and that consequently the claim is not barred by limitation.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him for trial of such other questions as may be in controversy between the parties. The Plaintiff is entitled to his costs in this Court as also one-half of the costs (other than Court-fees) already incurred in the Court below. The costs of the trial after remand will be in the discretion of the Subordinate Judge.

The Appellant will be entitled to a refund of the Court-fee paid on the memorandum of appeal under sec. 13 of the Court Fees Act.

BUCKLAND, J.—I agree.

J. N. R.

Appeal allowed.

(1) 5 B. L. E. 619 (1870).

(2) I. L. R. 38 Bom. 177 (1908).

(3) I. L. R. 33 Cal. 1047: 1s. c. 10 C. W. N. 874 (P. C.) (1906).

[CIVIL APPELLATE JURISDICTION.]**APPEAL FROM ORDER**

No. 133 of 1920.

CHATTERJEA, J. | MUNSHI MD. KAZEMALI
 CHOTZNER, J. and anr., Judgment-
 1921, debtors, Appellants,
 Heard, v.
 3, August. MUNSHI NIAMUDDIN
 Judgment, AHMED, Decree-holder,
 24, August. Respondent.

*Civil Procedure Code (Act V of 1908), sec. 150—
 "Assignment" of business within local limits of
 one Subordinate Court to another by District Judge
 if "transfer" of business—Civil Courts Act (XII
 of 1887), sec. 13 (2).*

*A decree was passed by the third
 Subordinate Judge's Court in respect
 of a claim the cause of action where-
 of arose within certain local limits.
 Subsequently the business arising within
 these limits was assigned to the fourth
 Subordinate Judge's Court by the District
 Judge under sec. 13 (2) of the Bengal and
 Assam Civil Courts Act (XII of 1887).*

*Held—That the fourth Subordinate
 Judge's Court could not entertain an ap-
 plication to execute the decree.*

*An "assignment" of business under
 sec. 13 (2) of Act XII of 1887 is not the
 same thing as "transfer" of business
 within the meaning of sec. 150 of the Civil
 Procedure Code.*

This was an appeal preferred on the
 23rd April 1920 against a decree made by
 the Subordinate Judge, fourth Court of
 24-Pergannahs, dated the 16th April 1920.

The material facts will appear from the
 judgment.

Babus Mohendra Nath Ray and Sasi
 Sekhar Bose for the Appellants.

A. S. M. Akram for the Respondent

The JUDGMENT OF THE COURT was as
 follows :—

This appeal arises out of proceedings in
 execution of a decree for money. The

decree was passed by the 3rd Subordinate
 Judge's Court 24-Pergannahs in respect of
 a claim, the cause of action of which arose
 within Diamond Harbour. The previous
 application for execution of the decree
 was made in that Court. Subsequently, the
 business arising within the local limits of
 the Munsif of Diamond Harbour was as-
 signed to the 4th Subordinate Judge's
 Court by the District Judge under sec. 13
 (2) of the Bengal and Assam Civil Courts
 Act (Act XII of 1887). The present appli-
 cation for execution was made in the 4th
 Subordinate Judge's Court, and a ques-
 tion was raised in the Court below whe-
 ther the latter Court had jurisdiction to
 execute it. The question was answered
 in the affirmative by the Court below.
 The judgment-debtors have appealed to
 this Court, and it is contended on their
 behalf that under sec. 13 (2) of Act XII
 of 1887 the business is not *transferred*, but
 is merely *assigned* to the Subordinate
 Judges, so that the case does not come
 under sec. 150 of the Code, and that even
 if it does, the provisions of that section
 are subject to those of secs. 27 and 38 of
 the Code.

Sec. 13 of Act XII of 1887 runs as
 follows :—

(1) The local Government may by noti-
 fication in the official Gazette fix and
 alter the local limits of the jurisdiction of
 any Civil Court under this Act.

(2) If the same local jurisdiction is ac-
 signed to two or more Subordinate Judges
 or to two or more Munsifs, the District
 Judge may assign to each of them such
 Civil business cognizable by the Sub-
 ordinate Judge or Munsif as the case may
 be, subject to any general or special orders
 of the High Court as he thinks fit.

The effect of re-distribution of business
 by the District Judge under sec. 13 of Act
 XII of 1887, upon the power of the Court
 to execute decrees was considered in some
 cases under Act XIV of 1882. In the case

MUNSHI MD. KAZIMUL O. MUNSHI NIAMU DDIN AHMED.

of *Kalipada Mukerjee v. Dinonath Mukerjee* (1) *A* obtained a decree against *B* in the Court of the first Munsif of Howrah. After the decree, the local area within which the cause of action arose and the judgment-debtor resided, was transferred (evidently under sec. 13 of Act XII of 1887) from the first to the second Munsif. On an application by *A* for the execution of his decree in the Court of the second Munsif which, allowed execution, it was held that the second Munsif had no jurisdiction to entertain the application and allow execution, and that the application ought to have been made in the Court of the first Munsif which passed the decree. Similarly in the case of *Bechu Koer v. Golab Chand* (2), it was held that the Court of Subordinate Judge which passed a decree is the only Court competent to execute it, and that the District Judge is not competent under sec. 13 (2) of Act XII of 1887 to assign to them different areas so as to limit or define their respective jurisdictions, the local limits of their jurisdiction being fixed by the local Government under sec. 13 (1) of the Act.

In cases of transfer of local jurisdiction by order of the local Government, it has been held with reference to the provisions of sec. 649 of Act XIV of 1882, that the application for execution of the decree may be made either to the Court which passed the decree, or to the Court to which the local jurisdiction has been transferred. See *Latchman Pande v. Madan Mohon* (3), *Jahar v. Kamini Debi* (4) and *Udit Narain v. Mathura Prosad* (5).

The Court below relied upon the provisions of sec. 37 (b) and sec. 150 of the present Code. There were no provisions

in the old Code corresponding to those of sec. 150 of the present Code. Sec. 150 lays down "save as otherwise provided where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred."

We think that an assignment of business under sec. 13 (2) of Act XII of 1887 is not the same thing as transfer of business under sec. 150 of the Code and that being so the provisions of sec. 150 do not apply to the present case.

In *Aminuddin v. Atarmoni* (6) there was no assignment of business by the District Judge under sec. 13 (2) of Act XII of 1887 as in the present. It was held in the circumstances of that case that the Subordinate Judge's Court so far as it related to suits up to the value of Rs. 2,000 must be taken to have been transferred to the second Munsif's Court, upon that Court being vested with powers to try suits up to Rs. 2,000 in value which evidently was conferred by the local Government under sec. 19 (2) of Act XII of 1887. The question what effect the words "save as otherwise provided" in the opening line of sec. 150 have upon the power of the Court to which business is transferred, to execute decree passed by the Court from which the business is transferred, does not in the view, we take of this case, arise for decision.

The fourth Subordinate Judge's Court did not pass the decree, nor was the decree sent to it for execution, and the 3rd Subordinate Judge's Court has not ceased to exist nor has ceased to have jurisdiction to execute the decree.

(1) I. L. R. 25 Cal. 315 (1897).

(2) I. L. R. 27 Cal. 272 (1899).

(3) I. L. R. 6 Cal. 513 (1890).

(4) I. L. R. 28 Cal. 222 (1900).

(5) I. L. R. 25 Cal. 274; a. c. 12 C. W. N. 859 (1908).

(6) I. L. R. 47 Cal. 1100; a. c. 24 C. W. N. 899 (1920).

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We are accordingly of opinion that the fourth Subordinate Judge's Court had no jurisdiction to entertain the application for execution of the decree passed by the 3rd Subordinate Judge's Court in this case. The appeal is accordingly allowed, and the order of the Court below set aside. The application for execution of the decree will be returned to the decree-holder for presentation to the proper Court. No order as to costs. Let the records be sent down at once.

N. G.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 449 OF 1913.

CHITTY, J.

RICHARDSON, J.

1916,

14, July.

DYAM KHAN and ors.,
Plaintiffs, Appellants,

v.

SARAT CHANDRA DE and
ors., Defendants,
Respondents.

Guardians and Wards Act (VIII of 1890), sec. 31 (3) (a)—Condition precedent distinguished from condition subsequent—Condition subsequent if vitiates a sale—bonâ fides of sale of minor's property.

1 condition precedent, if not complied with, vitates a sale but not a condition subsequent.

Where the District Judge acting under the Guardians and Wards Act empowers the guardian to sell a property of the minors for an alleged debt of theirs and further directs him to put in the bonds after these have been satisfied and so endorsed by the creditors, it does not follow that non-compliance with the latter direction vitates the sale if actually carried out and the vendee has all along been in possession of the purchased property.

Where the same property is held partly by adult co-sharers and partly by minors, the very fact that the minors' share was sold for a price a little over that for which

the shares of adult co-owners was sold goes to indicate the bonâ fides of the transaction relating to the shares of the minors.

This was an appeal against the decree of Babu Surendra Nath Ghosh, Subordinate Judge, 2nd Court of Zillah Tippera, dated the 31st of July 1913.

The facts of the case will appear from the judgment.

Dr. Sarat Chandra Basak and Babu Bipin Chandra Bose for the Appellants.

Babu Jatindra Mohan Ghosh for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiffs whose suit has been dismissed by the Subordinate Judge of Commilla. The Plaintiffs are Dyam and Abdul Hamid Bhunia, who are in the position of champertors, and Romjan Banu, Anarjan and Mahabat Ali, children of one Amanulla. Amanulla died about 1893 leaving by his first wife three children who had then attained their majority, and a widow Ayesha Bibi and four minor children by her. The majors were Syed Ali, Nayan Bibi and Meherjan Bibi, Defendants Nos. 7, 8 and 9.

Ayesha Bibi is Defendant No. 6, Romjan Banu, Anarjan and Mahabat Ali are Plaintiffs Nos. 3, 4 and 5; Mullickjan, the 4th child of Amanulla by Ayesha Bibi, is Defendant No. 10. Defendants Nos. 1 to 5 represent the firm of Khetra Mohan Dey and Co., who are said to have purchased from Ayesha Bibi towards the end of April 1898 the shares of her four minor children in the *howla* of Amanulla. This suit is brought to recover from Defendants Nos. 1 to 5 the seven annas fifteen gandas share of those children. It should be stated that Plaintiff No. 1 is alleged to have purchased the interest of Mullickjan, and Plaintiff No. 2 that of Romjan Banu.

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in the property in suit. Anarjan, though she at first joined in the suit as a party Plaintiff, has now come to terms with Defendants Nos. 1 to 5 and declines to prosecute the suit or appeal any further.

It appears that in 1898 there were negotiations for the sale of the *howla* of Amanulla by his children to Khetra Mohan Dey and Co. The reasons ascribed for the sale were that the lands were low lying, they were being encroached upon by the town and jetties of Chandpur and were increasing in value as lands suitable for jute godowns but losing their value as mere cultivable lands. In February 1898 the widow of Amanulla joined with his major children in executing a *bayana-patra* or agreement to sell to Khetra Mohan Dey and Co. It was understood that for the sale of the shares of the minors leave of the District Judge would have to be obtained. That was no doubt in the minds of the parties, when they entered into that agreement. On the 17th of February 1898 Ayesha Bibi put in a petition before the District Judge asking to be appointed guardian of her minor children. One paragraph in that petition says that it was necessary to sell certain properties to clear debts incurred by the father of the minors. On 16th March 1898 Ayesha Bibi, as one of the heirs of her husband, joined with the major children in transferring their 8 annas 4 gandas odd share to Krishna Chandra Dey for Rs. 2,809-11 (Ex. E (1)). On 30th March 1898 Ayesha Bibi was duly appointed guardian of the persons and property of her minor children, and thereupon on 2nd April 1898 she filed a petition Ex. C) for leave to sell. On the same day the District Judge sanctioned the sale of the property provided the bonds, meaning the three bonds, mentioned in the petition Ex. C, on which the estate of Amanulla was still indebted, were produced before

him endorsed as fully satisfied on 18th day of May 1898. The sanction having been given in that form another *kobala* was executed by Ayesha Bibi on behalf of her minor children conveying their 7 annas 15 gds. odd share to Krishna Chandra Dey for a similar sum of Rs. 2,809 as. 11. This *kobala* does not bear any date but we find that the stamp was purchased on 23rd April and the deed was registered on 28th April, so that it must have been executed within those six days. On the 18th May 1898 the bonds were not in fact produced before the District Judge though he twice gave time for their production. On the 27th July the District Judge made an order purporting to withdraw the conditional sanction of 2nd April 1898. The bonds as a matter of fact were never produced before him, but three registered receipts were put in on 27th June 1898 which purported to be executed by the obligees of those bonds stating that their respective bonds had been duly paid and discharged. They are Exs. F, F1 and Ex. (C). The sale had been carried into effect and possession given to Defendants Nos. 1 to 5, who have ever since been in possession of the land. *Plaintiffs Nos. 1 and 2 profess to have purchased the interests of Mullickjan Bibi and Romjan Banu by two *kobalas* which the learned Subordinate Judge has found to be sham transactions and without consideration. On the strength of these alleged purchases they obtained the concurrence of the other three Plaintiffs and filed this suit on 21st April 1910. The suit is obviously a purely speculative one brought by Plaintiffs Nos. 1 and 2. Finding that the value of the property in the locality had materially increased since 1898 they purchased this litigation with a view of making some profit out of it.

The only question with which we need deal is that of the sale in 1898. The

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learned Subordinate Judge has found that it was a perfectly good sale, that the interests of the minors passed and that the sale cannot now be rescinded. If the point be decided against the Plaintiffs it is obviously unnecessary to go into the further question, which the learned Subordinate Judge has also decided against them, namely, as to the validity of their own purchase from Mullickjan and Romjan Banu.

It has been argued that the sale in 1898 by Ayesha was in some way or other a fraud upon the minors. We had some difficulty in ascertaining from the learned Vakil for the Appellants what was the precise fraud which he now alleged. There is no doubt what was the fraud alleged in the plaint. But he stated here that the fraud of which he complained was that Syed Ali the elder brother of the minors misappropriated the money for which their shares in the property had been sold. Of that there is no evidence at all upon the record, and it need hardly be stated that if that were the fraud alleged the cause of action would be totally different. The suit would not be against Defendants Nos. 1 to 5 but against Syed Ali as having misappropriated the minor's property.

It has been suggested that the sale by Ayesha Bibi was defective because it was made under a conditional order of the District Judge and that the condition was not fulfilled. We agree with the learned Subordinate Judge in saying that the condition which the District Judge imposed was not a condition precedent affecting the sale but a condition subsequent, imposed in order that he might satisfy himself that Ayesha Bibi had properly applied the money realised by the sale in the discharge of the minor's debts. Had the learned District Judge imposed a condition such as that found in sec. 31,

(3) (a) of the Guardians and Wards Act (Act VIII of 1890) the sale could not have been completed without the sanction of the Court. He, however, did not do so, and we presume that he did not intend to do so. The condition which he imposed that the bonds should be shown to him fully discharged would not and could not affect the sale. It is obvious that the bonds could not be so produced before him until the sale had been completed, the money had been paid, and the sale proceeds had been applied in the discharge of the bonds.

Then it has been said the debts alleged did not in fact exist and that there was no bond out-standing against the estate of Amanulla for which the minors would have been liable. As to this we have no evidence on the record. The evidence that we have points to the bonds having been in existence and we have the registered receipts of the holders of these bonds that their debts had been discharged. The District Judge must have satisfied himself before granting the leave to sell that there were debts out-standing which had to be cleared off.

Then it is urged that the minors' estate would not have been liable for the whole sum of Rs. 921 said to be due upon those bonds, that they would be liable only in proportion to their share in Amanulla's property. This is perfectly true and must have been apparent to the District Judge when he granted the sanction. There is no reason to suppose that the number of heirs of Amanulla was concealed from him or that he was given to understand that the four minors were the only surviving children.

Then it has been suggested that the sale was for an inadequate price and in support of this reference has been made to the present prices said to be ruling for this and neighbouring property. There

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appears to be no force in this argument. We think it is a very strong circumstance in favour of the sale by the minors that the widow and major children of Aman-ulla were selling their shares at the very same time to the same people for a price much the same as was obtained for the minors' shares. The price paid for the minors' shares was indeed a little higher. This seems to put beyond all doubt the question of the *bonâ fides* of the sale in 1898.

It was alleged in the plaint that Defendants Nos. 1 to 5 were acting in some way in collusion with Syed Ali and his brothers-in-law Karim and Dengu Patari. Of this there is no evidence at all on the record, that can be believed. It is suggested that these persons were scheming in some way to defraud the minors. But this sale was duly carried out. The money was undoubtedly received and it is in evidence that Ayesha Bibi applied some of the money in building another *bari* to which she removed with her minor children.

There is one other fact urged with regard to the sale that it has not been shown as alleged in Ayesha's petition that the land was in fact, being washed away. The Plaintiff No. 1, Diam Khan, admits that there was some washing away by the *khal*. That, however, though given as a reason for the sale, could not be an essential condition for the sale.

The last point is whether the sale in 1898 which was carried through with the leave of the Court was a proper sale at a fair price. There is no doubt upon the evidence on the record that it was.

We accordingly agree with the Subordinate Judge in holding that the transfer to the principal Defendants in 1898 was valid and binding on the minors whose shares were thus transferred. It is unnecessary to investigate the title of the Plaintiffs Nos. 1 and 2.

The result is that this appeal must be dismissed with costs. Hearing fee Rs. 25.
S. C. C. Appeal dismissed.

[PRIVY COUNCIL.]

[APPEAL FROM BOMBAY.]

SITARAM BHAURAO
DESHMUKH, since de-
ceased (now repre-
sented by Kashinath
Sitaram Deshmukh
and ors.), and ors.,
Appellants,
v.
1921,
Heard, 6, May.
Judgment, 9, May.

SYED JIAUL HASAN
KHAN SYED SIRAJUL
HASAN KHAN,
Respondent.

Pre-emption—Property owned by Mahomedans—Sale by a co-sharer to a Hindu, on the assumption that other co-sharers were to have the right to pre-empt—Right of pre-emption of latter—Vendor if may prescribe special conditions not imposed by law—Agreement of sale understood by parties as and represented to be sale—Accrual of right of pre-emption—Transfer of Property Act (IV of 1882) sec. 54, if determines date of sale.

Where in property owned by Mahomedans, co-owners entitled to a fourth share agreed to sell their share to certain persons who were Hindus, and in pursuance of the agreement, the vendors intimated to the remaining co-sharer that they had sold their share as aforesaid and gave the latter two days' time within which to exercise his right of pre-emption:

Held—That as all the parties had considered that there was a law of pre-emption which applied between the vendors and their co-sharer and that it was applicable to the purchasers, who too had assented to that view, it was not necessary to enquire whether there was a local custom of pre-emption or whether it could be enforced by a Mahomedan against a Hindu purchaser.

SITARAM BHURAQ DESHMUKH v. SYED JIAUL HASAN KHAN.

That the general law of pre-emption being what the parties contemplated as applying to the case, it was not open to the vendors to impose conditions other than those prescribed by that law for the exercise of the option of pre-emption.

That the vendors and the vendees having regarded the sale as complete at the date of the agreement, that was the date with reference to which the requisite religious or other formalities had to be performed.

JADU LAL SAHU v. JANKI KOER (1) referred to.

The Transfer of Property Act was not intended to alter directly or indirectly the Mahomedan law of pre-emption as it previously existed.

BEGAM v. MOHAMMAD YAKUB (2) approved.

Appeal from a decree, dated 5th February 1917, of the High Court at Bombay, affirming a decree, dated the 4th December 1913 of the Additional First Class Subordinate Judge at Thana.

The facts of the case sufficiently appear from the judgment.

Sir G. R. Lowndes, K. C. (with Mr. J. M. Parikh) for the Appellants.—The question is, is the law of Mahomedan pre-emption part of the law of Bombay. In Madras it does not apply. In Punjab and Oudh, it applies by statute. Bombay has not yet decided on this. I say Mahomedan law of pre-emption does not apply. Again among the Hanafi sect this right is a personal right and so the right dies with him. The other side contended that he was a Shafi. The District Judge found he was a Hanafi. The case was abated. But the High Court held that the man was a Hanafi but they would revive the law of pre-emption in favour of the heir and they sent it to the District Court to

try it on the general questions of Mahomedan law.

[LORD HALDANE.—Refers to *jus ad quod tertium*.]

[LORD ATKINSON.—In the deed you provide for pre-emption.]

If the uncle was willing to purchase we were willing to let him have it on our own condition. The suit is filed not on contract at all but on Mahomedan law.

[LORD HALDANE.—Is sec. 54, Transfer of Property Act, different from English law? Do rights acquired under a contract to purchase in English law differ from those under Hindu law?]

Jadu Lal Sahu v. Janki Koer (1) is authority and defines rights under a right to pre-emption, at p. 597.

Mahomedan law is applicable to India only so far as statute has laid it down. The only other instances are a few under the rule of equity and good conscience. You cannot have a title under Mahomedan law till the conveyance is completed and the vendor must have divested himself of all his rights. The right of pre-emption is an infirmity attached to the title or something which comes in only later.

Farman Khan v. Bhurat Chandra (3).

[SIR JOHN EDGE.—We decided, I believe in *Begam v. Mohammad Yakub* (2), that the Transfer of Property Act did not apply to pre-emption under Mahomedan law.]

This point in *Jadu Lal Sahu v. Janki Koer* (1) was not argued before the Privy Council. If your Lordships hold that I gave an option on this under the Mahomedan law to the vendee, then I cannot get beyond this. The case in Bombay holds that Mahomedan law is overruled by the Transfer of Property Act.

(1) I. L. R. 35 Cal. 575 (1908).

(2) I. L. R. 16 All. 344 (F. B.) (1894).

(3) I. L. R. 35 Cal. 575 (1908).

(2) I. L. R. 16 All. 344 (F. B.) (1894).

(3) 18 W. R. 21 at p. 28 (F. B.) (1869).

SITARAM BHABURAO DESHMUKH v. SYED JIAUL HASAN KHAN.

Mahomed Beg Amir Beg v. Narayan Meghaji (4).

This right of pre-emption exists, however, in certain parts of Bombay by custom.

Mr. Parikh.—Even under Mahomedan law there was no complete sale. *Jadu Lal Sahu v. Janki Koer* (1) holds that even if the vendor says it is sold it must be confirmed by outside evidence.

Under Mahomedan law no sale is complete unless the purchase-money is paid and possession is transferred. "Intention" alone is insufficient. What has happened here is only a contract of sale and is not a complete sale under the Mahomedan law, *Begam v. Mohammad Yakub* (2).

Mr. L. DeGruyther, K. C. and *Mr. Raikes* for the Respondent were not called upon to reply.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—In this case several points have been referred to in the course of the argument which, if they arose, would be of great importance; but in the view their Lordships take, these points do not arise, and they therefore find themselves in a position to intimate at once the advice which they will tender to His Majesty.

The suit in which the question arises was brought by the original Plaintiff, who was the father of the present Respondent, as administrator, to recover from the Appellants a quarter undivided share in two villages, on the ground that the original Plaintiff was entitled to a right of pre-emption in regard to them under Mohomedan law. The question is whether the original Plaintiff had such a right of pre-

emption. The case was heard before the Additional Subordinate Judge at Thana, and it went to the High Court at Bombay on appeal. It came before the Additional Subordinate Judge and before the High Court on various interlocutory points, but finally a decision was given on the issue defined by the Subordinate Judge, and that decision was affirmed by the High Court on somewhat different grounds, which are sufficient, in their Lordships' opinion, to dispose of the merits of the case.

The original Plaintiff, who is now dead, was in the middle of October 1908, entitled, as co-sharer with his nephew, to the two villages. The original Plaintiff had an undivided three-fourths' share, and the nephew had the remaining undivided quarter. On the 14th October 1908, the nephew sold to the present Appellants, who are Hindus. The document is called by the parties a deed of agreement of sale, and it states that the nephew being the owner of the fourth share in the two villages, certain persons, including the Appellants, have agreed to purchase the same for Rs. 29,999, Rs. 1,000 paid down, and the remainder payable in two quick instalments, and that there was to be a pukka deed of sale, which it was obviously contemplated would be registered. Then they say this, which is important:—

"You" (that is, the nephew) "should also give us a copy of the notice which you have to-day given to the owner of the three-fourths' share, and a receipt of the notice which he will receive on the day of the sale deed."

And a little further on:—

"If the owner of the three-fourths' share is willing to purchase your said share, and if you and he agree to purchase, you should immediately return to us the rupees which you have received from us."

That is an important document because

(1) I. L. R. 35 Cal. 575 (1908).

(2) I. L. R. 40 All. 344 (F. B.) (1894).

(4) I. L. R. 40 Bom. 289 (1915).

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It shows not only that the parties considered that they had a full preliminary deed of contract of sale, to be carried out, no doubt, by a pukka deed to be registered afterwards, but they knew that under whatever was the law, the uncle might have a right of pre-emption under Moham-medan law or under some other law, and the whole transaction was made subject to the exercise by the uncle of that right. That they knew this is plain from the document itself, and contemporaneously with it there was a letter written by the nephew to the uncle, also on the 14th October 1908, which is in these terms:—

“My dear Uncle, I beg to intimate that I have this day sold my one-quarter share in the villages of Wahal and Patadhi, for a sum of Rs. 29,999, to”—the first Appellant and his brothers. “As you are an Inamdar of the three-fourths’ share in the said villages I give you this notice that if you are desirous of purchasing the said villages for the sum aforesaid, you will be good enough to send me a cheque for the amount, viz., Rs. 29,999, by return of post, and in the event of your not replying to this, or paying the money within two days after receipt hereof, I shall, without any further intimation to you, close the bargain and obtain the sale proceeds.”

The effect of that, which was obviously the document which the Appellants contemplated should be sent, appears to their Lordships to be a recognition that the uncle had a right of purchase as pre-emptor under the law which was treated as applying. It is far from clear that if that were true the nephew had the right to say: “If you do not reply to this letter or pay off the money within two days after receipt hereof, I will close the bargain and obtain the sale proceeds.” On the contrary, the effect of the document is an intimation, an admission, that there is a law of pre-emption which is doubtless, from the way in which it is referred to, a general law, and that the uncle holds

under that general law. It is therefore to the general law that reference has to be made to see what these rights were. The uncle took the view, which indeed if the letter addressed to him were true he was entitled to take, that there had been a sale. The letter says: “I have this day sold my one-quarter share.” The uncle thereupon performed the ceremonies—there are concurrent findings that the ceremonies were fully performed—and asserted his rights. He died, and ultimately an administrator was appointed in whom his right, such as it was, was treated by the Courts below as having vested, the reason being this: that it was not a case of an unexercised option which was said to have passed to the administrator, but an option which the uncle in his lifetime had actually exercised, because the uncle, almost immediately upon the 17th October 1908, gave through his solicitor a formal notice to the vendor, declaring his intention to exercise his right of pre-emption and asking for the address of the purchaser and inspection of the deeds. The nephew, taking the view that the uncle had not complied with the terms of his—the nephew’s—letter within two days after receipt thereof, and that he had lost his rights, went on with the transaction. Whether he was within the time or not is not clear, because there is some evidence that the letter of the 14th October 1908, was not received until the afternoon of the 15th, and two days from the date of the receipt thereof, which was the expression used in the letter of the 14th, would not be until the 17th, and the letter of explanation is dated the 17th October. However, it is not necessary to go into that, because if the view suggested is the correct one, the rights of the parties would be governed, not by the mere terms of the letter, but by the general law.

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The uncle having died, his administrator brings the suit to recover the land. The nephew had parted with it to the Hindus, assuring them that their right was a right that was incontestable, inasmuch as the uncle had not come forward within the time stipulated, and that they could safely complete, which they did, and ultimately a sale deed to them was registered. The proceedings are proceedings on the part of the representative of the uncle to get the land back. The learned Subordinate Judge who decided in favour of the Respondent did so on a variety of grounds, but when the case came to the High Court, the learned Judges there thought that it was not necessary to go into the question whether there was a local custom of pre-emption, or whether, if there was, it could be enforced by a Mohammedan entitled to it against a Hindu purchaser, which was another important point made in the case, the Appellants being Hindus, or whether, if there was a mere right of pre-emption, it could be enforced against a purchaser with notice of it, because they said the simple and obvious way of dealing with the matter was that all the parties had considered that there was a law of pre-emption which applied between the vendor and his co-sharer and that it was applicable to the purchaser, and that the Appellants had, in effect, assented to that view. Upon the question when the sale had taken place, which was material, inasmuch as it was with regard to that date that the question of whether the requisite religious and other formalities had been performed at the proper time must be determined, they thought they ought to look to what the parties represented to each other, and they followed a decision of the Calcutta High Court in a case of *Jadu Lal Sahu v. Janki Koor* (1). In

(1) I. L. R. 35 Cal. 575 (F. R.) (1909).

that case there was a question as to whether there had been a sale for the purpose of determining the application of the Mahomedan principle of pre-emption, and the learned Judges who decided it laid down that the real solution was to be found in determining in each case what was the intention of the parties. In the case before them they thought there was no doubt that the vendor and vendee did not regard the sale as a complete sale until the price had been paid and the deed registered.

In the present case their Lordships agree with the learned Judges in the Bombay High Court in thinking that the parties represented a full sale as having taken place on the 14th October 1908, sufficient to justify the uncle in proceeding at once to the ceremonies, and treating that as the crucial time. The view taken by the High Court is consistent with what was said in the case of *Begam v. Mohammad Yakub* (2). The Chief Justice, Sir John Edge, there observes, at page 351, in connection with the question whether the Transfer of Property Act, which required registration, had altered the principle of the Mohammedan law, which determined what was a sale for the purposes of the date in reference to which the ceremonies should be performed:—

"I cannot think that it was the intention of the Legislature, in passing Act No. IV of 1882" (the Transfer of Property Act), "to alter directly or indirectly the Mahomedan law of pre-emption as it existed and was understood for centuries prior to the passing of Act No. IV of 1882."

That at all events is in harmony with the conclusion come to by the High Court at Bombay. The conclusion is, that you are to look at the intention of the parties in determining what system of law was to be taken as applying and what was to be taken to be the date of the sale

(2) I. L. R. 10 All. 344 (F. R.) (1894).

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with reference to which the ceremonies were performed. That view is expressed at length in the judgment of the High Court, and their Lordships agree with it. If that view is right, as their Lordships think it is, it disposes of the whole of the controversy in this case, with the result that the appeal fails and must be dismissed with costs, and their Lordships will therefore humbly advise His Majesty accordingly.

Solicitor: Mr. Edward Dalgado for the Appellants.

Solicitors: Messrs. T. L. Wilson & Co. for the Respondent.

R. M. P.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER,
CENTRAL PROVINCES.]

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALL

1921,

Heard, 7, 8 and

10, February.

Judgment,

21, April.]

RANA MAHATAB
SINGH, since deceased,
(now represented by
RANA SHEONATH
SINGH) Appellant,
v.

BADAN SINGH, and
ors., Respondents.

Hindu law—Family custom—Migration of family carrying custom of primogeniture—Custom if necessarily ceases with the cesser of office.

In a suit for partition of family properties, the principal Defendant claimed that succession in the family was governed by the rule of primogeniture, the properties being in consequence impartible and as such belonging exclusively to him as the holder of the gaddi and the title of Rana. It was not disputed that the family to which the parties belonged were Chohan Rajpoots who had migrated from their original homes into the Nimar District in the Central Provinces:

Held—That the presumption was that they carried with them to their new homes the customs and institutions to which they were subject in the land of their birth.

That the evidence showed that the custom of primogeniture which the family brought with them continued to govern the family under the Mahomedan, the Marhatta and the British rules up to the present time, and that the existence of the family as an entity through so many centuries was mainly owing to this custom, and the theory favoured in the Judicial Commissioner's Court that after the head of the family ceased to be the holder of a hereditary fiscal office, the junior members must naturally assert themselves as share-holders according to the ordinary Hindu law which in consequence would displace the custom was based on a priori reasoning of a speculative character.

The mere cessation of services to which watan lands are attached which are by custom impartible does not ordinarily destroy that custom.

RAMRAO v. YESHWANTRAO (1) approved.

This was an appeal from a decision of the Court of the Judicial Commissioner, Central Provinces.

The facts of the case will appear sufficiently from the judgment.

Sir Erle Richard, K. C. (with Mr. E. B. Raikes) for the Appellant.—The early history of the custom of primogeniture amongst Rajpoots in this province is given in *Rao Kishore Singh v. Mumtaz Gahenabai* (2) by Lord Atkinson. See also Captain Forsyth's Report, secs. 34, 38 and 111. References to this family occur at secs. 117, 135, 241 and 269. I want to establish that the old

(1) I. L. R. 10 Bom. 327 (1885).

(2) 24 C. W. N. 601 (P. C.) (1919).

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system of impartibility has not been changed.

[LORD SHAW.—That decision establishes that the discontinuance of the reasons for the existence of a custom does not alter the character of impartibility once it has been firmly established.]

The Judicial Commissioner says that this family is similar to the one treated as impartible in this Board's judgment.

There is this ancient custom of impartibility and as far as pedigree goes this is kept up. Property has always been with the eldest son.

Mr. Raikes following:—

Todd's Rajasthan (1829), Vol. II, p. 307. Primogeniture prevails in all Rajpoot families. Also Todd, Vol. I, p. 117. Forsyth, secs. 111, 118, 119, 33, 43, 59, 113, 128 and 111. There was sub-infeudation to members of the family. *Pratapsing Shiasing v. Agar-singhji Raising* (3). Since *Rani Sartaj Kuari v. Deoraj Kuari* (4), the Board has treated these families as joint though there was a custom preventing partition.

Mr. L. DeGruyther, K. C. (with Mr. J. M. Parikh) for the Respondents.—Cites Forsyth, sec. 119, Mahomedans recognised them as collectors of revenue only and not as Zamindars. The grants were of *jagirs* only, a right to take the revenue and not the land. The sanad is a grant of pension and the second sanad is a grant of *jagir* of the revenue. A custom must be shewn affecting the whole estate. This is the custom alleged; while on the evidence certain villages have not so descended. The pension from the Government is on a totally different footing. The mere fact that certain villages are held by the Raj does not make them im-

partible. Impartibility must be proved with regard to every village. Forsyth, p. 182, sec. 241 and p. 135.

The holder of a *raj* may be able to throw self-acquired property into the impartible estate. Here there is no *raj*. Therefore family custom must be proved. Evidence of custom has failed, because it is not the sort of evidence that affects this class of property. Forsyth, sec. 269. As regards the two *jagirs*, they were part and parcel of the office. Three villages were originally so held. There is no doubt also that what these persons held was the revenue. The lands were settled under the settlement rules, while a sanad was given for the revenue. *Srimanta Raju Yarlagaddu v. Srimanta Raja Yarlagadda Durga* (5).

See Mayne's Hindu Law, sec. 469, Forsyth, sec. 119.

These persons were the *watun-dars* (office-holders) of the parganas. When the partition was made in 1844, he undoubtedly held the office. Each of the three brothers was to stand in exactly on the same footing as regards the *zeerats*, etc. There is no doubt as to a partition in 1844.

The settlement officer says, in 1864 sanads were granted to certain members of the family because they were found to be in fact share-holders by the settlement officers.

In 1892, Mahatab Sing says, they were a joint family. Forsyth, sec. 270.

Gazetteer of the District of Nimar, p. 176, sec. 209. The Report of the Land Settlement Revenue of the District of Nimar (1895-1899), secs. 42 and 113. *Ramakanta v. Shyumanand* (6).

Sir Erle Richards:

[MR. AMBER ALI refers to the case in

(5) L. R. 17 I. A. 134 (1890).

(6) L. R. 36 I. A. 49; s. c. I. L. R. 36 Cal. 590, 13 C. W. N. 581 (1909).

(3) L. R. 46 I. A. 97; s. c. 24 C. W. N. 57 (1918).

(4) L. R. 15 I. A. 51; s. c. I. L. R. 10 All. 279 (1898).

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Ramrao v. Yeshvantrao (1) about "watan property."]

The question of the two villages being held differently was never raised by the Plaintiff. Forsyth, secs. 34 and 59 (secs. 68 and 69). District Gazetteer of Nimar (1908), p. 87, sec. 97. Forsyth, sec. 133 (p. 68), secs. 134, 135 and 156 (p. 141).

In 1844 there was no real partition as in that case shares should have been equal. In 1866 (in the settlement) we find the eldest son is in possession of more than his proportionate share. There is an instance of one claiming merely maintenance without partition. Forsyth, sec. 269. *Ramakanta v. Shyamanand* (6) does not bear on this.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMER ALI.—This is an appeal from a judgment and decree of the Court of the Judicial Commissioner of the Central Provinces bearing date the 19th of April 1917, which, reversing the order of the District Judge of Nimar on the preliminary issue on which he had disposed of the suit, remanded the case for a further decision upon the merits. The present appeal to this Board is from that remand order. The facts of the suit have been set out at considerable length in the judgments of the two Courts in India. Their Lordships are thus relieved of the necessity of dealing with them at any length.

The parties to the action, excepting the second Plaintiff, are members of an old Rajpoot family settled in the District of Nimar for several centuries. Their possessions, which the Judicial Commissioners not without reason think must have been at one time considerable, have

now dwindled to two revenue-free or *muafi* villages, Nadia and Pangra, two revenue-paying or *malguzari* villages, Peplod and Jirvan, and certain *zirat* and *sir* lands. The Plaintiff, Badan Singh, who is the younger brother of the principal and contesting Defendant, Mahatab Singh, alleges that upon the death of their father Umed Singh in 1892, he along with Mahatab and another brother Nirbhe Singh, who has since died, became entitled upon partition, as members of a joint Hindu family, each to a one-third share in the family property. He further alleged that his cause of action arose when he was ousted from joint possession in 1909, the Defendant having turned him out of the family dwelling-house. He accordingly sued for a decree for partition and for possession of his share. The second Plaintiff, who is the clerk of the pleader in the action and is admittedly financing the litigation, is the assignee from Badan Singh of a 4-anna share in the revenue-free villages, the most valuable part of the family property.

The suit was filed on the 20th September 1910, and the sons of Nirbhe Singh were made parties, as representing that branch of the family. The Defendant Mahatab, whilst admitting that the properties were ancestral, denied the right of the Plaintiff to obtain a partition. He alleged that by the custom that had prevailed in the family from time immemorial the property devolved on a single heir by the rule of lineal primogeniture, who alone was entitled to the *gaddi* and to the title of Rana which had existed in the family "from the time of Gourishah Badshah." He further alleged that by the custom of the family the junior members had a right only to maintenance and not to any share in the property. The principal controversy between the parties thus centred round this alleged custom, and the Dis-

(1) I. L. R. 10 Bom. 327 (1885).

(6) L. R. 36 I. A. 49; a. c. I. L. R. 36 Cal. 590; 13 C. W. N. 581 (1909).

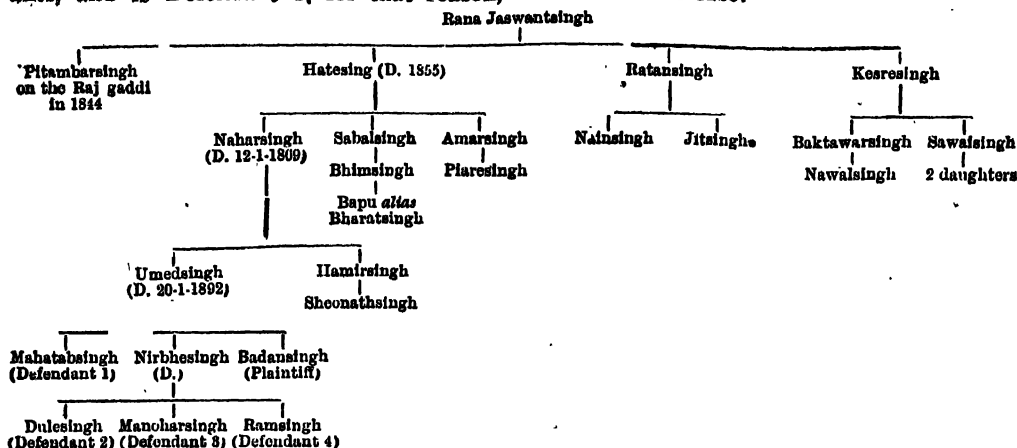
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strict Judge among the points for determination made this the first issue in the case. It is in these terms :—

“Is there any custom of primogeniture in the family of the Plaintiff I and Defendants, and is Defendant I, for that reason,

entitled to the whole of the family property to the exclusion of the Plaintiff I?”

The following genealogical table will explain the relative position of the parties and of the collaterals who have been examined in the case.



A considerable body of evidence was produced on behalf of the Defendant in support of the custom, and the District Judge examined it minutely in conjunction with the negative evidence on the Plaintiff's side. He dealt first with the oral testimony and then discussed with equal minuteness the documentary evidence, referring only to those, as he says, “on which the parties had relied when arguing the case.”

The conclusions which he drew from the oral evidence are expressed in the following words :—

“From the history of succession as shown by the oral evidence, it will be seen that the eldest son in each generation has succeeded to the *gaddi* and estate, while the younger members got land and pensions for maintenance. We find Hatesingh succeeding his elder brother Pitambar Singh, and his younger brothers and their sons remaining contented with maintenance. We next find Naharsingh, the eldest son, succeeding his father Hatesingh, and his two younger brothers and their sons remaining contented with maintenance.

We next find Umedsingh, the eldest son, succeeding his father Naharsingh, and his younger brother and his son remaining contented with maintenance. And it is many years after Defendant No. 1 succeeded his father that his youngest brother has disputed the custom which has regulated the succession for so many years and for three previous generations. Why should the younger brothers of Hatesingh, Naharsingh and Umedsingh have remained contented with maintenance if there was no custom of primogeniture? They remained quiet and their descendants are not asserting any claim to a share because the former knew, and the latter know, that only the eldest son succeeds to the *gaddi* and the estate and the title of ‘Rana.’”

It is to be observed that the first Plaintiff who started the case with the title of Rana attached to his name abandoned in the Court of the Judicial Commissioner any claim to the *gaddi* or to the title of Rana. The significance of this disclaimer does not appear to have been quite appreciated by the Appellate Court. It predicates the existence of a *gaddi* to which appears to be attached the title of Rana.

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dating its origin according to the Defendant's case based on family tradition, to the Ghoree Kings who held Nimar in the 14th Century.

Dealing with the documentary evidence on both sides he considered it consistent only with one hypothesis, *viz.* : The existence of the custom against partibility. He summed up his conclusion in the following words : " After a careful consideration of the evidence on both sides, I have no hesitation in finding the first issue in the affirmative." He accordingly dismissed the Plaintiff's suit.

On appeal the Judicial Commissioners have taken a different view. After analysing the evidence in great detail, they give their theory as to the status of this family.

They say, " We have summed up what we believe to be the history of the subject in our judgment in First Appeal No. 10 of 1911 already referred to." And then go on to observe :—

" Again, when the head of the family became the holder of a hereditary fiscal office, it was still necessary to apply a rule of primogeniture for succession to the office. But now the once ruler of the family had become merely the representative of the family for the management of such property and the receipts of such perquisite as attached to the hereditary office. Thereupon the ordinary Hindu law began to be reinstated, and junior members asserted themselves as share-holders. Still, while the ruling power recognised only the office-holder, the 'younger sons' were still to some extent under his sway, and their shares at his disposal. But the recurring demand for shares, and the advance of socialism in the family, due to education and the evanescence of all real authority in the head, made permanent partitions of estate necessary. The subsistence which the younger brother once received as a favour from the lord of the manor now became a share claimed by him as a right, ever increasing in quantum towards that equality which is favoured by the ordinary Hindu law from which only the particular

circumstances had for a time diverted enjoyment of the family property."

The particular litigation (Appeal No. 11 of 1911) to which they refer related to the neighbouring estate of Bamgurh, where the head of the family or chief is styled Rao and not Rana as in the present case. This family is not pure Rajpoot, having intermarried in the long course of ages with the Bhils, the highest of the aboriginal races in that part of India. The family is thus called Bhil-halla. They also have a *gaddi* and from the public records produced in this case, particularly Captain Forsyth's report and the Gazetteer of the Nimar District published under the authority of Government, it is clear that the two families of Bamgurh and of Peplod (with which the present case is concerned) are intimately associated. The chief of Bamgurh, it is stated, installs the Rana of Peplod on the *gaddi* and places the *teka* or mark of chiefship on his forehead. It may be mentioned by the way that the Peplod family belong to the Chohan clan of Rajpoots which played a distinguished part in the history of mediæval India, and that the title of Rana is the same as that borne by the Maharaja of Odeypur who is styled Maharana. In early Mahommedan history he bore the title of Rana. In the Bamgurh case, the identical question relating to the custom of impartibility was raised in the same form as here. The District Judge, a different officer from the Judge in the present case, had found the issue in favour of the custom. The Court of the Judicial Commissioner, composed of the same Judges who have decided the present case, proceeding on the theory already referred to, came to a different conclusion and held against the existence of the custom of impartibility in regard to the Bamgurh estate. On appeal to the Board, their Lordships in reversing the judgment of the Judicial Commissioners

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quoted the very passage referred to and observed as follows: "It is unnecessary to determine whether this reasoning would be sound as applied to any case. It is sufficient to say the facts which it assumes and upon which it is based do not exist in the present case." The decision of the Appellate Court makes it necessary to consider once more whether the reasoning in question applies to the facts of the case now before the Board. Having regard solely to the question relating to custom, it seems to their Lordships that two distinct periods of time should be kept in mind, *viz.*, that before the establishment of British rule in this part of the country and that subsequent to its acquisition by the East India Company. The District of Nimar with the adjacent territories or such portion of it as belonged to Scindia was taken over by the British between 1823 and 1825 for purposes of management. In 1844, says Mr. Morris, the Chief Commissioner of the Central Provinces in 1870, the sequestration was confirmed by the Treaty of Maharajpur. There was a settlement in 1856 for twenty years, which was revised in 1866. In connection with this settlement the task of preparing a comprehensive record of the conditions prevailing in the District was entrusted to Capt. Forsyth. His report on the revenue settlement of Nimar embodies the result of a searching inquiry into the customs and traditions among the tribes and clans inhabiting the soil and the system of taxation and administration under the former rule. His account of the principal Rajpoot families of the District is not the least interesting feature of the report.

It is not disputed that this particular family of Chohan Rajpoots migrated from their original homes under the pressure of Mahomedan arms into what is now called the Central Provinces. They estab-

lished themselves in the Nimar District where they have lived ever since, with the exception of one short vicissitude in the reign of Ala-ud-Din Khilji towards the end of the 13th Century. It may safely and reasonably be assumed that they carried with them to their new homes the customs and institutions to which they were subject in the land of their birth. Colonel Todd, who, for many years in the early part of the 19th Century, was Political Agent to the Governor-General in Rajpootana, in his valuable work on the Rajpoots writes as follows:—

"It may be of use in future negotiations to explain the usages which govern the different States of Rajpootana in respect to succession. The law of primogeniture prevails in all Rajpoot sovereignties: . . . the inconclusive dicta of Manu on this as on many other points, are never appealed to by the Rajpoots of modern days; custom and precedent fix the right of succession, whether the *gaddi* of the State or to a fief in the eldest son. . . ." "Seniority is, in fact, a distinction pervading all ranks of life, whether in royal families or those of chieftains."*

In this connection, Captain Forsyth's observations in his Report (para. 3) deserve notice.

"The Rajpoots brought with them the institutions of their race. Each chief remained independent, if he could, or became the feudal vassal of a stronger, still the lord and master of his domain, but rendering military service for his fief. The succession to the *gaddi* (throne) was by primogeniture, but all descendants or cadets of the house were provided for by assignments from the productive lands of the chiefship, to be held also on tenure of military service; and so the subinfeudation proceeded, until the Rajpoots themselves began to till the land. Then personal military service became impossible except on rare occasions, and a rent in kind took its place as the condition of tenure. Still

* "The Annals and Antiquities of Rajasthan," Vol. II, p. 307 (first published in 1832)

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the land held by each cultivator was his property, subject to the payment of this rent. This is also shown by the terms of all early grants of arable lands by the Rajpoot princes as religious endowments, in which the rents only are assigned and the Crown tenants are enjoined to pay the same to the assignees."

This clearly was the custom which the Rajpoot settlers brought with them; and it remained intact throughout the Mohomedan rule. The historian Ferishta clearly indicates that until the close of the Ghoris and Farookee rule the feudal system among the chiefs of Nimar from whom the kings of those dynasties chiefly drew their armies was fully maintained. This tract of country was incorporated in the dominions of Akbar about the end of the 16th Century. His Institutes and all the contemporaneous records show that beyond relieving the cultivating classes from the burdens to which they had been subjected under their former rulers, altering the assessment of rent and revenue to lighten its incidence, and improving the administration, he left untouched the domestic and internal institutions of the people, the chiefs as well as the masses. In his work on "The Highlands of Central India," Captain Forsyth gives in a few graphic sentences the pith of Akbar's policy:—

"The impetus given to the development and civilisation of the dark regions of India by the wise rule of that greatest of eastern administrators can never be overrated. Before the absorption into his Empire of the minor Hindu and Mahomedan States, their history is one of a continuous lawlessness and strife; and the further we investigate, the more certainly we perceive that political order, the supremacy of law, and principles of taxation, a wise land system, and almost every art of civilised government owe their birth to this enlightened ruler. His treatment of these unsettled wilds and their people was marked with the same political wisdom. While, in

the surrounding countries, which had already been in a measure reclaimed by Hindu races, he everywhere broke up the feudal system, under which strong government and permanent improvement were impossible, he asked no more from the chiefs of these waste regions than nominal submission to his Empire, and the preservation of the peace of the realm. Those on his borders, he converted into a frontier police, and the rest he left to administer their country in their own fashion. Acknowledgment of his supremacy he insisted on, however; and in case of refusal sent his generals and armies who very soon convinced the barbarous chiefs of their powerlessness in his hands. The influence of his power and splendour rapidly extended itself over even this remote region. The chiefs became courtiers, accepted with pride imperial favours and titles, and in some cases were even converted to the fashionable faith of Islam."

This policy of non-interference with the internal and domestic institutions of the chiefs and the people was wisely maintained throughout the Mogul rule, and was hardly disturbed even in the Mahratta times. In tracts largely settled by new and industrious immigrants from other parts of India he converted the feudal chief into a fiscal officer. Forsyth (Report, para. 119) thus sums up the general result of Akbar's policy:

"The feudal domination of the lord of the tract, or tappa, over all its villages was thus generally abolished; but in lieu of it the chiefs, besides retaining the headship (as Patels) of the villages actually in their own occupation, were further generally constituted the hereditary Zemindars, or fiscal officers, of their tracts (*vide* para. 113) with huqs (rights) of considerable value in the shape of percentages of revenue, collections and dues from the practisers of trades, &c."

Constant references will be found in the documentary evidence to the Pergunah Zemindar of Peplod indicating his position in the fiscal system of the Moguls;

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Before coming to the modern history, so to speak, of the family, it may be useful to refer to some observations in the Nimar Gazetteer.

'It first states that "the District contains a number of families of long standing, some of whom enjoyed important positions under native rule." It then goes on to say :—

"So far as can be ascertained succession goes by primogeniture in the families of the Mandlois of Khandwa, the Rana of Peplod, the Rao of Mandhata, the Thakur of Jeswari, the Thakur of Ghatakheri, the Rana of Punasa, the Thakur of Khandwa, the Mandloi of Beria and the Maslai, Bhamgarh and Selda families. On succession to the *gaddi* or headship of the house representatives of these families are marked with a teka or badge on the forehead and sometimes presented with a sword, and the investiture may be carried out by custom by the head of another house. Thus the investiture of the Rana of Peplod is performed by the Rao of Bhamgarh. Rajput landholders usually have the title of Rana or Thakur, and Bhilalas those of Rao Rawat."

This particular family is again referred to in paragraph 100 : "Among the Rajpoots the Chohan family of the Rana of Peplod is the most ancient, and the ancestors of the family are believed to have been at Asirgarh in the 12th Century when it was sacked by Ala-ud-din Khilji. The family regularly resort to Asirgarh to pay their devotions to their tutelary goddess Artapari, whose shrine is in the fort. Rana Mahatab Singh (the Defendant in this action) is about 40 years old and has four villages of which two are held revenue-free."

These references seem sufficient to show that the custom which this family brought from its ancient home continued for a long course of ages. Is there anything to lead to the conclusion that it was at any time abandoned or interrupted and

that the family has ceased to be under the custom? One fact is obvious, that had the ordinary Hindu law prevailed in the family, it would long ago have merged in the general population, and there would have been no *gaddi* and no Rana. It is the custom and custom alone which seems to their Lordships to have kept it intact. The pedigree set out at the beginning of this judgment goes back to Jaswant Singh, who died somewhere in the forties and was succeeded on the *gaddi* by his eldest son Pitambar Singh.

The Defendant has, however, produced a genealogy which traces the family for twenty-four generations and is in accord with what Capt. Forsyth says in his Report (para. 43). The correctness of this genealogy does not appear to have been disputed and it was admitted in evidence apparently without objection. Pitambar Singh had three brothers, Hate Singh, Ratan Singh and Kesre Singh.

In 1844 there seem to have been some differences among the brothers regarding their "watandari" and "huqs." The matter appears to have been referred to the Political Agent, and at his instance or suggestion it was submitted to arbitration, when an arrangement was arrived at under which the four brothers divided the income arising from various sources and the *zirat* lands in some of the villages, leaving absolutely intact to Pitambar Singh "the *zirats* and villages which are in the Pergunah and belong to the Raj." This arrangement is embodied in Ex. 1 D. 36, dated the 14th of August 1844. The ground on which these villages forming the principal landed property of the family was left in the hands of the eldest brother is sufficiently indicative of the character and right in which he took them. The three younger brothers claimed no share in them.

For a proper apprehension of the con-

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tentions in this case it is necessary to mention what these "watan-dari" rights and "huqs" are. It has been from ancient times customary almost throughout India for the superior holder of the soil, whether he was a feudal "baron," as Captain Forsyth calls these Rajpoot chiefs, or principal fiscal officer appointed by government, to levy certain dues, the nature of which can be judged from the list in Ex. 1 D. 36. In Bengal, these dues or cesses were called *abwabs*; in the Central Provinces and the Bombay Presidency, "huq," an Arabic word meaning "dues" or "right." Akbar appears to have reduced the capricious levy of these "dues," and regulated the system. These dues were made part of the emolument attached to the office, and as the office became hereditary the representative of the family who took up the office took it with the obligation of using the perquisites for the maintenance of the family. The old Zemindars were placed in the same position. Again in the Deccan when the Zemindar was appointed as a fiscal officer, lands were granted to him by way of additional emolument under the name of *watan*, the income arising from such lands being called by the same name. Again as the office became hereditary, the lands came into the hands of the next holder with the same obligation. Captain Forsyth describes the origin of these *watans* in para. 133.

It is contended in this case that when the Zemindar of Peplod was deprived of his office, the custom of impartibility ceased to have operation. From Ex. 1 D. 36 it would appear that the family had some *watan* lands and the expression *watan* occurs at least in that document. It is to be observed that in 1866, as shown in Captain Forsyth's order to which reference will be made later, there was no "watundar Patel" in these Mouzals. In

other words there was no separate fiscal officer holding *watan* lands by virtue of his office. Thus the duty of realising the *watan* and *huqs* devolved on the Zemindar. Besides, the mere cessation of services to which *watan* lands are attached, which are by custom impartible, does not ordinarily destroy that custom. This view is in accord with the decision of the Bombay High Court in *Ramrao v. Yeshvantrao* (1), where it was held that "discontinuance of services attached to an impartible *watan* does not alter the nature of the estate and make it partible." There is a further answer to the Respondents' contention: the present suit does not relate to *watan* or *huqs*; it is with respect to property declared in 1844 to belong to the Raj, which all the parties recognised to be an existing fact. The penultimate cl. (27) of Ex. 1 D. 36 shows exactly the position of Pitambar in relation to the custom in dispute. As the holder of the Raj and the representative of the family, the duty is laid on him to defray the contingent village expenses such as "expenses for guests, charities, *liha Dakhoda* and other miscellaneous expenses." It is stated significantly "the other three brothers have nothing to do with these things."

The report of the official deputed by the Political Agent to ascertain whether the differences between the brothers were settled throws no further light on the controversy. The subsequent conduct of the parties to the arrangement leads irresistibly to the conclusion that the acquiescence of all Jaswant's descendants until the present dispute, to the ancestral property being held by one member and he, the eldest in the direct male line, must have been due only to a long-established custom. Pitambar Singh died without leaving any male issue; he was succeed-

(1) 1, L. R. 10 Bom. 327 (1885).

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ed on the *gaddi* and in the possession of the "Raj" estate by the next oldest brother Hate Singh, and no question seems to have been raised by Ratan or Kesre. On this point the evidence of Ratan Singh's son, Jit Singh, the eldest surviving male member, is most material. He states :—

"Rama Jaswant Singh was my grandfather. He had four sons, namely. Pitambar, Hatesingh, Kesre and my father in order of seniority. Jaswant Singh and Pitambar Singh died before I was born. I only saw Hate Singh, Kesre Singh and my father. Pitambar Singh had no issue. Hate Singh was on the *gaddi* and owner of all the estate, when I came to remember anything. My father and Kesre Singh got no share in the estate, but only got maintenance allowance and land for cultivation. When the settlement was made by Government, my father and Kesre Singh each got Rs. 50 yearly pension, 30 bighas land for cultivation in Peplod, and a house for residence. The rest of the family estate went to the eldest branch, which was represented in my time by Hate Singh."

On Hate Singh's death in 1855 his eldest son Nahar Singh succeeded to the *gaddi*. Nahar Singh was alive when Captain Forsyth was carrying out his settlement. In his report he refers to Nahar in these terms :—"Others (of the Chohans who had escaped the sword of Ala-ud-din Khilji) are said by tradition to have returned to the Asir hills and to have founded the family of which Rana Nahar Singh, Zemindar of Peplod Pergunah, is the representative." The significance of the word "representative" can hardly be overlooked. Nahar died in 1869, and besides two sons, Umed Singh and Hamir Singh, left two brothers, Sabal Singh and Amar Singh. Of them Jit Singh says as follows :—

"On Nahar Singh's death, his eldest son, Umed Singh, got the *gaddi* and estate. Umed Singh died in Sambat 1948. Sabal Singh and Amar Singh made no dispute

about their shares either with Nahar Singh or with Umed Singh. They lived joint with both of them up to the time of Umed Singh's succession; about a year after Umed Singh's succession his uncles separated from him. When Sabal Singh and Amar Singh separated from Umed Singh they got 15 bighas land at Peplod for cultivation. They laid no claim for a share."

Jit Singh's evidence regarding the fact that his father had no share in the estate but only possessed a field or *virat* land is corroborated by the schedule attached to the Sanad granted to him (Ratan) in 1865 which only mentions a field of 36 bighas and confirms him in its possession as "free-hold enam." In the same year a Sanad was granted to Nahar, in the schedule to which the two *muafi* villages are mentioned as his "Jagleer" Mouzahs. The Sanad is in common form, but the powers it gives to the grantee are of a wide character on its face inconsistent with the right of any co-sharer.

Nahar Singh had obtained in 1856 a settlement of the revenue directly with him in respect of the two revenue-paying villages of Peplod and Jirwan. When a new settlement was set on foot in 1866, his application for a renewal of the settlement was opposed by an outsider who, or whose ancestors, had framed the land years before. The settlement officer dismissed the latter's claim "and conferred the whole proprietary right in Mouzah Peplod on the present holder Rana Nahar Singh." Among the grounds on which he made the settlement were that he was "Pergunah Zemindar" and that there was no "Watundar Patel" (fiscal officer in the village); the same was done in the case of Jirwan. In this instance, the settlement officer described the position of Nahar Singh in terms which should not be passed unnoticed. After stating that there is no "watundar patel in the Mouzah" he goes on to say :—

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"The present holder holds the position of Pergunah Zemindar, and is till the chief man in the pergunah and an Honorary Magistrate I consider the facts of his being in possession for the past 10 years with 10 more of his lease to run and of his being descended from Rana Jaswant Singh, who held the Mouzah before the claimant's family had anything to do with it, coupled with his hereditary position in the pergunah, to give him a superior claim."

Nahar Singh died in 1869 and was succeeded by his eldest son Umed Singh. On Umed's death, in 1892, the property attached to the *gaddi* came into the possession of the Defendant Mahatab Singh, and his name was accordingly entered in the Revenue records without any objection on the part of any member of the family. Soon after Umed's death there arose differences between Mahatab and his uncle Hamir Singh regarding the latter's maintenance; the dispute was referred to arbitration, the chief arbitrator being the Rao of Bhamgarh. The award bears date the 9th of August 1892, there is no trace in the reference to arbitration or in the award that there was any claim on the part of Hamir Singh to a share in the property. On Hamir Singh's death his sons endeavoured to enforce by a suit the provisions of the award against Mahatab, but it was finally held that the rights created thereunder were personal to Hamir Singh.

The Respondents refer to certain statements of Umed and Mahatab inconsistent with the continued existence of the custom alleged by the Defendant. Their Lordships agree with the Appellate Court in not attaching too much weight to statements made under dubious circumstances and for dubious reasons. Some stress was also laid on Captain Machenzie's Report. With respect to this document their Lordships wish to associate themselves with the remarks of the Board in the Bamgarh case.

Their Lordships have carefully reviewed the evidence furnished by the ancient traditions of the family and their recent history, and are forced to dissent from the theory on which the Judicial Commissioners base their decision. That theory proceeds on *a priori* reasoning of a speculative character. The judgment omits from consideration in the appraisement of the case the existence of the family as an entity through so many centuries which could only survive destruction and disintegration with the help of such a family custom. The traditions relating to its continued observance, without dispute, until Badan Singh came under the influence of his co-Plaintiff are consistent with the proved facts. Their Lordships are of opinion that the judgment and decree under appeal should be reversed and the order of the District Judge restored with costs here and in the Appellate Court in India. And their Lordships will humbly advise His Majesty accordingly.

R. M. P.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.	K. S. BONNERJI,
LORD CARSON.	Official Receiver,
SIR JOHN EDGE.	Appellant,
SIR LAWRENCE JENKINS.	v.
1921,	SITANATH
Heard, 31, October and	DAS and anr.,
1, November.	Respondents.
Judgment, 1, November.]	

Person in representative capacity, not strictly a trustee, if may delegate his authority.

"Fiduciary duties cannot be made the subject of delegation," so that where property was in the hands of one P, charged with expenses necessary for certain religious and charitable purposes, and P's son purporting to act as P's attorney executed a *mourasi mokurari pattah*: *

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Held—That the pattah was *ultra vires* and conveyed no title, for even if P was not in the strictest sense a trustee, his position was none the less a representative one.

Appeal against the decree of the High Court of Judicature at Fort William in Bengal, dated the 16th December 1918, affirming the decree of the Subordinate Judge of the 24-Parganahs, dated the 14th July 1916.

The suit was brought by the Plaintiff, in his capacity as Receiver appointed by the High Court to eject the present Respondents from land at Tallah.

The Respondents claimed the land as their property granted to them on a permanent lease by a duly authorised trustee. The facts were briefly as follows :—

Hara Chandra Ghose died in 1868 leaving a widow, four sons and two daughters. On the 7th May 1880 these persons executed a deed conveying the property to the widow Padmabati and her eldest son Protap on certain religious and charitable trusts.

In 1900 Padmabati died and Protap became sole trustee but in December 1900 the latter left Calcutta and paid little attention to the trust business.

In March 1910 Protap's son Bhupendra purporting to act as his father's attorney granted a lease of the property in suit to the Respondents, who thereupon entered into possession.

In 1910 Sarat Chandra brought a suit against Protap as trustee praying for a declaration that the trust deed was void.

In 1912 a declaration was made to that effect on the ground that the objects were too indefinite, and Sarat was appointed Receiver with liberty to institute proceedings for setting aside leases granted by the trustees. The present suit was accordingly instituted by Sarat in 1914 alleging

that the lease of 1910 was *ultra vires* and conveyed no title as against the family.

In 1916 the Official Receiver, the present Appellant, was appointed Receiver in place of Sarat.

The suit was dismissed by the Subordinate Judge and that decree was confirmed by the High Court (Chitty and Panton, JJ.).

Hence this appeal.

Mr. A. M. Dunne, K. C. (with Messrs. E. B. Raikes and Shelley) for the Appellant.—There are three main considerations : (1) Can a trustee who has a discretionary power delegate that discretion? I say no. Nor can he ratify any such power which has been exercised by his delegate. (2) There is no evidence that Protap had appointed Bhupendra as his attorney. (3) In any event Protap had no power to grant the lease. The evidence as to the contents of the alleged power of attorney is inadmissible.

Mr. DeGruyther, K. C. (with Mr. Kenworthy Brown) for the Respondents.—Both the lower Courts have found as a fact that Bhupendra had a general power of attorney to deal with the trust estate.

The lease was registered so that a power of attorney must have been produced before the Registrar (sec. 32, Registration Act).

[LORD BUCKMASTER.—The power of attorney required by the Registrar would not be the power required for the execution of the document.]

In any case the existence and contents of the power of attorney were not challenged either in the pleadings or in the lower Court. Protap was not a trustee in the true sense of the word. The property belonged to the family and he was the manager, as such he was entitled to delegate his powers. (Mayne's Hindu Law, para. 438). The question of delegation was not raised until after Bhupendra's death and

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was an after-thought. Even if Protap did not authorise Bhupendra to execute the lease he ratified the transaction when it had been done.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—On the 14th March 1910, a document was executed by Bhupendra Sri Ghoshia, purporting to act on behalf and as attorney of his father. Protap Chandra Ghosha, by which a garden at Tallah was granted to the Respondents under a mokurari lease, at the annual rent of Rs. 125, and a premium of Rs. 3,000. The Respondents on the execution of the lease entered into and have since remained in possession of the property.

The question raised in this case is whether the lease conveyed to them any title at all. It is challenged in the following circumstances: The property in question originally belonged to Hara Chandra Ghose, who died in 1868. He was survived by his widow, four sons and two daughters. On the 7th May 1880, a trust deed was executed by all the interested persons, by which the property was placed in the hands of trustees for certain religious and charitable purposes. The two first trustees under the deed were the widow, Srimati Padmabati Dasi, and her eldest son, Sri Protap Chandra Ghosha. The deed contained the statement that upon the death of the widow the eldest son, Protap, should be the sole trustee, and on his death the second son, Sri Sarat Chandra Ghosha, should be the sole trustee, and so on. It also provided that during the absence of any trustee for over one year during his life, the person entitled to be the trustee immediately in succession to him should be appointed to the office of trustee for the time being. It is unnecessary to consider the exact

terms of the deed or the nature of the trust for which the property was conveyed. For the present purpose it is sufficient to say that until the deed was challenged by a family suit that was instituted in 1910, it was accepted as creating a good trust, and the persons named were assumed to be exercising the duties of trustees. On the 16th April 1900, the widow died, and from that time Protap became, by the terms of the deed, the sole trustee. On the 31st December 1900, he left Calcutta, and he only returned twice afterwards, the first of the two visits being after the execution of the lease. The lease was, as has been stated, executed by Bhupendra Ghosha, and all the preliminary negotiations and transactions must have been carried out by him, or someone on his behalf, because the evidence of Protap, which has been taken at some considerable length, makes plain that he had no knowledge of the matter until after it had taken place. He was asked when he was told that the land had been sold or perpetually leased to somebody, and his answer was he did not know. Then he was asked, "When did you come to know?" and his reply was, "About the time when the High Court suit was commenced." That suit was instituted on the 31st May 1910, after the date of the execution. Later on he is asked this "Do you know who gave the lease?" and his answer is, "I did not know then. I came to know afterwards that it was done in my name under some power of attorney." Finally in re-examination he repeats this statement, and says, "I found my actual knowledge since I perused type-written copy supplied to me by an outsider, which suggested many things, and made me curious." There is no evidence to which their Lordships' attention has been directed in the long and tedious deposition which Protap was called upon to make which

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contradicts these statements, and consequently it must be accepted that when this document was executed he had neither negotiated its contents, nor was he aware of them. The whole of the authority for the execution of that lease must be found in the power of attorney under which Bhupendra Ghosha purported to act, and the existence and extent of that authority is the chief question on this appeal.

In order, however, to see how this suit has arisen, it is necessary to go back a little in the family history. About the time of the execution of the lease, and possibly because of its execution, anxiety arose among the members of the family as to the way in which the affairs of the trust were being conducted, and in consequence a suit, to which reference has already been made, was instituted on the 31st May 1910, by Sarat against Protap, as trustee, claiming to have the deed of trust declared void, charging Protap with misconduct as trustee, and asking for accounts against him. In the plaint this lease was challenged, though not on the ground now under consideration. The beneficiaries were made parties to the suit, and a settlement of the disputes was ultimately effected; but one of the parties being an infant, it was necessary to obtain the consent of the Court to the proposed terms. This was secured by a decree on the 2nd August 1912, which declared that the general trusts of the deed were bad because the objects of the charity were far too indefinite, but the settlement of the litigation being approved by the learned Judge, his declaration was confined to the failure of the trusts, and to declaring that the properties that were the subject of the deed were merely charged with such necessary expenses as were incurred in the lifetime of the lady for the maintenance and ownership (?) of the *granth* mentioned in the third clause, and the annual service men-

tioned in the fourth clause. The settlement released Protap from liability to account for monies received from the lease, but it appointed the second trustee in the order Sarat Chandra Ghosha, Receiver of the estate, and express directions were reserved in these terms of settlement that he should be at liberty to take steps to recover and set aside the perpetual lease or leases granted by Protap.

The proceedings out of which this appeal has arisen were accordingly instituted by Sarat. It is unfortunately true that the plaint is not expressed in plain terms, but it does most clearly set out allegations in para. 5 and para. 6, putting forward this lease under which the Defendants claim as a suggested or alleged lease, and there is nothing in the plaint to show that the lease was accepted as having in fact been properly executed. Again, the particular matter in controversy was not exactly defined in the issues that were settled, but it is certainly covered by the third issue, which was in these terms: "Was the trustee or his *am-nioktar* competent to grant the permanent lease in question, and is it binding on the Plaintiff?" The case came on for trial before the Subordinate Judge on the 14th July 1916, when he dismissed the suit. In the course of taking the depositions, attempts were made to give in evidence the contents of the power of attorney under which the deed had been executed, and objection was promptly taken that no such evidence was admissible because the document must be in writing, and verbal evidence as to its contents could not be given until some proper and sufficient explanation was offered as to the reason why the document itself was not before the Court. On more than one occasion, in the course of the evidence, similar attempts were made, and similar objections were taken, and in the end there was no evidence on which

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reliance could be placed as to what the actual terms of that document were, or whether in fact any such document was in existence or operative at the time when the lease was executed. The best evidence upon the point was that of Zatiudra Muthik, who was managing clerk to Bhupendra in his profession of solicitor. He is not himself a solicitor, and is now a trader in fish. He says that he read the power of attorney, and that it granted full power to execute lease, mortgage, etc., but he did not recollect the exact expressions. The power was a general power to sell, mortgage, or lease.

This evidence was objected to, and is useless for the purpose of proving the contents of a written document. Their Lordships only refer to it for the purpose of saying that had they accepted the evidence, it would not be sufficient. If any power existed in Protap to delegate authority under the trust deed it would be quite clear that the power of attorney to be granted would have to be a special power of attorney, specially referable to dealing with the estate which was subject to the trust, and not a general power of attorney, which may have been executed by Protap in favour of his son, entitling him to deal with the whole of his private property. No evidence whatever that it is properly admissible having been given of the power of attorney, it necessarily follows that there was no proof that the lease under which the Defendants claim had ever been properly executed at all, and the defence failed.

The learned Subordinate Judge, who dismissed the suit, dealt with the matter in a few sentences. He seems to think that the statement in the plaint of the suit that had been compromised was sufficient to lead to the inference that Bhupendra, the son, had full power to execute the

lease on Protap's behalf, and he says at page 198 of the Record :—

"I may also point out here that Bhupendra Sri's authority to execute the lease on behalf of Protap Babu has not been challenged in the plaint, though the Plaintiff knew, as the plaint in the High Court case indicates, that such lease was granted. Bhupendra Sri Babu was alive when this plaint was filed, and this explains why the Plaintiff did not consider it expedient to challenge his power."

It may be pointed out that even though Bhupendra Sri Babu had died since the suit was instituted, that would not have prevented the parties whose duty it was to obtain production of the power of attorney from taking the necessary steps either to obtain a copy of the document or to prove that that copy could not be obtained. The point raised that the matter was not specifically mentioned in the plaint does not appear to their Lordships to be sound, because although it is true that the plaint is couched in uncertain language, it is nowhere intimated in the plaint that such a lease was properly executed, and it therefore became incumbent upon the Defendants to prove the title under which they held. But whatever may be said about what happened before the Subordinate Judge, the grounds of appeal to the High Court expressly suggested that the Court below had made a mistake in overlooking the fact that the alleged power of attorney had not been proved, so that the question was definitely raised, and the attention of the High Court directed to it. The High Court, who confirmed the decree of the Subordinate Judge, dealt with the question in these terms, at page 206 of the Record :—

"There can be no doubt that Bhupendra Sri Ghosha held an Ammekhtarnama from his father. Unfortunately neither side seems to have been at any pains to procure the production of the document or to give proper secondary evidence of its con-

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tents, if it could not be found. The evidence on the record, such as it is, indicates that that Am-mokhtarnama was registered at Bindhyachal, and that it granted full power to sell, mortgage and lease."

Their Lordships desire to point out that if a proper case has not been established for the admission of secondary evidence of the contents of a written document, and objection has been taken to the fact that the document has not been produced, it is not permissible to go to other evidence for the purpose of indicating what the contents of the written document may prove to be if once it were examined.

Their Lordships, therefore, are clearly of opinion that in this case the defence must break down through the inability of the Defendants to prove the execution of the lease under which they claim by anybody having proper authority, and even if the evidence as to the existence and contents of the power of attorney were accepted, it would be inadequate for the reasons already given. Their Lordships are, however, impressed with what had been said by Mr. DeGruyther as to the Defendants not being alive to this point being raised in the plaint, though they see no reason whatever for this inadvertence from the date when the notice of appeal was given to the High Court. Their Lordships, therefore, have considered what the position would be supposing such document had, in fact, been proved, and had been shown to be a special power purporting to authorise dealings with the trust estate, and they are of opinion that even in that event it could not have availed the Defendants. The reason for this

plain. In whatever capacity Protap the land in question, the capacity must have been a representative one. It was said that he was not in the strictest language a trustee; but be it so, his position was none the less a representative

one, and it being plain that he never negotiated nor considered, nor knew of the lease until after it had been executed, if what was done, was done by virtue of a power of attorney, it could only have been because the power had delegated the representative authority that he possessed to a third party. The duties of Protap, however they may be defined, were in their nature fiduciary, and fiduciary duties cannot be made the subject of delegation. If, therefore, the document had been before their Lordships it would have been impossible to have supported the contention that it conferred the power to negotiate and execute the document upon which the whole of the Defendants' case rests.

Their Lordships desire to express their opinion that there is nothing to cause them to qualify the findings that have been found by both the Courts as to the Defendants having acted honestly in the matter. They acted honestly, but they acted with scant wisdom, and with a strange disregard of the caution that, it is essential, should be observed in dealing with a person who has no authority to act on his own behalf.

For these reasons their Lordships think this appeal should be allowed, the suit should be decreed, an order made for possession of the land, an enquiry should be directed as to mesne profits, and the Appellants should have the costs here and below, and they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Watkins and Hunter* for the Respondents.

G. D. M.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL

JURISDICTION

No. 104 of 1920.

GOUR MOHAN MULLICK,

SANDERSON, C. J.

Appellant,

RICHARDSON, J.

v.

1921,

NOYAN MANJURI DASSI

7, April.

and ors.,

Respondents.

Judgment—Cl 15 of the Letters Patent—Suit on behalf of a lunatic—Benefit of the lunatic—Application to take the plaint off the file—Dismissal of the application—Right to apply at the hearing—Final decision.

In a suit instituted on behalf of a lunatic one of the Defendants applied for taking the plaint off the file on the grounds, amongst other, that the suit was not for the benefit of the lunatic and was an abuse of the process of the Court. The Court dismissed the application on the ground that on the materials before the Court at that stage, the Court was not prepared to hold that these grounds were substantiated. The Defendant appealed:

Held—That the order dismissing the application was not a "judgment" within the meaning of cl. 15 of the Letters Patent, inasmuch as the said order did not finally decide any right between the parties, it being open to the Defendant to substantiate the grounds by further materials at the hearing of the suit.

THE JUSTICES OF THE PEACE FOR CALCUTTA *v.* THE ORIENTAL GAS CO. (1) and RAMBALLAV *v.* MONGILALL DALINCHAND (3) referred to.

This was an appeal preferred on the 4th September 1920 from the order of Rankin, J., dated the 19th July 1920, passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

Mr. Langford James and Mr. S. C. Roy,

(1) 8 B L. R. 433 nt p 452 (1872).

(3) 23 C. W. N. 1017 (1919).

Counsel for the Appellant Gour Mohan Mullick.

Mr. N. N. Sircar and Mr. B. K. Ghose Counsel for the Respondent Noyan Manjuri Dassi.

Mr. N. C. Sen and Mr. P. N. Chatterjee Counsel for the Respondent Jogendra Nath Mullick.

Mr. A. N. Chaudhuri Counsel for the Respondent Kanta Mohan Mullick.

Mr. E. Pugh Counsel for the Respondent Panna Lal Seal.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal by one Gour Mohan Mullick, one of the Defendants in the suit, from the judgment of my learned brother Mr. Justice Rankin whereby he dismissed an application which had been made by the Appellant. It arises in connection with litigation in respect of Gopal Lal Seal's estate, which, it is said, has occupied much time of this Court; and, it is only necessary for me to mention that there was a settlement in this Court arrived at on the 4th of April 1919 and a consent decree passed, in a suit No. 1223 of 1917 in which Gour Mohan Mullick and others were Plaintiffs and Srimati Noyan Manjuri Dassi and others were Defendants. The present suit is a suit by Srimati Noyan Manjuri Dassi—a person of unsound mind—by her grand-mother Srimati Brindarani Dasi against Kanta Mohan Mullick, Gour Mohan Mullick (who is the Appellant in this appeal) and others; and, the object of the suit is to obtain a declaration that the consent decree, to which I have referred, is not binding upon the Plaintiff and that her interest is not affected in any way by the same and that if necessary the said decree may be set aside and that Suit No. 1223 of 1917 as well as the different appeals arising therefrom may be heard on the merits.

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There are other incidental reliefs asked for in the suit.

The Appellant Gour Mohan Mullick who is, as I have said, one of the Defendants in the suit made an application on the 10th April 1920 to the learned Judge on the Original Side that the plaint in the suit brought by Srimati Noyan Manjuri Dassi might be taken off the file, or for an enquiry whether the suit was properly instituted and whether it was fit and proper and for the benefit of the Plaintiff, that the suit should be further prosecuted and that all further proceedings should be stayed in the meantime and that Srimati Brindarani should be directed to furnish security for costs and that all proceedings should be stayed until such security was given. On the hearing of that application, the learned Judge delivered a judgment and directed that the Plaintiff should give particulars of certain allegations, which were contained in the plaint; and on a subsequent occasion after these particulars had been given, he delivered a second judgment; and, I propose to read three passages from that judgment to show what was the conclusion at which he arrived. After stating what was the rule with regard to an application such as this, taking a passage from Daniel's Chancery Practice as his guide, he proceeded as follows: "I propose therefore to consider first whether this is a plain and strong case, as appearing upon such evidence as can be given and considered upon a mere interlocutory application first for saying that there is no substance or possibility of benefit to the lunatic in the action, and secondly, whether the present next friend has been shown to be unfit to be allowed to continue in that capacity." Dealing with the first point, which is the material point in the consideration of this appeal, the learned Judge said, after discussing the evi-

dence: "On these lines and broadly speaking, I am of opinion that it would be wrong to hold within the meaning of the passage which I have just cited that this is a suit which can be seen to have no basis in the benefit of the lunatic and to deserve to be terminated." And, in order to make the position which the learned Judge was taking up clear, towards the end of the judgment he said: "It remains for me to add one matter by way of explanation. I have held that I am not prepared upon this proceeding to say that the suit is either *malâ fide* or entirely unsubstantial so that there would be an abuse of the process of the Court in allowing it to go on. But I want it to be distinctly understood that this judgment is not to be taken as the approval of a Court administering a lunatic's estate to the institution of this suit. That is an entirely different matter."

Upon the hearing of this appeal the learned Counsel for the Plaintiff-Respondent took the point that there was no right of appeal from the learned Judge's judgment inasmuch as it was not a "judgment" within the meaning of cl. 15 of the Letters Patent of this Court. The well-known passage in the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Company, Limited* (1) was relied upon by the learned Counsel for the Plaintiff-Respondent. That passage, which is familiar to us all is as follows: "We think that 'judgment' in cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be

(1) 8 B. L. R. 483 at p. 452 (1872).

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determined." It has been held several times in this Court that that definition is not an exhaustive definition and that whenever a point similar to the one, which I am now discussing, is taken, the Court has to decide whether the particular order in question is a "judgment" within the meaning of cl. 15, having regard to the nature of the order. In this case, the learned Counsel for the Appellant Gour Mohan Mullick urged that the Defendant-Appellant has a right to have the suit stopped on the ground that it had been shown that the suit was an abuse of the process of the Court in that it had not been brought for the benefit of the lunatic but for some ulterior and improper motive; and, he further urged that that right had been finally determined by the learned Judge and that consequently this appeal would lie. In my judgment, the alleged "right"—if that word can be properly applied in this connection, is not such a right as is contemplated by the definition of the learned Chief Justice which appears in *The Justices of the Peace for Calcutta v. The Oriental Gas Company, Limited* (1). It is true that the Defendant had a right to apply to the Court to have the plaint taken off the file on the ground that the suit had not been brought for the benefit of the lunatic Plaintiff, but it was in the discretion of the learned Judge to decide upon the materials, which were then before him, whether he would make that order or whether he would allow the suit to proceed to trial. The learned Judge has decided, in effect, that upon the materials then before him and upon the application which was made to him by the Defendant-Appellant, he could not see his way at that stage to stay the suit. The learned Judge has not decided finally the question whether the suit has been brought for the benefit of the lunatic

or whether it is brought *malâ fide* or whether it is an abuse of the process of the Court. In view of the passages in the learned Judge's judgment which I have read, it is clear that the issue as to whether the suit is for the benefit of the lunatic or is brought *malâ fide* or is an abuse of the process of the Court is still open and can be raised at the trial. In fact, the decision of the learned Judge really amounts to no more than a decision as to the procedure which is to be followed, the result being that in his judgment the suit should proceed to trial. In my opinion, the learned Judge's judgment does not amount to a decision which affects the merits of the question between the parties by determining some right or liability. It is not, therefore, a "judgment" within the meaning of cl. 15 of the Letters Patent and consequently there is no right of appeal. In my judgment, the appeal therefore must be dismissed.

As regards the costs of this appeal, the Appellant must pay the costs of the Plaintiff-Respondent. As regards the other Respondents they must pay their own costs with the exception of Panna Lal Seal. The other Respondents, with the exception of Panna Lal Seal, are all in the same interest as the Appellant, and it seems to me that there was no necessity for them to appear in this appeal. That consideration does not apply to Panna Lal Seal, because we find that there is an allegation in the plaint that this suit was instituted "for personal gains and benefit of Srimati Brindarani Dasi, Kuchil Lal Sen, Panna Lal Seal and their associates who had been instruments in putting the estate to a very heavy loss hitherto." In view of the allegation against Panna Lal Seal it appears to us that Panna Lal Seal was entitled to appear on this appeal; and, inasmuch as we decided that the Defendant-Appellant has no right of appeal

(1) 8 B. L. R. 433 (1872).

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the usual result must follow and the Appellant must pay the costs of Panna Tal Seal of this appeal.

RICHARDSON, J.—I agree and only add a few observations in difference to the argument of Mr. Langford James.

It is difficult, perhaps, to reconcile all the numerous decisions as to the meaning of the term judgment in cl. 15 of the Letters Patent. The infallible test for distinguishing between an appealable judgment and one which is not appealable has still to be discovered. There is, however, a consensus of opinion that some limitation must be put upon the term and the gloss of Sir Richard Couch, C. J., in *The Justices of the Peace v. The Oriental Gas Co.* (1) has generally been adopted as a starting point. The term means according to Couch, C. J., "a decision which affects the merits of the question between the parties by determining some right or liability," and the decision "may be either final, preliminary or interlocutory." A difficulty often arises in the application of this definition to decisions of the class known as interlocutory. It is not conclusive that the question decided is a question depending upon the judicial discretion of the Court of first instance nor is it conclusive that the decision would not amount to a decree or an appealable order under the Civil Procedure Code; nor again, would it be correct to say that no interlocutory decision on a question of procedure is appealable; for instance, there are the cases where a judgment on a question of venue has been held appealable [cf. *Joylall v. Gopiram* (2)]. But the considerations to which I have adverted may in particular instances afford some assistance to the Court.

As to the case of *Korammall Ramballav*

(1) 8 B. L. R. 138 (1872).

(2) 1 L. R. 27 Cal. 511: r. c. 24 C. W. N. 612 (1900).

v. *Mongilal Dalimchand* (3), upon which reliance was placed for the Appellant that seems to me distinguishable because there a right *in presenti* was asserted to a sum of money. Possibly that case goes to the furthest limit compatible with general adherence to Sir Richard Couch's definition.

In the present case Mr. Langford James argued that his client had a right to have the plaint rejected or the suit stayed on the ground that the suit was not for the benefit of the lunatic for whose benefit it was nominally instituted, or in other words that the suit was an abuse of the process of the Court. Granted that the Appellant, who was a Defendant in the suit, was at liberty to apply to the learned Judge to stay the suit on such a ground, the learned Judge has not committed himself to anything further than this, that at this stage on the material, now available, the plaint and the Appellant's application and so forth, he is not prepared as a matter of discretion to accede to the application or to say that the suit has not been brought *bonâ fide* for the protection of the interest of the lunatic. In my opinion that is not within Sir Richard Couch's definition—"a determination of a right or liability affecting the merits of the controversy between the parties." The only right of the Appellant we are now concerned with is his right to apply and to have the question decided sometime, now or later. It is conceded that it lay in the discretion of the learned Judge to say whether the question should be decided now or later. The learned Judge has not denied expressly or by implication that the Appellant was at liberty to make this application. On the contrary he has dealt with the matter on the footing that the Appellant was entitled to apply and he has dealt with it most carefully and attentively.

(3) 23 C. W. N. 1017 (1910).

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It is conceded again that the learned Judge's order would not be appealable under the Civil Procedure Code.

It would further appear that the decision to the extent to which it goes, relates only to procedure—it merely postpones a determination on the merits of the question until a later stage of the suit. Not only, as I understand, will the Appellant be at liberty to raise the question again at a later stage on further materials, but it will in any case be the duty of the trial Judge to determine whether or not the suit is for the lunatic's benefit, whether or not it is for his benefit that the settlement arrived at in the course of the previous litigation should be set aside [*Gf. Porter v. Porter* (4)].

The authorities seem to show that in order to make a decision appealable there must be in it some element of finality and I am unable to find that element in the present case.

I may add that the application to stay this suit having been made on behalf of a Defendant, the question arises *inter parties*; and is, as I have said, open on the merits to further consideration. It may be that where such an application is made by a third party, not a party to the suit, assuming that it is open to a third party to apply, different considerations would arise.

In the result I agree with my Lord that the appeal fails on the ground that it is incompetent and I concur in the order which he has proposed.

Mr. K. K. Dutt, Solicitor for the Appellant.

Mr. P. C. Ghosh, Solicitor for the Respondent Noyan Manjuri Dassi.

Messrs. N. C. Bural and Pynn Solicitors for the Respondent Jogendra Nath Mullick.

Mr. B. N. Mitter, Solicitor for the Respondent Kanta Mohan Mullick.

Messrs. Jones & Co., Solicitors for the Respondent Panna Lal Scal.

M. N. K.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 225 of 1918.

TEUNON, J.

BEACHROFT, J.

1920,

Heard, 3 and

4, February.

Judgment,

4, February.

MOHSINUDDIN AHMED,

Defendant No. 1,

Appellant,

v.

KHABIRUDDIN AHMED

and ors., Plaintiffs,

Respondents.

—Civil Procedure Code (Act V of 1908), Sch. II, r. 17, agreement to refer to arbitration—Mahomedan Law, mother as "de facto" guardian if can execute the agreement on behalf of her minor children—A party to the agreement if can subsequently question the validity of the agreement and withdraw therefrom—Subsequent assent of the "de jure" guardian if can validate the agreement—Subordinate Judge if may allow mother to act for her infants in partition proceedings—K. i., who is.

A Mahomedan mother on behalf of her minor children entered into an agreement with some others to refer to arbitrators a dispute about some properties and they all made an application to Court under r. 17 of the Second Schedule to the C. P. Code. The guardian of the minors' properties appointed by the District Judge subsequently gave his assent to the agreement to refer and participated in the said application under r. 17. The Court thereupon acted upon the agreement and referred the dispute to arbitration:

Held—That the mother was not competent to bind the infants by the agreement to refer to arbitration, The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant.

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The natural guardian can perform acts which are purely advantageous to the infant, but can impose no obligations on the infant.

IMAMBANDI v. MUTSADDI (1) followed.

A party who entered into the agreement to refer, under a misconception as to the legal authority of the mother, may afterwards withdraw therefrom.

The legal guardian's assent subsequently given to the agreement to refer and his participation in an assent to the application under r. 17 cannot validate the agreement which formed the basis of that application.

Per BEACHCROFT, J — The fact that the Subordinate Judge subsequently found the mother fit to act for the minors would not validate an arrangement which in its inception was invalid, there being no appointment of the mother to act for the infant in the partition proceedings by the District Judge who takes the place of the Kazi in Mahomedan law.

This was an appeal preferred on the 29th July 1918 against an order of Babu Bepin Behary Ghosh, Subordinate Judge of Zillah Rajshaye, dated the 30th April 1918.

The facts will fully appear from the judgment

Babus Sarat Ch. Roy Choudhury and Krishna Kamal Maitra for the Appellant.

Babus Mohendra Nath Ray, Bankim Ch. Mukerjee, Sarat Ch. Mukerjee, Bir Bhusan Dutt and Paresb Nath Mukerjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

TEUNON, J. This appeal arises out of an application made under r. 17 of the Second Schedule to the Code of Civil Pro-

It appears that the descendants of a person of the name of Jhalu Mandal are in dispute as to the extent of their joint properties and as to the manner in which they should be distributed amongst them. On the 21st October 1916 these persons entered or purported to enter into an agreement to refer the dispute to the decision of certain arbitrators. The application under r. 17 was made by or on behalf of five of the persons whose signatures appear on the agreement to refer. It was made on the 4th April 1917. After hearing the parties the Subordinate Judge directed that the agreement should be filed and that the matters in dispute should be referred to the arbitrators named in the deed of agreement. Against this order Mohsinuddin Ahmed one of the parties to the agreement has appealed.

He contends before us that in entering into this agreement he acted under coercion, and he further contends that as a matter of fact the agreement referred to was abandoned by the parties thereto and never became operative. These are matters into which we do not think it necessary to enter because we are of opinion that on a further contention this appeal must succeed. Of the persons who purported to enter into the agreement two are minors, Din Mahamad and Kasiranessa on whose behalf when executing this agreement their mother Sakhina Bibi acted. It is contended by the Appellant that inasmuch as Sakhina Bibi the mother was not appointed guardian of the properties of the minors by the District Judge under the Guardian and Wards Act, she is not competent to deal with the properties of the minors and not competent to enter on their behalf into the agreement to refer to arbitration, the said agreement being one which will necessarily, if acted upon, involve dealings with the properties of the minors.

(1) I. L. R. 45 Cal. 575; s. c. 23 O. W. N. 59 (P. C.) (1918).

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To this contention in view of the decision of their Lordships of the Privy Council reported in *Imambandi v. Mutsaddi* (1), we think there can be no sufficient answer. It is true that in that case their Lordships of the Privy Council were dealing more particularly with cases of sale or mortgage, but they had in view also the general question how far and under what circumstances according to Mahomedan law dealings by a mother or other unauthorised guardian of a minor are operative. They observe *inter alia*; "The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The term "*de facto* guardian" that has been applied to these persons is misleading: it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous." Later on they further say—"Without such derivative authority—(that is authority derived either from powers given by a will or by appointment by the Judge as guardian)—if the mother assumes charge of their property of whatever description and purports to deal with it, she does so at her own risk and her acts are like those of any other person who arrogates an authority which he does not legally possess. She may incur responsibilities but can impose no obligations on the infant." In view of this decision and these observations we cannot but hold that in the present case the mother is not competent to bind the infants by this so-called agreement to refer to arbitration.

In answer to this it is suggested that the reference to arbitration is for the manifest advantage of the infants and therefore comes within the third class of

the exceptions provided for the protection of a minor child who has no *de jure* guardian. But to that suggestion we are unable to accede. Acts coming within the third exception are acts purely advantageous to the infant, or as it has been put in the judgment to which we have referred, acceptance on behalf of the minor of unburdened bounty. It is clear that agreements to refer to arbitration disputes between infants and other persons regarding their movable and immovable properties do not come within this exception.

It has further been contended that the Appellant Mohsinuddin Ahmed having entered into this agreement is not competent to withdraw therefrom. This also is a proposition which we are unable to accept. Even if he had entered into it voluntarily it would seem that he did so under a misconception as to the legal authority of the mother to bind her infant children by her dealings with their property. But now that he has been advised that, as is apparent from the judgment to which we have referred, the mother has no such legal authority and that the agreement is not binding upon the infants it is clear that he should not be compelled to undergo the expenditure of time and money involved in a proceeding which may very possibly, and indeed in all probability will, in the end, prove futile and infructuous.

A further contention was advanced to the effect that on application made to the District Judge under the Guardians and Wards Act two persons, one Sakina Bibi's brother Haider Buksh was appointed guardian of the properties of the two minors to the extent of about one-third of their value, and that another person Khabiruddin Ahmed who is one of the respondents in this appeal was appointed guardian of the minors' remaining pro-

(1) I. L. R. 43 Cal. 578; A. C. 23 C. W. N. 50 (Pt. C) (1913)

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perties. These appointments, however, were both conditional on the furnishing of security. Haider Buksh it is true furnished the required security. Khairuddin Ahmed never furnished that security, he never acted as guardian of the properties of the minors, and in fact his appointment as guardian never became operative. It follows that Haider's assent subsequently given to the agreement to refer and Haider's participation in or assent to the application under r. 17 cannot validate the agreement which forms the basis of that application.

We therefore decree this appeal and set aside the order of the District Judge with costs. We assess the hearing fee in this Court at five gold mohurs. The costs are to be paid by the contesting major Respondents.

BEACHROFT, J.—I agree and wish only to add a few words with reference to an argument which was advanced before us. It was that the case of *Imambandi v. Mutsaddi* (1) did not conclude the matter before us as there are special rules in the Hedaya with regard to partition. We were referred to one, which provides that in case of a partition between an adult and a minor the Kazi must appoint some one to act for the minor; and it was argued that here the Court had found the mother a fit person to represent the minors. The short answer to that is that the District Judge, who takes the place of the Kazi in Mahomedan law, did not appoint the mother and the fact that the Court subsequently found her fit to act for the minors would not validate an arrangement, which in its inception was invalid.

J. N. R.

Appeal decreed.

(1) L. L. R. 45 Cal. 878; s. c. 23 C. W. N. 50 (P. C.) (1918).

[PRIVY COUNCIL.]

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD DUNEDIN.

LORD PHILLIMORE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1921,

16, March.

RAJA MOHAMMAD

ABUL HASAN

KHAN, since deceased (now represented by the

Deputy-Commissioner of Gonda),

Appellant,

v.

LACHMI NARAIN

and ors.,

Respondents.

Bankati brit of Oudh—Butias, if have under proprietary right.

In Oudh, there exist various kinds of butis, the incidents of each of which differ from those of others.

The pottah of the birtias in this case expressly declared that the grantor had given the land of the village to the grantee to get it cultivated and populated. It was for the purpose of clearing the jungle, making the land fit for cultivation and bringing in ruyats which carried with it the duty of sinking wells. The birt-holder was to enjoy it free for five or six years. A comparatively small but gradually ascending rent was fixed for the years 1210 to 1214 in proportion to the increasing productiveness of the soil. After 1214, he was to pay the revenue to the sarkar prevalent in the Taluqa and take the daswant prevalent in the Taluqa, the daswant being a deduction in the nature of a rebate. The rent of the tenure could not be capriciously enhanced by the Taluqdar as the assessment of the jama was to be in accordance with the rate prevalent in the Taluqa:

Held, in view of the above and other circumstances of the case, that the Judicial Commissioners were right in holding that

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the grantees had under-proprietary right in the village.

This was an appeal by special leave from a judgment and decree, dated the 27th April 1915, of the Court of the Judicial Commissioner of Oudh, reversing a judgment and decree, dated the 18th October 1913 of the Court of the Subordinate Judge, Gonda.

The material facts of the case will appear from the judgment.

Messrs. DeGruyther, K. C. and Parikh for the Appellant.

Messrs. Dubé and Hyam for the Respondents.

THEIR LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The suit, which has given rise to this appeal, was brought by the Plaintiffs in the Court of the Subordinate Judge of Gonda, in Oudh, on the 1st May 1913, and relates to a village called Kundarwa, lying within the Taluqa Birwa Mahnon, in the Gonda district, in which the first Plaintiff owns a half share; the second Plaintiff, a resident of Lucknow, appears to have purchased at a sale in execution of a decree a part of the village in dispute. Why he has been joined in the suit as Plaintiff does not clearly appear. The other half of the Taluqa is owned by the Taluqdar of Balrampur. The Defendants hold the village Kundarwa under a *birt* grant created so long ago as 1802 by one Maharaj Kumar Madho Sing, who owned the property in those days. Later the Taluqa came into the possession of a lady named Rani Sarfaraz Kunwar; on her death it devolved on her daughter, Birraj Kunwar. On Birraj Kunwar's death somewhere in 1879 it passed into the hands of her husband, Achcha Ram. In 1888 half of the estate was purchased by the first Plaintiff's father, Raja Kazim Hos-

sain, whose title as purchaser was affirmed finally only in 1899; whilst the other half was acquired at or about the same time by the Taluqdar of Balrampur.

The *Pottah* under which the *birt*-holders obtained the village of Kundarwa is in the following terms:—

"I have given the land of village Kundarwa to Pathak Guni Ram by way of *birt*. He is free to settle himself and others (therein) and to cultivate it himself or get it cultivated, year after year; that is to say, he is free to have it cultivated and populated. He should pay the revenue to the Sarkar at the rate prevalent in the Taluka and take the *dasaundh* at the rate prevalent in the Taluka. I have written this; none should act against this."

For the first year, the rent is fixed at Rs. 4 rising in the course of five years to Rs. 36. And then follows the clause relating to future rent:—

"He [meaning the grantee] is to enjoy it free for five or six years. Thereafter at the rate for *Bankati* prevalent in the Taluka."

The character and incidents of these *birt* grants will be referred to more particularly in the course of this judgment. It is enough to say at this stage that the Circular issued by the Chief Commissioner of Oudh in 1861 shows that so late as the early part of the nineteenth century large tracts of land in the Province were lying unreclaimed and uncultivated, and the usual method for large proprietors was to let out the waste lands on favourable terms and security of tenure to tenants to bring them under cultivation. These grants were usually called *birt bankati* (as in the present case) or *bantarashi*, the names indicating the purpose for which they were made. The *birtia*, or *birt*-holder, had to cut down the forest, clear the land, build tanks and induct *rai-yats*.

The predecessors in title of the Defendants remained admittedly in unmolested

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possession of the village for nearly 78 years.

In 1869, in the course of what is called the first Regular Settlement in Oudh, they applied for a direct settlement with them of the revenue assessed on their village. Their application was opposed on behalf of Sarfaraz Kunwar, who then held the Taluqa. The case came for final disposal before the Extra Assistant Commissioner of Gonda on the 30th January 1871; the *birt*-holder was arrayed as Plaintiff and the Taluqdar as Defendant. The Taluqdar charged the documents produced by the *birt*-holders to be forgeries. This was found to be untrue; and the actual decision relative to the respective rights of the parties is in the following terms:—

“Now the question whether the *Bunkati birt* is tantamount to the *birt* right or not remains to be dealt with. It is evident that when the *birt* *dahyak* dues are being deducted all through, no extinction of the *birt* rights can take place on account of the decrease or increase in the amount of rental. In mortgage and sale *birt** the owners of villages generally enjoyed the power to assess rents, to make amendments in them, and to grant periodical leases in their districts; and the *dahyak* dues have been estimated at 10 per cent. only. The Plaintiff has all these qualities in him.

“For the above reasons it is ordered that a decree upholding possession and occupation as an under-proprietor be passed in favour of the Plaintiff under the provisions of Circular No. 11 of 1862 in respect of village Kunderwa No. 590, Pargana Gonda, subject to the condition that the Talukdar shall always have the power to renew the *patta* and to amend and to assess the *jama* according to the practice observed during the *Shahi* times: that the Plaintiff having deducted only 10 per cent. *dahyak* dues, shall pay the balance of the *jama* proposed to the Talukdar: that in case of refusal to take up the lease and the village held under direct management, the Plaintiff shall be deemed entitled to *dahyak* dues at 10 per cent. from the amount

of gross rental, and that, having, deducted his *dahyak* dues in both the seasons, he shall have the accounts adjusted at the end of the year.”

It is clear from this decree that the Extra Assistant Commissioner found that the Plaintiff in that case possessed all the powers ordinarily enjoyed by *birt*-holders of his class; and he accordingly upheld the Plaintiff's “possession and occupation as an under-proprietor,” subject to the conditions set forth above.

It is alleged by the Plaintiffs in the present suit that there was a discontinuance in “the possession and occupation” of the *birt*-holders between 1875 and 1879, when they declined to take a *Pottah* on the rent assessed by the Taluqdar. During this period, it is alleged, the village was let to some other people, the Defendants receiving only the tenth of the rent received by the Taluqdar, and that in 1880 the *birt*-holders again got possession under a new arrangement. These allegations are not admitted by the Defendants; they deny that they ever lost possession. No *Pottah* or *Kabuliat* appears to have been produced to show what the new arrangement was. Anyhow, whatever its character, it has lasted a considerable time.

In 1898 Achcha Ram, who had come into the possession of the Taluqa on the death of his wife, Birraj Kunwar, brought a suit against the Defendants for ejectment and enhancement of rent. That suit failed; the Judicial Commissioner dismissed the action on the ground that both reliefs were exclusively for the Revenue Courts to determine.

In 1901 Raja Kazim Hossain Khan, the father of the first Plaintiff, who had by that time become the owner by purchase of a half share of the Taluqa, brought a suit against the Defendants in the Court of the Deputy Collector of Gonda for arrears of rent for the Fasli years 1307 and 1308

* For the meaning of this class of *birt* see Sykes.

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(1900 and 1901), on the allegation that they held Kunderwa on a rental of Rs. 503-14-6 and that he was entitled to receive a moiety thereof. The Defendants contended that the rent was payable as a whole and they could not be made separately liable for a share of the rent. They also alleged that their rent was Rs. 500, which they had been always willing to pay less their *dahyak*, the tenth, which they were entitled to deduct, and that Rs. 3-14-6 claimed by the Plaintiff was an overcharge for rates.

The Deputy Collector of Gonda, before whom the case came for trial, dealing first with the plea that the Defendants were not liable to pay the rent in halves, stated his view as to the status of the Defendants in the following terms:—"They are not tenants; nor are they ordinary *thekadars*; rather they hold the land as under-proprietors, or inferior proprietors." In this view he overruled the *birtias*' objection to being made liable to pay rent in halves. On the question of the rent he held as follows:—

"The Defendants admit the *jama* to be Rs. 500, and on adding to it Rs. 3-14-6 on account of rate, we get the amount of Rs. 503-14-6, as claimed by the Plaintiff. But the suit has not been brought in respect of rate, nor was any issue framed as to whether the Plaintiff was entitled to get the same. The Defendants are not tenants nor are they responsible for profits and loss; they are in possession (on payment of *jama* minus a fixed percentage, i.e., 10 per cent.). Till the rate is sued for I cannot include it in the claim from my own side. I take the amount of *jama* to be Rs. 500 and thus the Plaintiff's share comes to Rs. 250 per year. The Defendants have stated that from the *jama* fixed, 10 per cent., that is to say Rs. 50 per year, used to be deducted as *dahyak* dues. The Plaintiff is silent as regards this objection. From the copy of the order dated the 30th January 1871, passed in the previous settlement it appears that

a decree for *dahyak* (10 per cent.) was passed in favour of Sheo Ratan, the ancestor of the Defendants, and it was settled that the proposed rent should be paid to the Talukdar after deducting therefrom the *dahyak* right, that is 10 per cent. From the copy of the judgment, dated the 29th October 1898, passed by the Court of the Judicial Commissioner (of Oudh) in *re* Sheo Ratan *versus* Achcha Ram, it appears that up to that time the *dahyak* right prevailed, and there appears to be no reason why it should have ceased thereafter. From the proposed rent Rs. 50 per year should be deducted; and after deducting this amount Rs. 450 are due, out of which the Plaintiff is entitled to get Rs. 225."

The decree of the Deputy Collector is dated the 23rd December 1901. The North-Western Provinces and Oudh Land Revenue Act (III of 1901) was enacted about this time, and under its provisions the revenue assessment of the Gonda District was taken in hand. In the course of the settlement proceedings relating to the Birwa Mahnon Taluqa a claim was preferred for the assessment of rent in respect of the village of Kunderwa. Before the Settlement Officer the Balrampur Estate, as the owner of the half-share of the Taluqa, was arrayed as Plaintiff, whilst the *birt*-holders appeared as Defendants. The Assistant Settlement Officer, after stating in his judgment that "the case was instituted in his Court simply to determine whether or not the *daswantdar*-holders of the village Kunderwa should be assessed with rent by him," sets out the contentions of the parties. The Taluqdar's Mookhtear urged again that the Defendants were holding at a rental of Rs. 503-14-6 under a lease executed by them, and that therefore the Settlement Court should not assess the rent on the village; whilst the Defendants contended they had never been disturbed in their possession of the village, and that for the last 30 years they had been paying

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rent of Rs. 500 less Rs. 50, their *dahyak* dues, which they were entitled to deduct. Dealing with the Kunderwa village, he held as follows :—

“When the Settlement Court allowed the *daswand*-holders to retain possession over the hamlet of Kunderwa, and they were not dispossessed by the Civil Court, the rent thereof should certainly be assessed by this Court. Now there only remains to be seen what would be the amount of rent. The revenue fixed formerly in respect of the village has been allowed to stand, therefore I allow the rent of Kunderwa to be the same as before for the following reasons :—

After giving his reasons for the conclusion at which he had arrived, he went on to say that whilst there was a possibility of improvement in one of the hamlets in dispute, “there was very little chance of improvement in Kunderwa.” In other words, in his opinion there was little room for enhancement in the case of Kunderwa. And accordingly he made the following order in regard to the hamlet and the village respectively :—

“For these reasons I think it advisable to let the former Revenue, Rs. 50 of Pura Sanwant Ban, stand as good, and Rs. 250 of Pura Kunderwa. The (net) profit thus comes to Rs. 500, and after deducting the *dahyak* dues, the rent of the hamlet Kunderwa amounts to Rs. 450; and this is the rent which I fix.”

The effect of the Assistant Settlement Officer's order was simply to recognise and affirm the rent the Defendants were paying. The Taluqdar preferred an appeal from this order to the Settlement Officer; and his order in respect of Kunderwa is in these terms :—

“This is one of those unfortunate decrees of the last settlement which gave and took away rights in the same breath. The Respondents were decreed possession of mauza Kunderwa and intermediate rights, *i.e.*, under-proprietary but the Talukdar was given power to fix the rent, and if the under-proprietors were not prepared to pay it they

could resign possession and receive 10 per cent. of assets instead. Such conflicting appeals are merely provocative of further litigation, in order to define the status of the subordinate party. The Appellant urges that as no rent was fixed at last settlement the Settlement Court has no power to fix rents now. I find that whatever else the Settlement Court at last settlement gave, it certainly conferred under-proprietary rights to land, and I am therefore empowered to fix rents under sec. 79 of the Revenue Act.”

The Settlement Officer's order was made on the 1st December 1902. From that date to November 1912, the Taluqdars remained quiescent. By that time the first Plaintiff in this action had succeeded to his father's estate; and he, on the 19th of that month, issued to the several Defendants the following notices couched in identical terms offering a three years' lease. After setting out the decree of the Extra Settlement Officer made on the 30th January 1871, the Plaintiff says :—

“I, the sender of this notice and the possessor of the Estate of Birwa Mahnon, of which the aforesaid village forms a part, assess and fix the lease money of the aforesaid village at Rs. 580, as detailed below, from 1320 F. to 1322 F. After deducting therefrom Rs. 58, the *dahyak* (10 per cent.) dues at the rate mentioned in the settlement decree, you shall be liable to pay every year the remaining amount of Rs. 522, as detailed below, in the instalments noted below. If you accept the rental, mentioned above, you can attend the estate office of the sender of this notice and get the *patta* and the *Kabuliat* completed; but if you fail to get the same completed within fifteen days from this date or refuse to take up the lease (*Shaka*) of the aforesaid village at the above rental, you shall cease to have the right of possession over the village and it shall be taken under direct management. If you fail to make a reply to this notice within seven days from this date, it shall be deemed that you do not agree to take up the lease of the village on the rental assessed by me.”

The Defendants do not seem to have given any reply to this demand—at least

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there is nothing on the record to show that there was a reply—and accordingly the first Plaintiff, in conjunction with Lachmi Narain, brought this suit as already stated in the Court of the Subordinate Judge of Gonda on the 1st May 1913, for the following reliefs :—

“(a) That a declaration be made to the effect that the Defendants Nos. 1 to 5 have no zamindari right superior or inferior, in the entire village Kundarwa owned by the Plaintiffs.

“(b) That it may be declared that according to the old settlement decree, dated the 30th January 1871, the Plaintiff alone is entitled to assess and alter the amount of rent to be paid by the Defendants Nos. 1 to 5.

“(c) That a decree for possession of the entire village Kundarwa be given.”

He also claimed mesne profits.

The Defendants in their written statement denied the right of the Plaintiff to eject them; they admitted that under the decree of the 30th January 1871, the Plaintiff No. 1 was the superior proprietor of the village, and they claimed that under the same decree they were entitled to under-proprietary rights. And in paragraphs 24 and 25 they said as follows :—

“Thakurain Sarfaraz Kunwar obtained a decree for the superior proprietary right in respect of this village on the 24th March 1869, and in the said suit a direction had been given that the ancestor of the Defendants Nos. 1 to 5, Sheo Ratan, should bring a separate suit for under-proprietary rights. Accordingly the said Sheo Ratan Pathak, having brought a claim for the pukhtadari rights, obtained a decree on the 30th January 1871. Now the Plaintiff is the representative of Thakurain Sarfaraz Kunwar: therefore he is the superior proprietor of the said village.

“In the recent settlement Rs. 500 was determined to be the amount of rent, and after deducting Rs. 50 on account of *dahyak* dues, the Defendants pay Rs. 450 annually to the superior proprietor. In view of the quality of land in this village, the amount of rent cannot exceed Rs. 500. If the Court

determines that the Plaintiffs and the Defendant No. 6 are entitled to a rent exceeding the amount assessed during the recent settlement, *the undersigned Defendants do not object to the payment of an enhanced amount of rent. The Plaintiffs should seek redress in the Revenue Court.*”

The issues raised by the Subordinate Judge were wider than the prayers in the plaint: the first was whether the Defendants were under-proprietors; and the second whether the relation of landlord and tenant existed between the parties.

He decided both issues against the Defendants, and accordingly made a decree in favour of the Plaintiffs in respect of all the reliefs asked for. He treated the Defendants as trespassers and awarded to the Plaintiffs possession of the village with mesne profits. On appeal the claim for ejectment and mesne profits was abandoned; the Judicial Commissioners therefore dealt only with the question of the Defendants' status. They were of opinion that the decree of the 30th January 1871, conferred on the *birt*-holder “more than a mere right of *dahyak*.” In their view it affirmed his right as under-proprietor, and that therefore the decree for ejectment made by the Subordinate Judge was bad. They accordingly dismissed the Plaintiffs' suit.

On the present appeal before this Board, it has been conceded that the claim for the ejectment of the Defendants and for possession is not maintainable. It is admitted that such a claim arising between landlord and tenant (even assuming that the Defendants' position is no more than that of an ordinary tenant) is exclusively cognizable by the Revenue Courts. The decision of the Board is thus confined to the first two prayers in the plaint, which relate to the status of the Defendants and the effect of the Extra Assistant Settlement Commis-

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sioner's order made on the 30th January 1871.

It seems clear that the rights of the *birt*-holders must be adjudged on the basis of the document which created their interest. It is called a *Pottah*; but the term *Pottah*, like the word *jote* in Bengal, is a general expression and comprehends all tenures and subordinate interests, from a permanent *mokurrari* tenure to a yearly lease. It has to be observed that in Oude, as pointed out in the Chief Commissioner's Circular already referred to, there exist various kinds of *birts*, the incidents of each of which differ from those of others. Some are acquired by purchase, and are accordingly called *bai birts*; some are given from motives of piety to Brahmins, and are designated *bishunpriti birts*. Sykes, in his valuable work, at p. 178, states their character thus:—

“*Bishunpriti birts* were cessions similar in almost every respect to the *bai* or purchased *birts*, save that these were given to Brahmins for the honour and glory of God (if not for that of the giver) and no consideration was taken.”

Such was the nature of the grant in the case reported in 14 Oudh Law Reports, p. 336, on which the Plaintiff's counsel relies in support of his contention that the Defendants have no right in the land beyond the receipt of the *dahyak*. The dispute there related to a *bishunpriti birt* (see p. 339). As the Judges dealing with that case pointed out, a *bishunpriti khushast* is not a grant for “valuable consideration,” but a mere “grant by favour.” Again, the settlement decree there appears to be quite different from the decree in the present case; it had simply confirmed the *bishunpriti*-holder's “existing possession” coupled with the Taluqdar's power to fix the rent and renew the lease. There is little or no analogy except in the common

use of the word *birt* between a gratuitous grant like the *bishunpriti birt* and a jungle-clearing grant where the grantee has to incur considerable outlay before he can obtain any return from the land.

There is a reference to “jungle-clearing *birts*” in pp. 176-77 of Mr. Sykes' work. And on p. 191 a fuller explanation is given, thus:—

“Chaharum and Daswant (also known in the neighbouring district of Benares as *Bunkuttee*) is an under-proprietary right obtained by clearing jungle land under a lease granted for the purpose (*bunkuttee*) and bringing it under cultivation and in other cases granted to all proprietors and influential residents of the village to keep them contented and loyal. The terms Chaharum and Daswant are in use chiefly in the districts of Gonda and Bahraich, and mean respectively one-fourth and one-tenth, thus giving a clue to the original extent of these subordinate tenures; the *daswant* being very similar in its nature and extent to the *dahyak* of the *birtias*.”

“The use of the terms *chaharum* and *daswant* arose in this way. The terms of the lease were usually as follows:—For five years the land was rent-free; in the sixth year the tenant paid one-sixth of the produce; in the seventh, one-fifth; in the eighth, one-fourth; in the ninth, one-third; and in the tenth, one-half the full rent. Henceforward the clearer was entitled to hold at that rent so long as the land was held *pakka*; but if the landlord held *kacha* the clearer was entitled to have one-fourth or one-tenth of the produce which in practice, came to mean one-fourth or one-tenth of the land rent-free in under-proprietary right. This tenure, like the others, was liable to encroachment in the shape of an assessment of rent, but that would be low in any case.”

The *Pottah* in the present case expressly declares that the grantor has given the land of the village to the grantee to get it cultivated and populated. It was for the purpose of clearing the jungle, making the land fit for cultivation and bringing in *raiya*t, which carried with it the duty of

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sinking wells, etc. It is declared in the *Pottah* that "the *birt*-holder was to enjoy it free for five or six years." A comparatively small but gradually ascending rent is fixed for the years 1210 to 1214, in proportion, it would seem, to the increasing productiveness of the soil. After 1214 he was to pay "the revenue to the *sarkar* prevalent in the Taluqa, and take the *das-want* prevalent in the Taluqa." The deduction was in the nature of rebate.

By his order of the 30th January 1871, the Extra Assistant Commissioner declared the right of the *birt*-holder, and made a decree "upholding" in express terms his "possession and occupation as an under-proprietor . . . under the provisions of Circular II of 1862 in respect of the village Kunderwa." The reference to the Circular in the decree shows, as the Judicial Commissioners rightly observe, that "the Extra Assistant Commissioner decided and must have intended to decide" that the *birt*-holder was an under-proprietor under the provisions of that Circular. The Extra Assistant Commissioner further declared the condition on which the land was held under the *Pottah*, that "the Taluqdar shall always have the power to renew the *Pottah* and to award and assess the *Jama* according to the practice observed during the *Shahi* times;" that is, before the Annexation. The *Jama* is to be assessed according to the practice observed prior to 1855, as indicated in the Circular itself. There is no evidence, however, in the case what the practice was in those days. The *Pottah*, however, lays down a standard for the assessment of the *Jama*. The Taluqdar cannot capriciously enhance the rent; the assessment must be in accordance with the rate prevalent in the Taluqa. Whether it is in accordance with such rate or not, in case of a dispute, is a matter wholly within the cognizance of the Revenue Courts. Nor, from the terms of

Pottah or the decree of 1871, does it appear that the Taluqdar is vested with the power of amending and assessing the rent arbitrarily at short intervals, which would necessarily be a harassment to the inferior holder as well as the raiyat.

The facts already recited show that for a number of years the Defendants have been paying a rent of Rs. 500, less their tenth. It is alleged by the Plaintiff that between 1875 and 1879 there was an interruption of their possession, and the village was let on a higher rental to other people. If these *Pottahs* represented real transactions it is difficult to understand why no reference was made to them in the proceedings in 1898, or 1901 before the Deputy Collector. Again, considering that the rent in the *Pottah* for 1287 is stated to be Rs. 1,451, and in that of 1875 it is stated to be Rs. 1,826, it is not explained how the Defendants were found in 1901 to be paying only Rs. 500. Anyhow, interruption of that character cannot affect or alter the Defendants' rights under the *Pottah* of 1802 or the decree once they got back into possession.

On the whole their Lordships concur with the Judicial Commissioners in holding that the Respondents, as declared in the decree of 1871, possess an under-proprietary right in the village of Kunderwa, granted to their ancestor in 1802. The appeal will, therefore, be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitor: Mr. Edward Dalgado for the Appellant.

Solicitors: Messrs. Barrow, Rogers and Nevill for the Respondents.

R. M. P.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD BUCKMASTER.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1921,

11, November.

RAJA RAI
BHAGWAT DAYAL
SINGH, since de-
ceased (now repre-
sented by Raj-
kumar Barhamdeo
Narain Singh),
Appellant,
v.
RAM RATAN
SAHU and ors.,
Respondents.

Order in Council—Construction—Interest, from what date payable—Mesne profits—Compensation for improvements—Excessive time taken by litigation in India, commented upon.

An Order in Council directed that on payment by the Appellant of certain sums of money, due in respect of mortgages, and interest thereon at 6 per cent., the Appellant should recover possession of the property together with mesne profits:

Held—That interest should run concurrently with the mesne profits, that being the construction which the Board had placed upon the order upon an application for review.

Held, also—That part of the mesne profits having been due to permanent improvements made by the disseisor, a deduction of 10 per cent. was properly allowed by the High Court in respect thereof.

Held, further—That the increased rents that could be properly attributable to the improvements could be properly set off against the mesne profits even though they were not actually executed by the persons in possession of the date of the decree, but by persons from whom they had purchased the property.

The Order in Council of which interpretation was sought was passed in conformity with the judgment of the Board in *Bhagwat Dayal Singh v. Debi Dayal*

Sahu (1), where the facts are more fully set out.

Jileb Kuer made an unauthorised sale of three villages to Debi Dayal. On her death the reversionary heirs sold the same villages to Raja Bhugbat Dayal Singh who brought suits against Debi Dayal to obtain possession of the property. The suits eventually came before the Judicial Committee and on the 25th January 1908 an order in Council was passed which provided *inter alia*—“that upon the Appellant Raja Rai Bhagwat Dayal Singh, paying to the Respondent Debi Dayal Sahu the two sums of Rs. 11,198-13-6 and Rs. 6,400 found in the latter's favour by the Court of the Subordinate Judge together with interest on the said sums at six per cent. per annum, the Appellant do recover possession of the property the subject-matter of the said two suits together with mesne profits to be ascertained in execution proceedings . . .”

In 1909 the Appellant decree-holder filed a suit to enforce the said order in Council and prayed for possession of the properties in dispute. Possession was duly given but the execution of the Order in Council was objected to on the ground that the claim for mesne profits covered a period of 15 years but interest on the amount due to the judgment-debtors was confined to one year namely from January 1908.*

The other point was with regard to mesne profits which it was contended had been increased by permanent improvements effected by the Rajah's predecessors.

The Subordinate Judge of Palamau decided that no interest was chargeable prior to the date of the Order in Council, and that the judgment-debtors were not entitled to any allowance on account of improvements effected by them.

This decree was varied by the High Court of Patna on appeal. The learned

(1) L. R. 35 I. A. 48 at p. 54; s. c. I. L. R. 85 Cal. 420; 12 C. W. N. 393 (1908).

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Judges held that interest was payable from the dates of the bonds and not from the date of the Order and that the judgment-debtors should have as compensation for improvements a deduction of 10 per cent of the annual profits of the villages in calculating the mesne profits.

Against the decree of the High Court the decree-holder appealed to His Majesty in Council and the judgment-debtors filed a cross-appeal by special leave.

Messrs. A. M. Dunne, K. C. and B. Dubé for the Decree-holder.—Contended that the order in Council of 25th January 1908 contemplated two specific sums and bore interest from the date of the said order when those sums were ascertained, and that the 10 per cent. reduction should not have been allowed.

Mr. E. V. Eddis for the Judgment-Debtors. (*Contra*).

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—Twenty-six years ago in the month of November 1895, one Raja Rai Bhagwat Dayal Singh, bought three villages known as Chianki, Ganke, and Lalgara, which were situate within the jurisdiction of the Subordinate Judge of Palamau in the District of Ranchi. Together with these villages he bought litigation, which has ensued from that day until this. He found that the villages were occupied by persons who claimed an absolute title under conveyances that had been made by a Hindu widow with a limited estate. It was consequently necessary for the Raja to take proceedings for the purpose of obtaining possession. He accordingly instituted a suit which was heard before the Subordinate Judge, who allowed his claim to possession and also mesne profits as from the proper date. That judgment was made the subject of an appeal to the High Court of Judicature

at Fort William in Bengal, and upon that appeal the judgment was reversed. From the decree of the High Court at Fort William an appeal was brought before their Lordships, who restored the judgment of the Subordinate Judge. They advised that the appeal should be allowed, and that the Appellant should recover possession together with mesne profits, which were to be ascertained in the execution proceedings; but they did something more, which has caused the first of the questions that has been argued upon the present appeal. It appeared that although the persons whom the purchaser in 1895 ejected had no title to the property against the Raja, yet the widow had, before the sale under which they claimed, raised money for necessities, ancestral worship, and other similar matters for all of which she was perfectly entitled to charge the estate. Mortgages had been executed to secure these monies, and when the properties were sold by the widow, these mortgages were paid off. The Subordinate Judge, when the matter first came before him, decided that certain parts of these mortgages which he gathered together under two heads, amounting in the one case to Rs. 11,198, and in the other to Rs. 6,400, should be allowed, and that these sums should carry interest at the rate of 6 per cent. When the matter was before their Lordships they confirmed the finding of the Subordinate Judge, both as to possession and as to those sums, and found that the sums that were to be paid should carry interest at 6 per cent. per annum.

The first question that has been raised upon this appeal is as from what date the 6 per cent. should run. The proceedings have emerged from a finding originally made by the Subordinate Judge, who held that according to the true construction of this order the interest should run from the date of his own original decree, but the

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High Court of Judicature at Patna has said that the effect of the order is to take the interest back to the date of the mortgages. It is unnecessary for their Lordships to settle in detail the question which led to that conclusion, for this reason : that the order of their Lordships on the former appeal was the subject of review, and an application was made to them for the purpose of ascertaining what it was that was meant by the allowance of interest at 6 per cent. when no date was mentioned as the date from which it should run, and upon the matter coming again before their Lordships on the 11th February 1909, upon an application by the Respondents for modification of the judgment, they made it clear that what they meant was that the interest should run concurrently with the mesne profits; that as one sum was allowed on the one hand for the mesne profits, the sum for interest should be allowed upon the other. This relieves their Lordships entirely from the necessity of considering what, without the assistance of that interpretation, they might have decided that the order meant, and they can only express their sincere regret that the litigant parties in these proceedings did not think right at the earliest moment to have obtained the information which has not been placed before a single one of the Courts from whom this dispute has proceeded, and indeed was only placed before their Lordships this morning after the case had been partly heard. It at any rate disposes entirely of the first part of the appeal, and the order that is appealed from in that respect must be modified so as to bring it into agreement with the declared intention of their Lordships in the earlier proceedings. But this does not dispose of the whole of the appeal, for there still remains a further matter for consideration that arises in this way. When the inquiry was directed with re-

gard to the mesne profits, a question arose as to whether part, at least, of the mesne profits had not been due to permanent improvements that had been executed upon the property by the purchasers whose title had been dispossessed by the Raja, who had bought in November 1895. There has never been any contention before their Lordships as to the right to obtain some allowance in respect of these improvements, if in the circumstances of this case such a right was capable of being established. The Commissioner before whom the matter was first heard disposed entirely of the two villages, Chianki and Ganke, with regard to which no further question now arises; but with regard to Lalgara he stated that the purchaser from the widow had made improvements, and that in consequence of these improvements the jama of the village was raised to Rs. 2,400. There seems no doubt that these improvements were in their very nature of a permanent character. They were the erection of tanks for the purpose of irrigation, and the construction of a dyke. It seems quite impossible to believe that any estate that had received the advantage of seven or eight big tanks and the irrigation consequent upon their use would not have had the jama thereby increased. The learned Commissioner in his determination made a finding that the amount of the mesne profits for which the person in possession would be made liable amounted to a sum which in respect of this village was Rs. 35,057, and he then added that if he was entitled to a deduction for the improvement, then a deduction of Rs. 4,000 should be made therefrom, and if not, it should not. In other words, what he attempted to do was to make the deduction for the capital spent in the improvements and not the amount by which the mesne profits themselves had been increased by the expenditure. The matter then went

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back before the Subordinate Judge, and he confirmed the report of the Commissioner as a matter of form. The case then came before the High Court of Judicature at Fort William, and they dealt with the objections and remanded the matter with this direction :—

“ Neither party will be entitled to challenge the figures arrived at by the Commissioner nor the findings arrived at by him, except that with regard to the improvements, the judgment-debtors will be at liberty to show on the materials on the record that the Commissioner has not given them credit for any particular improvement which they are justly entitled to. But they will not be entitled to take exception to the findings of the Commissioner as to their value, and no fresh Commission will be issued nor any further evidence will be allowed to be given by the parties.”

It appears that the further objections that were taken upon this remand were first of all to the allowance of any money at all, and secondly, it was argued that an allowance could not be made because the improvements had in fact been executed by the person who had been the original purchaser from the vendor who had the limited estate, and that he had again sold and that it was the purchaser from him who was in possession at the time when the final purchase of the property was made. Their Lordships are of the opinion that there is no substance in these contentions. The increased rent that is properly attributable to the improvement can be properly set off against the mesne profits, even although it was not actually executed by the person in possession at the moment when the decree for possession was made, and the only question that is left is to determine whether or no any sum should be allowed. The Subordinate Judge held that there should be no sum allowed at all, and the High Court at Patna has fixed a sum of 10 per cent. on the rents. With regard to the adequacy

or the accuracy of a 10 per cent. allowance, their Lordships are not in a position to speak; they cannot possibly know the circumstances, but the sum of 10 per cent. appears to be a perfectly fair and reasonable sum to allow in the circumstances of this case. The facts found by the Commissioner are those upon which all the judgments must proceed, and among these is the statement that the improvements have increased the value. Their Lordships are clearly of opinion that that is not only the finding of the Commissioner, but that it is the only reasonable inference that can be drawn from the character of the improvements, and they therefore think, in that respect, that the judgment of the High Court must be affirmed.

That disposes of all the matters upon this appeal, but their Lordships cannot part with this case without expressing once more their regret as to the interminable course of litigation in India. It cannot be for the welfare of any community that the purchaser of property bought in good faith should be liable to endless quarrels arising out of his purchase, which continue, as they do in this case, and as they must in many, beyond the period of his natural life. The man who bought this property never knew what it was to be free from the anxiety of a law suit until the day he died; even then the litigation was not ended, and has been pursued until the present appeal. This has itself taken four years to come here from the High Court, and of course no explanation has or ever can be offered of why these delays occur. Their Lordships refer once more to this matter in the earnest hope that a condition of things which they regard as constituting a serious blot upon the administration of justice should be removed.

With regard to the costs of this appeal, their Lordships have given careful consideration to what order justice requires.

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and they have come to the conclusion that there ought to be no costs of the appeal or of the cross-appeal; that the costs of the High Court, although the order of the High Court has been varied, should in the circumstances of this case be allowed to stand. They will therefore humbly advise His Majesty that the order of the High Court be varied to the extent that has been already indicated, namely, by declaring that the interest of 6 per cent. should run concurrently with the mesne profits, but that the costs should be dealt with as above mentioned.

Solicitors : Messrs. Barrow, Rogers and Nevill for the Decree-holder (Appellant in the first appeal).

Solicitors : Messrs. Pugh & Co. for the Judgment-debtors.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 44 of 1920.

MOOKERJEE, J.	MOHAN MOLLA,
PANTON, J.	Plaintiff, Appellant,
1921,	v.
Heard, 25, July.	BARU BIBI and anr.,
Judgment,	Defendants,
23, August.	Respondents.

Mahomedan Law—Divorce by writing—Pregnancy followed by miscarriage—Divorce in khula form—Date on which period of iddat commences—Circumstances by which iddat may be terminated earlier.

A Mahomedan husband executed and registered a deed of divorce in favour of the wife and a few days later saw her, pronounced the legal formulas, made over the document to her and went away. Subsequently she went through ceremonies of marriage with two persons one after the other, the marriage with the Plaintiff taking place last. In a suit for restitution of conjugal rights by the Plaintiff on the allegation that the first marriage after the

divorce took place within the period of iddat and as such was void, the defence set up was that the period of iddat commenced on the date of the execution of the document and expired before the first marriage after the divorce took place, that the lady was pregnant at the time of the divorce and miscarried and this had the effect of terminating the period of iddat, and that the divorce was in khula form :

Held—That the divorce took effect from the date of the writing and not from the date of its receipt by the wife unless there were words in the instrument showing a different intention.

That the case must be sent back for re-investigation as to the validity of the first marriage after the divorce on production of the Talaknama so as to enable the Court to consider whether there was anything in the document preventing its taking effect from the date of its execution and after allowing the parties to adduce relevant evidence regarding the divorce so as to enable the Court to consider the other points raised in the defence.

This was an appeal preferred on the 25th June 1921 from a decision of the Hon'ble Justice Newbould, dated the 3rd May 1920, passed in S. A. No. 1629 of 1919, reversing that of Babu Matilal Ray, Subordinate Judge, Faridpur, dated the 17th July 1919, reversing that of Babu Satchidananda Mukerjee, Munsif, Madaripur, dated the 15th June 1918.

The facts of the case will appear from the judgment of Newbould, J., which is as follows :—

NEWBOULD, J.—This appeal arises out of a suit for restitution of conjugal rights. The first Defendant Baru Bibi was divorced by her first husband by a Talaknama, dated 12th May 1916. Eight days afterwards the husband saw the wife, pronounced the

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legal formula and made the document over to her. On 12th August 1916 the Defendant No. 1 went through a form of marriage with Defendant No. 3 and on 3rd September 1916 she went through a form of marriage with the Plaintiff. The lower Appellate Court has decreed the Plaintiff's suit on the finding that the marriage to Defendant No. 3 was invalid because it took place during the period of *iddat*. In coming to this finding it appears to have wrongly held that the period of *iddat* commenced on 20th May when the word *talak* was pronounced within the hearing of the wife. From the authorities it would appear that the period of *iddat*, when there has been a divorce by a deed, commences from the date of the document. In the case of *Sara Bai v. Rabia Bai* (1), it has been held that "a divorce by talaknama 'is effected as soon as the words are written even without the wife receiving the writing.'" Also, at p. 164 of Wilson's Anglo Mahammdan law; 2nd Edition, I find "for the purpose of estimating the duration of the *iddat*, a divorce by writing is considered to take effect from the date of the writing, not from the date of receipt, in default of words showing a different intention." Here it is not suggested that the talaknama contained any words which would suggest that it would not take immediate effect. Further authority in support of this view will be found in Tyabji's Mohammedan Law, 2nd Edition, p. 219. For the Respondent reliance is placed on the case of *Furzund Hossein v. Janu Bibi* (2) but that case has no bearing on the point that arises in this case as the divorce which was the subject of that case was not alleged to have been effected by a deed. If the divorce of Defendant No. 1 by her first husband took effect from 12th May 1916 there can be

no ground for holding that the marriage to Defendant No. 3 was void. Even if the period of the *iddat* be held to have commenced from 20th May it is quite possible that it might have expired before this marriage. The Defendants' contention is that she was pregnant at the time of her divorce and miscarried. That would determine the period of the *iddat*. Further, in the case of a girl of this age, the period of *iddat* is not three calendar months but three courses in the case of a woman subject to menstruation; even if I held that the lower Appellate Court was right in law in dating the commencement of the *iddat* from 20th May, it would be necessary to remand the case for a definite finding as to the truth or otherwise of the allegation of pregnancy and miscarriage. It appears that the Defendant No. 1 is still living with Defendant No. 3. The marriage of the Plaintiff took place during the validity of her marriage with Defendant No. 3 and consequently was not a legal marriage. I must, therefore, hold that the Plaintiff's case fails and was rightly dismissed by the Court of first instance. I accordingly decree this appeal, set aside the judgment and decree of the lower Appellate Court and restore those of the Court of first instance. The Appellant will get his costs in this and in the lower Appellate Court.

Babus Trailokyanath Ghose and Manmotho Nath Ray for the Plaintiff-Appellant.

Babu Rupendra Kumar Mitra for the Defendants-Respondents.

THE JUDGMENT OF THE COURT was as follows:—

This is an appeal under cl. 15 of the Letter's Patent from the judgment of Mr. Justice Newbould in an appeal from appellate decree in a suit for restitution of conjugal rights.

(1) I. L. R. 30 Bom. 537 (1906).

(2) I. L. R. 4 Cal. 588 (1878).

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The first Defendant Baru Bibi was married to one Erfan. On the 12th May 1916, Erfan executed and registered a deed of divorce in her favour. On the 20th May 1916, Erfan saw the lady, pronounced the legal formulas, made over the document to her and went away. On the 12th August 1916, she went through a ceremony of marriage with the third Defendant. On the 3rd September 1916, she went through another ceremony of marriage with the Plaintiff. The Plaintiff and the third Defendant are, consequently, the rival claimants. The case for the Plaintiff is that no valid marriage took place between her and the third Defendant on the 12th August 1916, inasmuch as the period of *iddat* had not expired at that time. If this view is maintained, there is no bar to the validity of the marriage between her and the Plaintiff. The determination of the controversy between the parties thus depends on the solution of the question, when did the period of *iddat* expire? In other words, when did the period of *iddat* commence—on the 12th May 1916, as the third Defendant urges or on the 20th May 1916, as the Plaintiff contends? The Court of first instance decided against the Plaintiff and dismissed the suit. The Subordinate Judge decided in favour of the Plaintiff and decreed the claim. Mr. Justice Newbould has reversed this decision and restored the decree of dismissal made by the trial Court. On the present appeal, we have been invited to decide whether the divorce became operative from the 12th May 1916, or from the 20th May 1916.

It is stated in the Digest of Anglo Mahamadan Law by Sir Roland Wilson (5th Edition 1921, Art. 62) that a talak divorce may be effected by writing as well as by word of mouth (Baillie Book III Chap. II, sec. 6, pp. 232-235). Such writing must ordinarily be addressed to, and reach, the wife. Two exceptions are

then specified. We are concerned here only with the first exception, namely, that for the purpose of estimating the duration of the *iddat*, a divorce by writing is considered to take effect from the date of the writing, not from the date of receipt, in default of words showing a different intention. The rule thus enunciated is supported by the judgment of Batchelor, J., in *Sara Bai v. Rabia Bai* (1) where it is stated that the authorities show that a *bain talak*, such as this, reduced to manifest and customary writing, takes effect immediately on the mere writing, Baillie, p. 233; Mahomed Yusoof, Tagore Law Lectures, Vol. III p. 95. The Divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing." It is to be noted that in the case mentioned, the talak was *talak-i-bain* or *irrevocable talak*, and belonged to the category of *talak-ul-bidaat*, the only kind of talak which becomes irrevocable immediately it is pronounced. The other two kinds of talak, namely, *talak ashan* and *talak-hasan*, are always revocable, and the option to revoke continues, in the former case till the expiration of the period of *iddat*, and in the latter case till the third pronouncement.

The effect of a talak by writing as stated in *Sara Bai v. Rabia Bai* (1) is accepted by Tayabji in his treatise on principles of Mohammedan Law, Art. 145. This view is not contradictory to the decision in *Furzund Hossein v. Janu Bibi* (2) where the divorce was not by writing, and it was ruled that the mere pronouncement of the word talak three times by the husband, without its being addressed to any person, is not sufficient to constitute a valid divorce. We observe, however, that the decision in *Furzund Hossein v. Janu Bibi* (2) has been doubted in the cases of *Fulchand v. Nawab*

(1) I. L. R. 30 Bom. 537 (1906).

(2) I. L. R. 4 Cal. 588 (1878)

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Ali Chowdhury (3) and *Asha Bibi v. Kadir Ibrahim* (4) where it was ruled that according to the Hanafi Law, it is not essential that the talak or words of repudiation should be addressed directly to the wife to constitute a valid divorce, and that, consequently, the absence of the wife does not make the pronouncement of talak void and inefficacious. A similar view appears to have been adopted in *Wahid Khan v. Zainab Bibi* (5).

The position then is that the divorce in this case took effect from the date of the writing and not from the date of its receipt by the wife, unless there are words in the instrument which show a different intention. As the document has not been produced, it is impossible for us to decide finally its legal effect on the status of the parties and the matter must accordingly be re-investigated. The Respondent has further contended that she was pregnant at the time of her divorce and miscarried; if this fact be established, the period of *iddat* would be terminated. It has also been urged that in the case of a girl of this age, subject to menstruation, the period of *iddat* was not three calendar months but three courses. This also has not been considered (*Hedaya*, Book IV, Chap. XII, p. 128). Finally, it has been argued on behalf of the Respondent that, as appears from the register of talaknamas, the divorce was in *Khula* form; if the divorce was really in that form, the fact cannot be ignored and may vitally affect the situation of the parties.

We hold, accordingly, that the appeal must be allowed, the decree made by Mr. Justice Newbould set aside and the case remitted to the Court of first instance for retrial of the question of validity of the

marriage between the first and third Defendants. The Court will take steps to compel the production of the talaknama and allow the parties to adduce relevant evidence regarding the divorce of the first Defendant by her first husband. The costs of the two hearings in this Court and of the hearing before the Subordinate Judge will abide the result.

S. C. M.

Appeal allowed;
Case remanded.

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 308 of 1920.

MOOKERJEE, J.
BUCKLAND, J.

1921,
21, June.

SRISTIDHAR GHOSE,
Defendant, Appellant,
v.
RAKHYAKALI DAS,
Plaintiff, Respondent.

Transfer of Property Act (IV of 1882), sec. 59, attestation of mortgage deed—Scribe who signs for and on behalf of the mortgagor if competent to become one of the attesting witnesses—Personal decree, when allowable.

The executant of a certain mortgage deed was illiterate and she executed the instrument "by the pen of" the scribe of the document, who also signed the document as one of the attesting witnesses:

Held—That the document was not legally attested by the scribe according to the provisions of sec. 59 of the Transfer of Property Act.

Where no mark, seal or thumb-impression of the mortgagor appears on the mortgage deed, the scribe who executes the document for and on behalf of the mortgagor is not competent to become an attesting witness to attest the signature he himself has written out.

UPENDRA v. HUKUM (1) approved and followed.

(1) I. L. R. 46 Cal. 1 : s. c. 23 C. W. N. 220 (1918).

(3) I. L. R. 36 Cal. 184 : s. c. 13 C. W. N. 134; 9 C. L. J. 105 (1908).

(4) I. L. R. 33 Mad. 22 (1909).

(5) I. L. R. 36 All. 458 (1914).

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SARUJIGAR BEGUM v. BARODA KANT' (2), HUDSON v. PARKER (4), BRYAN v. WHITE (5), ROBERTS v. PHILIPPS (6) and BUNDETT v. SPILSBURY (7) and several other cases referred to.

A personal decree for the recovery of the money is only allowable if the suit is brought within six years of the date of the bond or from the date of any payment within the meaning of sec. 20 of the Limitation Act.

This was an appeal against the decree of Babu Amullya Chandra Ghose, Subordinate Judge of Zillah Burdwan, dated the 30th of October 1919, affirming the decree of Babu Tarani Kanta Nag, Munsif, 2nd Court at Katwa, dated the 28th of September 1918.

The facts will fully appear from the judgment.

Babu Mohesh Chandra Banerjee for the Appellant.

Dr. Jadu Nath Kanjilal for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the Defendant in a suit to enforce a mortgage security, alleged to have been executed by him in favour of the Plaintiff-Respondent on the 21st April 1908. The principal sum advanced is stated to have been Rs. 90 which carried interest at the rate of 18½ per cent. per annum and was repayable on the 13th April 1909. The present action was commenced on the 28th November 1917 for the recovery of Rs. 210, upon the allegation that nothing had been paid towards the satisfaction of the mortgage debt, except three sums paid on ac-

(2) 14 O. W. N. 974; s. c. 11 O. L. J. 543 (1910).

(4) 1 Rob. Eccl. 14, 26.

(5) 2 Rob. (Eccl.) 315 (317) (1850).

(6) 4 H. & B. 450; 24 L. J. Q. B. 171 (1855).

(7) 10 Cl. & F. 340 (1842).

count of interest, namely, Rs. 16-4-0 in 1910, Rs. 12 in 1911 and Rs. 12 in 1912. The Defendant pleaded that the Plaintiff was not competent to sue inasmuch as the real creditor was her paramour, one Hari Pal, who had been paid in full; that the bond had not been duly attested and thus could not operate as a mortgage bond; and that the suit was barred by limitation. The trial Court found that the real creditor was the Plaintiff herself that the bond had been duly attested, that the suit was not barred by limitation, as it had been instituted within twelve years from the due date, and in this view, made the usual mortgage decree. On appeal, the Subordinate Judge confirmed the decree of the Court of first instance. On second appeal, it has been argued on behalf of the Defendant that the facts found show that the bond was not duly attested, and in support of this contention reliance has been placed upon the decision in *Upendra Chandra v. Hukum Chand*, which is also reported as *Rajani v. Panchananda* (1).

The facts material for the decision of the question of law raised before us lie in a narrow compass. The Defendant mortgagor, Sristidhar Ghose, was illiterate and was unable to sign his name. The bond was written out by one Bholanath Ghose. The name of the executant was at his request written out by Bholanath Ghose. The actual endorsement is as follows. "Sri Sristidhar Ghose by the pen of Sri Bholanath Ghose." At the foot of the document, we have the following entry: "Witnesses, scribe—Sri Bholanath Ghose."

Sri Hari Pal by the pen of Sri Bholanath Ghose." Bholanath Ghose, who has been examined as a witness, states that at the request of Hari Pal who was illiterate he wrote his name. The substance of the matter consequently, is that Bholanath

(1) L. L. R. 42 Cal. 582; s. c. 22 O. W. N. 390 (1918).

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Ghose wrote the body of the document, wrote the name of the executant, wrote the name of Hari Pal as an attesting witness and signed his own name as an attesting witness. The question arises on these facts, whether the document was attested by two witnesses within the meaning of sec. 59 of the Transfer of Property Act. The decision of Fletcher and Walmsely, JJ., in *Upendra v. Hukum Chand*, which is also reported as *Rajani v. Panchananda* (1) shows that the question must be answered in the negative. That case is an authority for the proposition that where no mark, seal or thumb impression of the mortgagor appears on the mortgage deed, the scribe who executes the document for, and on behalf of, the mortgagor is not competent to become an attesting witness to attest the signature he himself has written out. This decision is clearly applicable to the facts of the present case. We do not overlook that an examination of the original document shows that there is what looks like a small cross after the name of Sristidhar Ghose; that was apparently put by Bholanath Ghose, and there is no suggestion that Sristidhar Ghose executed the document by affixing thereon his mark as he might have done (see Act III of 1885 which amends the Transfer of Property Act and makes the provisions of sec. 59 supplemental to the Indian Registration Act, sec. 3; see also the General Clauses Act, 1897, sec. 3; cl. 52). Here the case is that Bholanath Ghose wrote out the name of Sristidhar Ghose at his request, and this constituted a valid execution of the deed just as if Sristidhar Ghose had written out his own name. In such circumstances, it is plain, on the authority of the decision in *Upendra v. Hukum Chand*, which is also reported as *Rajani*

v. Panchananda (1) that Bholanath Ghose was not competent to attest his own signature, as an attesting witness. But we have been pressed on behalf of the Plaintiff-Respondent to hold that the decision in *Upendra v. Hukum Chand* (1) is not well-founded on principle and to refer the matter to a Full Bench. After examination of the arguments addressed to us we are unable to accede to this request.

Sec. 59 of the Transfer of Property Act provides that where the principal money secured is Rs. 100 or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. *Prima facie*, the persons who attest are different from the person who signs. The term "attest" is not defined in the statute and may consequently be taken to have been used in its ordinary sense; see *Sarurijigar Begum v. Baroda Kant* (2), where various definitions will be found quoted. The Oxford Dictionary states that the word is derived from the Latin "*ad*" and "*testari*" and means literally "to witness" or "to bear witness." This is the sense in which the term "attestation" is used by Blackstone in his commentaries (Vol. II, 307): "the last requisite to the validity of a deed is the attestation or execution of it in the presence of witnesses." The same meaning is attributed to the term by Lord St. Leonards when in his *Handy Book of Property Law* (XVIII, 136) he says that the attestation of a will should be in this form: "Signed by the above testator, in the presence of us present at the same time who have hereunto signed our names." To the same effect are the observations in *Wright v. Wakeford* (3), where it was ruled that

(1) I. L. R. 46 Cal. 522; s. c. 23 C. W. N. 290 (1918).

(2) 14 C. W. N. 974; s. c. 11 C. L. J. 563 (1910).

(3) [1812] 4 Tempt 213.

(1) I. L. R. 46 Cal. 522; s. c. 23 C. W. N. 290 (1918).

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the witnesses who attest must not only see the execution but sign their own names as part of the same transaction, so that an attestation added after many years by persons who had seen the signing of the deed will not supply the defect. Reference may also be made to *Hudson v. Parker* (4), where Dr. Lushington said: "to attest is to bear witness to a fact. Take a common example. A notary public attests a protest. He bears witness, not to the statements in that protest, but to the fact of the making of these statements. So the witnesses in a will bear witness to all that the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence." Of precisely the same import are the rules enunciated by Dr. Lushington in *Bryan v. White* (5), by Lord Campbell, C. J., in *Roberts v. Philipps* (6) and by Lord Lyndhurst, L. C., in *Burdett v. Spilsbury* (7), which were all quoted with approval by the Judicial Committee in *Shamou Patter v. Abdul Kadir* (8). All this obviously implies that the person who makes the signature is not the identical person who witnesses that the signature has been made in his presence. We are unable to accept the contention of the Respondent that the scribe who wrote out the name of the executant may be taken to have at the same time witnessed that fact, in other words, to have simultaneously performed a double function. It might have been maintained with equal plausibility that where a deed had to be executed by A, and B, under authority conferred by a power of attorney, executes it on his behalf writing thereon "A by his duly

constituted attorney B," B is competent to become an attesting witness, to witness the endorsement made by himself. Dr. Kanjilal frankly conceded that such a position was manifestly incongruous and untenable. But, plainly, no real distinction in principle can be found between the hypothetical case mentioned and the concrete instance before us. In our opinion, there is no escape from the position that a scribe cannot be an attesting witness of what he has himself written. If in the case of execution of a document by a literate man, who can write his own name, it is deemed necessary by the legislature to have two other persons as attesting witnesses, it is at least equally essential to have two independent attesting witnesses when the man is illiterate and cannot write his name which is written for him by another; *Saroopchand v. Tularam* (9). In such a case, one object of the statute in requiring attestation is to ensure identity of person and to prevent the fraudulent substitution of another document, another object may be to surround the executant with witnesses who may be able to judge of his capacity. If for the attainment of these and other objects, two attesting witnesses are necessary when the executant is literate, the need is very much more imperative, where the executant is illiterate, and the additional question must arise whether his name has really been written by a person authorised in that behalf. It is plain that the contention of the Respondent ignores the fundamental distinction between execution and attestation. The term "executed" signifies the acts required of the person who makes the deed either himself or through a representative, the term "attested" signifies the act of the witnesses who see the execution; obviously the same person cannot possess the two-fold capacity.

(4) 1 Rob. Ecol. 14, 26.

(5) 2 Rob. (Ecol.) 315 (317) (1850).

(6) 4 E. & B. 450; 24 L. J. Q. B. 171 (1855).

(7) 10 Cl. & F. 340 (1848).

(8) L. R. 39 I. A. 218; s. c. I. L. R. 35 Mad.

607; 16 C. W. N. 1008 (1912).

(9) [1911] 8 N. L. R. 17.

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Reliance has been placed by the Respondent upon a series of judicial decisions which are not directly in point and lend no real support to his contention. In *Dinamoyee v. Bun Behari* (10), a lady executed a mortgage deed by putting her finger mark to the same; thereafter a person, who saw her put the finger mark, wrote her name at her request and added the words "by the pen of " before his name written by himself. It was ruled that the document was executed by the lady and not by him on her behalf, and that, consequently, he was a competent attesting witness. A similar view was adopted in *Govind Bhikaji v. Bhan Gopal* (11). There, an illiterate person signed a mortgage deed by putting his mark to it, which mark was subscribed by the scribe, of the deed. The deed was attested by two independent witnesses. It was ruled that the deed had been duly executed and attested. The execution was complete when the mortgagor, unable to write his name, placed his mark thereon. The function of the scribe ended when he signed his name at the conclusion of the body of the document; he thereafter signed his own name under the description of the mark made by the executant, with a view to authenticate the mark, that is, to vouch the execution of the deed by the markman, in other words, to act as an attesting witness. In *Sasi Bhusan v. Chandra Peshakar* (12), the question arose whether for purpose of valid attestation it is essential that the witness must sign his name personally. It was ruled that a deed is properly attested, when the signatures of the witnesses, who are illiterate and unable to write, are affixed for them by another per-

son at their request. The Court observed that it had previously been held, in the case of executant himself, that his name may be written on his behalf by another person authorised for the purpose, *Deo Narain v. Kukur Bind* (13). It may be added that the view taken in *Sasi Bhusan v. Chandra Peshakar* (12) is not inconsistent with that adopted in *Paramhans v. Randhir* (14) and *Ram Bahadur v. Ajodhya Singh* (15). These cases, however, do not support the proposition that the person who, at the request of the mortgagor, writes out the name of the mortgagor as executant, can also become an attesting witness that is, attest the signature made by himself. On the other hand, the principle of the decisions in *Sarurijigar Begum v. Baroda Kant* (2) and *Debendra Chandra v. Behari Lal* (16), militates against the contention of the Respondent. In both these cases, it was ruled that a person who is a party to a deed cannot be regarded as an attesting witness, and this conclusion was supported by reference to the decisions in *Irreshfield v. Reed* (17) and *Wickham v. Marquis of Bath* (18), which recognise the fundamental principle that the law insists upon attestation in certain cases in order that a witness shall be present to testify that the party who purports to have executed the deed had done the act required; consequently, a co-executant or a mortgagee cannot be an attesting witness. The reason for this view was emphasised by Lord Selborne, L. C., in a well-known passage in his judgment in the

(10) 7 C. W. N. 160 (1903).

(11) I. L. R. 41 Bom. 334 (1913).

(12) I. L. R. 33 Cal 861; 4, 5, 4 C. L. J. 41 (1906).

(2) 14 C. W. N. 974; s. c. 11 C. L. J. 535 (1910).

(12) I. L. R. 33 Cal 861; s. c. 4 C. L. J. 41 (1906).

(13) I. L. R. 24 All. 319 (1902).

(14) [1916] 14 All. L. J. 328.

(15) 20 C. W. N. 399 (1916).

(16) 16 C. W. N. 1075 (1912).

(17) [1842] 9 M. & W. 404; 60 R. R. 769.

(18) [1865] L. R. 1 Eq. 17, 24.

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case of *Seal v. Claridge* (19), which may be usefully recalled here: "I was at first surprised that no authority could be found directly in point; but no doubt the common sense of mankind has always rejected the notion that the party to a deed could also attest it. I do not pay much attention to the old rule of evidence whereby interested persons were rendered incompetent as witnesses; it has now been done away with by statute. What is the meaning of the word 'attestation' apart from the Bills of Sale Act, 1878? The word implies the presence of some person who stands by, but is not a party to the transaction. The view which I take seems to be confirmed by the circumstance that attestation is unnecessary, unless it is required by an instrument creating a power or by some statute. If the argument of Mr. Dugdale is correct, the attestation required by the Bills of Sale Act, 1878, would be satisfied by the mere repetition of the signature of a party to the deed; can this be regarded as a useful provision? I do not place much reliance upon what was said by Lord Eldon, L. C., in *Coles v. Trecothick* (20), but I do rely upon *Freshfield v. Reed* (17). It follows from that case that the party to an instrument cannot 'attest' it." Reference may further be made to the exposition of the meaning of the term "attestation" given by the Judicial Committee in the cases of *Shamu Patter v. Abdul Kadir* (8), *Padarath Haldar v. Ram Nomi* (21) and *Ganga Pershad v. Isri Pershad* (22), see also *Sarurijigar Begum*

v. Baroda Kant (2). The substance of the matter is that when an instrument is required to be attested, the meaning is that a witness must be present at its execution and shall testify that it has been executed by the proper person; *Freshfield v. Reed* (17). To attest an instrument is accordingly, not merely, to subscribe one's name to it as having been present at its execution, but includes also essentially the presence in fact at its execution of some disinterested person, capable of giving evidence as to what took place; *Roberts v. Philipps* (6) and *Ford v. Kettle* (28). We hold accordingly that the decision of Fletcher and Walmsley, JJ., in *Upendra v. Hukum Chand*, which is also reported as *Rajani v. Panchananda* (1) is well-founded on principle and we are not prepared to depart from the rule enunciated therein. The inference follows that the mortgage deed in suit was not duly attested and consequently does not operate as a mortgage; nor does it create a charge; *Shamu Patter v. Abdul Kadir* (8) and *Lian Narain v. Adhindra Nath* (24). The mortgage decree made by the Court below must accordingly be set aside.

The question next arises; whether the Plaintiff is entitled to a personal decree for recovery of the money which has been found to have been advanced. As the suit was instituted more than six years after the due date of the bond, this involves the question of limitation which has not been considered from this point of view. Its

(8) L. R. 39 I. A. 218; s. c. I. L. R. 35 Mad. 607; 16 C. W. N. 1009 (1912).
 (17) [1842] 9 M. & W. 404; 60 E. R. 769.
 (19) 7 Q. B. D. 516 (519) (1881).
 (20) 9 Ves. 234 at p. 251 (1804).
 (21) L. R. 42 I. A. 163; s. c. I. L. R. 37 All. 474; 19 C. W. N. 991 (1915).
 (22) L. R. 45 I. A. 94; s. c. I. L. R. 45 Cal. 749; 22 C. W. N. 607 (1918).

(1) I. L. R. 44 Cal. 522; s. c. 23 C. W. N. 290 (1918).
 (2) 14 C. W. N. 974; s. c. 11 C. L. J. 568 (1910).
 (6) 4 E. & B. 450; 24 L. J. Q. B. 171 (1856).
 (8) L. R. 39 I. A. 218; s. c. I. L. R. 35 Mad. 607; 16 C. W. N. 1009 (1912).
 (17) [1842] 9 M. & W. 404; 60 E. R. 769.
 (23) 9 Q. B. D. 189 (1882).
 (24) I. L. R. 44 Cal. 368; s. c. 21 C. W. N. 388 (P. C.) (1916).

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decision must depend upon the genuineness or otherwise of the payments of interest alleged to have been made by the Defendant to the Plaintiff within the meaning of sec. 20 of the Indian Limitation Act.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him for reconsideration of the question of limitation with reference to the provisions of sec. 20 and Art. 116 of the Indian Limitation Act. The Subordinate Judge will be at liberty to take additional evidence to be adduced by both sides upon the question, whether the alleged payments were made, and if so, on what dates. The costs will abide the result.

BUCKLAND, J.—This is an appeal by the Defendant against the decision of the learned Judge of Burdwan, dated the 30th October 1919, upholding the decision of the Munsif of Katwa in a suit on mortgage.

It has been contended that the suit should have been dismissed so far as there was a claim to realise the amount due by sale of the property purporting to have been mortgaged on the ground that the deed was not attested as required by sec. 59 of the Transfer of Property Act.

What actually are the facts as regards execution and attestation is not clear from the judgment of either of the lower Courts. The learned Munsif says in his judgment that Hari Pal one of the attesting witnesses is dead and the other one is the scribe Bholanath. He does not say how the executant executed the document. The learned Subordinate Judge has not considered the evidence on the point but has contended himself with merely observing that "the evidence on the record established that the bond in suit was attested as a mortgage bond by at least two witnesses and the Defendant admits execution." On that he has found that the document was duly attested.

In these circumstances, ordinarily, the appeal would have to be remanded for a rehearing on this point, but there is no dispute as to what occurred and we have seen the deed for ourselves.

It is common ground that the executant was illiterate, that he executed the instrument "by the pen of Sri Bholanath Ghose," the scribe, who also purports to be an attesting witness.

The point therefore is, whether in these circumstances Bholanath was a competent attesting witness. Unless Bholanath was a competent attesting witness it is immaterial, having regard to the provisions of the section, whether or how Hari Pal attested the document.

The case is clearly covered by authority. In *Rajani Kanla Bhadra v. Panchananda* (1), the facts were that the scribe executed the document for and on behalf of the mortgagor. He signed it also as a scribe and there was one other attesting witness. The scribe having executed the document for, and on behalf of, the mortgagor was held to be incompetent to attest his own signature as attesting witness even in the view that the subscription of his name as the scribe amounted to attestation.

But even were the matter *res integra* I should not be prepared to hold otherwise. Though the case [*Shamu v. Abdul* (8)] mentioned in the judgment to which I have just referred is not a direct authority upon the point, it contains observations making it clear beyond all questions what is the meaning of the word "attest." The following extract from the judgment of their Lordships will suffice: "In *Bryan v. White* (5) Dr. Lushington in 1850 laid down that "attest" means the per-

(1) I. L. R. 46 Cal. 522 : s. c. 23 O. W. N. 390 (1918).

(5) 2 Rob. (Ecc.) 315 (317) (1850).

(8) L. R. 39 I. A. 218 : s. c. I. L. R. 35 Mad. 607 ; 16 O. W. N. 1009 (1912).

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sons shall be present and see what passes and shall when required, bear witness to the facts. In 1855 Lord Campbell Chief Justice, in *Roberts v. Philips* (6) enunciated the same rule as regards the word "attested" that the witnesses should be present as witnesses and see it signed by the testator. And the principle was given effect to in the House of Lords in *Burdett v. Spilsbury* (7). The Lord Chancellor summed up the conclusion in these words:—"The party who sees the Will is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness."

Though these observations were made in cases of Wills, that does not prevent their application to the case of any instrument requiring attestation where the only point involved is the meaning of the word "attest" without qualification. A scribe who executes a document for, and on behalf of, the executant is not a person who "sees what passes" or "sees it executed," when he himself does the very thing to which by subsequently signing as a witness he professes to bear witness.

For these reasons, I agree that the deed in question was not validly attested as a mortgage and I concur in the order to be made.

J. N. R.

Appeal allowed.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 769 OF 1919.

MOOKERJEE, C. J.
FLETCHER, J.
1920,
5, August.

JANAKI NATH SINHA
Roy, Plaintiff,
Appellant,

v.
BEJOY CHAND MAHATAB
BAHADUR, Defendant,
Respondent.

Limitation Act (IX of 1908), sec. 14, applicability of, when the parties in the two proceedings are

(6) 4 R. & B. 450; 24 L. J. Q. B. 171 (1855).
(7) 10 Q. & F. 240 (1843).

not the same—Arts. 62 and 97, which applies, where an execution purchaser of a putni paid rent to the zemindar after the setting aside of the sale by the first Court and during the pendency of infructuous appeal—Existing consideration, meaning of.

Plaintiff purchased a putni at a sale held under Reg. VIII of 1819 in May 1908. In October 1910 the purchaser paid rent to the zemindar after the sale was set aside by the Court of first instance in May 1910, and during the pendency of an appeal by the zemindar, which was ultimately dismissed. There were certain proceedings for assessment of mesne profits between the purchaser and the original putnidar on the basis of the decree for cancellation of the sale. Thereafter the said purchaser in February 1916 sued for recovery of the money paid as rent to the zemindar:

Held—That the suit was barred. In view of the provisions of sec. 14 of the Limitation Act, the Plaintiff was not entitled to a deduction of the time during which the mesne profits proceedings were going on as the zemindar was not a party therein, nor was there, since October 1910, any period of time when the right of the Plaintiff to sue was suspended by reason of events over which he had no control.

PRANNATH v. ROOKEA (1), SURNOMOYEE v. SOSHEE MOOKHEE (2) and NRITYAMONI v. LAKEHAN CHANDRA (3) referred to.

That Art. 62 of the Limitation Act applied to the case. The fact that there was failure of consideration at the time the payment was made in October 1910 attracted the operation of the bar imposed by Art. 62. Art. 97 did not apply because at the time when the money was paid there was no subsisting consideration.

HUKUM CHAND BOID v. PIRTHI CHAND

(1) 7 M. I. A. 323 (1859).

(2) 12 M. I. A. 244 (1868).

(3) L. R. 43 Cal. 660; s. c. 20 C. W. N. 552 (P. C.) (1916).

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LAL CHOWDHURY (4), RAGHUMONI AUDHIKARI v. NILMONI SINGH DEB (5) and MAHOMED WAHIB v. MOHOMED AMIR (6) referred to.

This was an appeal against a decision of G. N. Roy, Esq., District Judge, Hughli, dated 17th February 1919 reversing that of Babu Kedarnath Choudhury, Sub-Judge, Hughli, dated 25th January 1918.

The facts of the case will appear from the judgment.

Babus Mohendra Nath Roy and Sitaram Banerjee for the Appellant.

Babus Bepin Behary (Hosc (Jr.) and Sarat Kumar Mitter for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

MOOKHERJEE, C. J.—This is an appeal by the Plaintiff in a suit for recovery of money paid by him to the Defendant as *putni* rent on the 14th October 1910.

It appears that the Plaintiff purchased the *putni* at a sale held under Reg. VIII of 1819 on the 14th May 1908. The *putndar* instituted a suit for cancellation of the sale, which was decreed on the 28th May 1910. The zemindar Defendant thereupon preferred an appeal which was ultimately dismissed on the 2nd May 1912. In the interval on the 14th October 1910, that is, after the Court of first instance had directed cancellation of the sale, the Plaintiff paid rent to the Defendant to prevent further sale under the Regulation. The present suit, which was instituted on the 14th February 1916, has been dismissed by the District Judge as barred by limitation. We are of opinion that this view cannot be successfully challenged.

The Appellant has argued that he is entitled to a deduction of the time which

was occupied by a proceeding for assessment of mesne-profits as between himself and the original *putnidar* on the basis of the decree for cancellation of the sale. This contention cannot be upheld in view of the provisions of sec. 1 of the Limitation Act which renders it essential that the proceedings should be between the contesting parties; here the zemindar was not a party to the proceedings for assessment of mesne-profits. Nor can it be suggested that there was, since the 14th October 1910, any period of time when the right of the Plaintiff to institute the present suit was suspended by reason of circumstances over which he had no control, so as to entitle him to invoke the aid of the rule recognised by the Judicial Committee in *Prannath v. Rookea* (1), *Surnomoyee v. Sosehee Mookher* (2) and *Nrityamoni v. Lakhan Chandra* (3). The question, thus arises, which article of the Limitation Act governs this matter. We are of opinion that Art. 62 applies to the circumstances of the case.

Art. 62 provides that a suit for money payable by the Defendant to the Plaintiff for money received by the Defendant for the Plaintiff's use must be instituted within three years from the date when the money is received. It has been pointed out in the decision of the Judicial Committee in *Hukum Chand Boid v. Pirthu Chand Lal Chowdhury* (4) that this article is intended to apply to cases which in English law are described as suits for "money had and received." The same view had been previously taken in numerous cases in this Court, amongst which may be mentioned *Raghumoni Audhikari v. Nilmoni Singh Deb* (5)

(1) 7 M. I. A. 323 (1889).

(2) 12 M. I. A. 344 (1888).

(3) I. L. R. 42 Cal. 500: 20 C. W. N. 363 (P. O.) (1913).

(4) 23 C. W. N. 731 (P. O.) (1918).

(5) I. L. R. 2 Cal. 323 (1877).

(4) 23 C. W. N. 731 (P. O.) (1918).

(5) I. L. R. 2 Cal. 323 (1877).

() R. 32 Cal. 527 (1905).

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and *Mahomed Wahib v. Mohomed Amir* (6). The fact that there was a failure of consideration at the time the payment was made on the 14th October 1910, attracts the operation of the bar imposed by Art. 62.

It has been suggested in the course of argument that Art. 97 might apply to this case. That Article provides that a suit for money paid upon an existing consideration which afterwards fails must be instituted within three years from the date of the failure. In the case before us, this article does not apply, because, as we have just explained, at the time when the money was paid there was no consideration. But even if we hold that the validity of the *putni* sale was finally decided, only on the 2nd May 1912, as the result of the appeal by the zemindar, still, the Plaintiff would be entitled under Art. 97, to sue only within three years from the 2nd May 1912. As he did not institute the suit until the 14th February 1916, even upon that view it would be barred by limitation. [*Bejoy Chand v. Tinkari* (7)].

The result is that the decree of the District Judge is confirmed and this appeal dismissed with costs.

FLETCHER, J.—I agree.

J. N. R. Appeal dismissed with costs.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

EDWARD BUCKMASTER.

EDWARD ATKINSON.

LEONARD CARSON.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

1921,

17, November.

NALAM PATTABHIRAMA RAO and
ors., Appellants,

v.

MANDAVILLI
NARAYANAMOORTHY, since
deceased, and ors.,
Respondents.

Hindu joint family business—Admission of part-

(6) I. L. R. 22 Cal. 527 (1905).

(7) 24 C. W. N. 617 (1923).

ner—Evidence—Evidence Act (I of 1872), secs. 17 and 21.

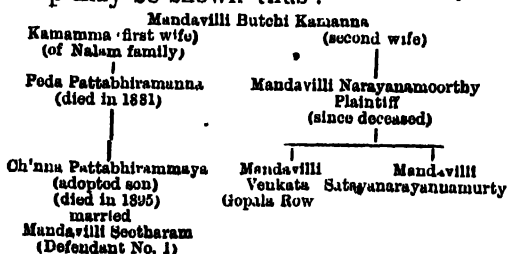
An arrangement was alleged to have been made with a Hindu joint family, part of whose property consisted of a joint family business, to take in as partner the person through whom the Plaintiff claimed to have a share in the family properties:

Held—That no such arrangements had been proved.

That a statement in a Will which suggests an inference as to a fact in issue cannot be proved by or on behalf of the person who made it or his representative in interest.

This was an appeal from a judgment of the High Court of Judicature at Madras, dated the 17th January 1917.

The facts which have given rise to the litigation may be shortly stated as follows:—All the Appellants (referred to as the Nalam family) are descendants of one Nalam Bhimanna. He had seven sons and three daughters, one of whom was Kamamma and she was married to Mandavilli Butchi Kamanna. The other two daughters were also married. Kamamma gave birth to a son named Pattabhiramanna, and died a few days later. Her husband married a second wife, and the Plaintiff is his son by her—the relationship may be shown thus:—



The said Nalam Bhimanna and his seven sons were members of a joint Hindu family and were traders by occupation. The father died in or about 1848 leaving his seven sons joint. In 1849 the seven Nalams prepared an account of the assets

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of the joint family and it was duly signed by them. In 1870 one of the seven Nalams separated from the joint family after executing a deed of partition on the 15th December 1870, which was duly registered on the 19th December 1870. In the deed the names of the seven Nalams were mentioned as constituting the joint family, and the joint estate was specified and was divided into eight instead of seven shares. One share was partitioned off to the separating brother and the settlement about the remaining seven shares was recorded in the following terms:—

“That excluding the share allotted to me as my portion out of the eight shares as per settlement already made by us, seven brothers, and excluding the six shares which you, six persons, would divide on the whole out of the seven shares, the remaining share should be dealt with by you, six persons, and your heirs as you like.”

The six Nalams and their children continued to live, and trade, and hold property jointly till 1896, when they separated. It appears that the daughters of Nalam Bhimanna together with their children lived with and were maintained by the Nalams. At the time of the partition the representatives of the daughters asked that their claims upon the bounty of the Nalam family—which was wealthy—ought to be considered. A family council was then held, and a family settlement was made for partitioning the joint estate. All the family properties were divided into seven shares: one share was awarded to each of the six Nalams, and out of the remaining share a three-eighth share was allotted to Defendant No. 1, as representing the branch of the daughter Kamamma, and a four-eighth share to the issue of the second daughter, and an one-eighth share for charity at Rajahmundry.

The moveables were divided in 1896,

but the division of the immoveable properties was not finished before 1900. The Plaintiff (since deceased) who would have been the nearest reversioner on the death of Defendant No. 1, questioned the partition and filed the present suit on the 29th July 1910 against Defendant No. 1 and the Appellants who represented the Nalam family.

In his plaint the Plaintiff alleged that Pattabhiramanna, the son of Kamamma (the eldest daughter of Nalam Bhimanna) was a co-parcener of the Nalam Joint family equally with the Nalams, under a special agreement, and strongly relied upon a Will alleged to have been executed by the said Pattabhiramanna on the 11th July 1881. The material portion of the Will is the following:—

“After my father, Butchi Kamanna Garu, married Kamamma, the eldest daughter of Nalam Bhimanna Garu, residing at Mandapeta, I was born to her. But as she died 10 days after I was born, my mother's father, the said Bhimanna Garu, his wife Papamma Garu, and his seven sons Virayya and others, had since then kept me in their house, supported me, and educated me and taught me wisdom and business. As they arranged to get my second maternal uncle, Venkanna Garu's daughter married to me and to give me a share equally along with my maternal uncles, without my having anything to do with the property of my natural father, I was attending to their business matters carried on at Mandapeta, Vizianagram, Cocanada, Berhampur, Rajahmundry, Tallarevu, Madras and other places, for some time jointly with my maternal uncles and for some time myself singly.”

The Subordinate Judge of Rajahmundry held that the Plaintiff had failed to establish that the said Pattabhiramanna owned and possessed one-seventh share in the

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Nalam joint family estate in pursuance of the special agreement alleged in the plaint, or on any other ground. The only evidence which the Plaintiff adduced in support of his case was the alleged Will of the said Pattabhiramanna himself and the learned Subordinate Judge refused to attach any weight to it, firstly, because it was a statement made by Pattabhiramanna in his own interest, secondly, because in making it, Pattabhiramanna's object was to provide for his adopted son and thirdly, because its execution had not been proved beyond question.

The Subordinate Judge made a decree dismissing the Plaintiff's suit with costs and from that decree the Plaintiff appealed to the High Court of Justice at Madras, which delivered judgment on the 17th January 1917. The learned Judges of the High Court came to a contrary conclusion. They held that the Will of the said Pattabhiramanna was based on "a consciousness on the part of Peda Pattabhiramanna that he was entitled to one-seventh of the properties, that is, to a share equal to that of the sons of Nalam Bhimanna." In their opinion "all his acts shewed that he considered himself as being entitled to deal with the assets of the business and the income of the properties as a share-holder, and that position was acquiesced in by the members of the Nalam family." They found that "the probabilities of the case strongly point to Peda Pattabhiramanna having acted throughout his life under some such arrangement, if not as that mentioned by him in the Will."

They also considered that the partition carried out in 1896 could not be supported as a family arrangement since, in the opinion of the learned Judges, there was no dispute as to the rights of the parties at the time. As regards the question of limitation they held that the Plaintiff's

claim concerning the moveable properties was barred inasmuch as "the partition was practically completed in 1900" and the present suit was brought in 1910, that is, more than six years after the expiry of the period allowed by Art. 120 of the Indian Limitation Act, 1908. They allowed the Plaintiff's claim in respect of the immoveable properties, apparently holding that the period of limitation commenced to run from 1900 and that it required 12 years to bar the suit.

The result was that the High Court allowed the Plaintiff's appeal in part, set aside the decree of the said Subordinate Judge, and made a decree declaring that Pattabhiramanna, the deceased husband of the 1st Respondent (1st Defendant), was entitled to 1/7th (one-seventh) share in the immoveable properties which were the subject of partition in 1900 and that any alienation made by the 1st Defendant of such properties by way of sale or release in favour of the members of the Nalam family is not valid or binding beyond the life-time of the 1st Respondent. (1st Defendant).

The Appellants appealed from the said decree of the High Court to His Majesty in Council.

Messrs. DeGruyther, K. C. and B. Dubé for the Appellants.

The main question is whether Pattabhiramanna was a partner in the Nalam family business.

He conducted the family business in his own name for a number of years but this was only to facilitate trade.

Other members of his family also managed branches of the business in their own names but it is not suggested that they too became partners.

The statement in the Will is untrue and in any case cannot be evidence against me (Evidence Act, I. of 1872, secs. 17 and 21).

There is no disinterested evidence to

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show that Pattabhiramanna had a partner's interest or to substantiate the alleged arrangement.

The Defendants have sworn that Pattabhiramanna's adopted son was not taken as a partner and their evidence has been accepted by the first Court.

The High Court say that the suit is barred as to a declaration for moveables but not for immoveables.

[SIR L. JENKINS.—So far as I know if it is for a declaration it does not matter what the declaration is for.]

The Respondents were not represented.

[The Board took time to consider the advice that they should tender to His Majesty and on the 17th November 1921].

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—This is an appeal from a decree of the Madras High Court, dated the 17th January 1917, reversing a decree passed on the 24th July 1913, by the Temporary Subordinate Judge of Rajahmundry.

The Defendants Nos. 2 to 49 are members of a Hindu family known as the Nalam family. Their common ancestor was Nalam Bhimanna, who died in or about 1848, leaving seven sons and three daughters. The sons were Virayya, Venkanna, Ramanna, Vallabharayudu, Pattabhiramanna, Subbayya, and Chalamayya. The daughters were Kamamma, Venkamma, and Jaggamma.

The fifth of the sons, Pattabhiramanna, separated from his brothers in 1870. The Defendants Nos. 2 to 49 are the descendants of the six brothers who continued joint, and they are the Appellants in this appeal.

Kamamma married Mandavilli Butchi Kamanna, and the only child of that marriage was Peda Pattabhiramanna. He died in 1881, leaving an adopted son,

Chinna Pattabhiramanna, who died in 1895 without issue but survived by his widow, Mandavilli Seetharam. She is Defendant No. 1.

The original Plaintiff was Mandavilli Narayanamoorthy, a son of Mandavilli Butchi Kamanna by his second marriage, and so a half-brother of Peda Pattabhiramanna. On his death his sons, Mandavilli Venkata Gopala Row, and Mandavilli Satayanarayannamurthy, were substituted as parties in his place. They are the Respondents in this appeal.

In 1896 the members of the Nalam joint family as then constituted separated, but the partition was not completed until 1900. Though there were only six branches, the family property was divided into seven shares. One share was allotted to each branch, and the remaining seventh share was allotted as to three-eighths to Defendant No. 1 as the representative of Kamamma, four-eighths to the issue of the second daughter, Venkamma, and one-eighth to charity at Rajahmundry. The purpose of this suit is to impugn this partition and establish the Plaintiffs' claim as heir in reversion to one-seventh of the Nalam properties.

In the plaint it is alleged that Nalam Bhimanna arranged that Pattabhiramanna should do business with his sons and be given an equal share along with his sons; and that this was agreed to by the sons; that the partition of 1896 was made only with the evil intention of disinheriting the reversioners and there was no legal necessity for it; and that the cause of action arose from November 1900.

By the plaint it is prayed that a decree may be passed "declaring that the division effected among the members of the families of Defendants Nos. 2 to 49 concerning the joint property wherein the first Defendant was entitled to one-seventh share, is invalid after the first Defendant's

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life-time, so far as it relates to the 1st Defendant's share of the property, and cannot affect the reversioners." It will thus be seen that the Plaintiffs' claim is based on an alleged right in Peda Pattabhiramanna to a share in the Nalam joint family property. It was rejected by the first Court, but on appeal the claim was affirmed by the High Court and a decree passed in the Plaintiff's favour. The right asserted could not have been an inherent one, and so an arrangement under which it is alleged to have accrued in set up. This arrangement is pleaded and the following issue was settled :—

"1. Whether Nalam Bhimanna agreed as alleged in para. 5 of the plaint to give a share in his family properties to Pattabhiramanna along with his sons, and whether the sons of Bhimanna assented to that arrangement?"

The burden of establishing this agreement and the sons' assent to it is on the Plaintiff, and it is necessary to see whether this burden has been discharged.

First the Plaintiff seeks to rely on a statement in the Will of Peda Pattabhiramanna, dated the 11th July 1881, in these terms :—

"After my father, Butchi Kamanna Garu, married Kamamma, the eldest daughter of Nalam Bhimanna Garu, residing at Mandapeta, I was born to her. But as she died 10 days after I was born, my mother's father, the said Bhimanna Garu, his wife Papamma Garu, and his seven sons, Virayya and others, had since then kept me in their house, supported me, and educated me and taught me wisdom and business. As they arranged to get my second maternal uncle, Venkanna Garu's daughter married to me and to give me a share equally along with my maternal uncles without my having anything to do with the property of my natural father, I was attending to their business matters carried on at Mandapeta, Vizianagram, Cocanada, Berhampur, Rajahmundry, Tallarevu, Madras and other places for some time jointly with my maternal uncles and for some time myself singly."

Even treating this as a statement which suggests an inference as to a fact in issue, still it cannot be proved by or on behalf of the person who made it or his representative in interest (Evidence Act, secs. 17 and 21).

Therefore standing alone, the statement in the Will cannot be proved by or on behalf of the Plaintiff as evidence of what it asserts.

To escape from this difficulty the Plaintiff contends that the course of dealing in the family, the conduct of Peda Pattabhiramanna in relation to the properties in his possession and the independent status which he held and enjoyed, the conduct of the executors in acting on the Will, and the treatment of him by the family, support the view that the statement in the Will is true. Thus it has been contended that the Will was acted on by the executors, who were members of the Nalam family, with the result that the statement was adopted as true.

What happened is this. Property was purchased with the joint funds of the family, and the transfer was taken in the name of Peda Pattabhiramanna. On his death it became necessary to obtain a transfer from his name, and accordingly, on the 6th October 1882, a petition was presented on behalf of Nalam Kamaraju and his brother Nalam Venkatarayuloo, to the Deputy Collector and Deputy Registrar of Grants and Certificates, Madras, praying for the issue of a certificate. In the application it was stated that the property had been acquired by inheritance, the grantee or registered holder being the brother-in-law of the Petitioners, and that the registered holder being on the point of death, wrote and delivered a Will stating that the two brothers-in-law might take a fresh certificate after his death. There is a clause in the Will to that effect. The certificates were issued as prayed.

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Though this may be properly regarded as an assent by the two executors that the Will was duly executed, it cannot be treated as an admission by the members of the family that the statement in the Will, on which reliance is now placed, was true. What was done by the executors was a requisite or at any rate convenient step for the purpose of procuring a transfer in the Registry, but cannot be deemed an admission of title in the sense urged by the Plaintiff.

The High Court was influenced by the idea that account books had been kept back, and if there was any real foundation for this, there might be ground for considering whether there was a presumption that these accounts, if produced, would be unfavourable to the Defendants. But when regard is had to all the facts disclosed, there is no justification for the view that books were improperly withheld, as is conclusively shown in the judgment of the first Court. Nor do their Lordships think that the items in the accounts that have been produced when properly considered really support the Plaintiff's case; for it has to be borne in mind that Peda Pattabhiramanna was a son-in-law and in management of the branch where he resided, and it is no matter for surprise if he was treated with favour. And in this connection it is significant that the family of Vijjapu, also a son-in-law, and engaged in the family business, was treated with similar favour, and yet it never has been suggested that this was evidence of or even pointed to a right of participation in the Nalam family property.

But over and above this infirmity in the Plaintiff's proof, the dealings with the property are inconsistent with the right he claims. According to his case Peda Pattabhiramanna acquired his share before the date of Ex. I, which is a Cadjan leaf dated the 24th August 1849. It embodies the

terms drawn up by the seven sons for the guidance of the Nalam family in reference to the joint family property. Peda Pattabhiramanna was not a party to it, nor does it contain any reference to any share of his in the property. The first Court relied on this exhibit as genuine. The High Court, however, doubted its authenticity, but on grounds that do not satisfy their Lordships, and they prefer to accept the appreciation of the Subordinate Judge as to its genuineness.

On the 15th of December 1870, a partition deed, Ex. II, was executed, when Pattabhiramanna separated from the Nalam family. This document contains no reference to any share such as that now claimed. It treats the property, after deduction of the separating brother's share, as divisible into seven shares, six of which were to belong to the remaining six branches, while the seventh share was to be dealt with by these six branches as they liked. These branches continued joint till 1896. In that year the partition now attacked began. Its terms have already been set out.

In the plaint it is described as "made only with the evil intention of disinheriting the reversioners of the said property and not *bonâ fide*." But no such case is proved. In its omission of all notice of a one-seventh share as belonging to the line of Kamamma, this partition is in precise accord with the dispositions of 1849 and 1870, and it is difficult to suppose that they were both made without the knowledge of Peda Pattabhiramanna. Moreover, the members of the six branches did not gain by the omission; they did not keep for themselves the one-seventh share, but allotted it in the manner indicated. Then again it is significant that the lines of the two daughters both benefited, and that Appalaraju, the first Defendant's father took part in this allotment, and

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never suggested that the one-seventh share belonged to his daughter, or that she had any better claim than the line of Venkamma the sister. Nor did the first Defendant herself demur to the allotment which was made. On the contrary, she expressly assented to it. This the Plaintiff treats as a relinquishment and in effect an invalid alienation of the one-seventh share to which he claims to be reversionary heir.

In their Lordships' opinion the Plaintiff has failed to prove the arrangement or agreement under which a share is alleged to have been given to Peda Pattabhiramanna, and they will humbly advise His Majesty that the decree of the High Court ought to be reversed and the suit dismissed with costs in both the lower Courts. The Respondents must also pay the costs of this appeal.

Solicitor: *Mr. Douglas Grant* for the Appellants.

G. D. M.

Appeal allowed.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

1921,

Heard, 17, and

18, February.

Judgment,

19, April.]

MOSAMMAT SUKHI,

Appellant,

v.

MUNSHI GHULAM

SAFDAR KHAN and

ors., Respondents.

Successive mortgages—Suit by first mortgagee without impleading puisne mortgagee—Purchaser at mortgage sale, may set up first mortgage as shield in puisne mortgagee's suit—Puisne mortgagee's right to be placed in the same position in which he would be if he had been impleaded.

Under r. 5 of Or. XXXIV of the Civil Procedure Code (which has repealed sec. 89 of the Transfer of Property Act) an

owner of a property who is in the right of a first mortgagee and of the original mortgagor, as acquired at a sale under the first mortgage, is entitled, at the suit of a subsequent mortgagee who (not having been made a party in the first mortgagee's suit) is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield.

HET RAM v. SHADI JAL (1), MATRU MAL v. DURGA KUNWAR (2) and VANMIKALINGA MUDALI v. CHIDAMBARA CHETTY (3) referred to.

But in such a case, the puisne mortgagee (Plaintiff) also is entitled to be put in the position which he would have occupied had he been made a party to the first mortgagee's suit.

After two mortgages had been effected by the owner of certain properties, the first mortgagee sued on his mortgage and purchased the property without impleading the second mortgagee. Later on his successor in interest executed another mortgage in favour of the Plaintiff. Subsequently the second mortgagee sued on his mortgage without impleading the Plaintiff, and in that suit the then owners recovered from the second mortgagee the amount of the first mortgage (which they set up as a shield), but as they failed to redeem the second mortgagee the property was sold and purchased by the latter. In Plaintiff's suit to enforce Plaintiff's mortgage against the property in the hands of the second mortgagee:

Held—That the amount of the first mortgage had been wrongly taken away by the owners, the same being then subject to the mortgage of the Plaintiff, and that therefore in this suit unless the Defendant paid to the Plaintiff that amount with in-

(1) L. R. 45 I. A. 130: s. c. 22 C. W. N. 1033 (1918).

(2) L. R. 47 I. A. 71 (1919).

(3) I. L. R. 29 Mad. 37. (1905).

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terest Plaintiff was entitled to get a decree for the sale of so much of the estate as would realise that sum, and that the Plaintiff should get a decree for sale of the rest of the estate on condition that the Plaintiff paid to the Defendants the amount or the decree passed on the second mortgage.

Appeal against a decree, dated 16th January 1917 of the High Court at Allahabad, varying the decree of the Subordinate Judge of Agra, dated the 23rd February 1915.

The facts of the case will sufficiently appear from their Lordships' judgment.

Mr. K. V. L. Narasimham for the Appellant.—Second mortgagee brings an action without making the widow a party. He made the grantees parties. It was the widow who made a gift of the properties. Her rights are not therefore affected.

Our prayer was that we should be allowed to sell the whole property free from all mortgages. The High Court held that the 1883 and 1884 mortgages still subsisted against us. *Gokuldas v. Rambux* (4) and *Ibrahim Hossein v. Ambika Prosad* (5). My contention is that the decree has wiped out the second mortgage of 1883, and so the mortgagees under the deed of 1883 (the present Respondents) are not entitled to the amount of the decree on their suit. *Het Ram v. Shadi Lal* (1) and *Izzat-un-nisa v. Pertab Singh* (6), *Toulmin v. Steere* (7), sec. 101, Transfer of Property Act, sec. also sec. 89.

[*MR. ANEER ALI*.—The only question that you could raise is one of procedure.]

The case here is that the second mortgagee had a conditional sale. Therefore throughout he wanted to become the owner. So sec. 101 of the Transfer of Property Act must not be presumed to apply. He had no intention of keeping the mortgage debt alive. The difference between the English and the Indian law as regards foreclosure is as stated in sec. 87 of the Transfer of Property Act. In England a decree may be reopened. Or. XXXIV, r. 3, Civil Procedure Code, Transfer of Property Act, secs. 86 and 87 corresponding to Or. XXXIV, rr. 2, 3, 4 and 5, Civil Procedure Code. The second mortgage (1883) was not to carry interest after the period was over according to the deed. The mortgagee's laches is responsible if he loses his interest, so if an account is taken no interest should be given to him.

Mr. Kenworthy Browne for the Respondents.—I was not a party to first mortgagee's suit. The question to be decided is what is the result of my omission to make the widow (Appellant) a party. *Het Ram v. Shadi Lal* (1). Secs. 89 and 87, Transfer of Property Act are different. Security is not mentioned in sec. 87, *Het Ram v. Shadi Lal* (1) based on sec. 87, Transfer of Property Act and Limitation Act. See *Matru Mal v. Durga Kunwar* (2). Here sec. 89 (Transfer of Property Act) was in question. It lays down when a first mortgagee gets a decree and purchases the property without making the second mortgagee a party, then the second mortgagee must pay up the first one, before he could come in, *Gokuldas v. Rambux* (4). I did exactly what the puisne mortgagee did in *Matru Mal v. Durga Kunwar* (2).

(1) L. R. 45 I. A. 130: s. c. 22 C. W. N. 1033 (1918).

(4) L. R. 11 I. A. 126 (1884).

(5) L. R. 39 I. A. 68: s. c. I. L. R. 39 Cal. 527; 16 C. W. N. 505 (1912).

(6) L. R. 36 I. A. 203: s. c. 13 C. W. N. 1143 (1909).

(7) 3 Mer. 210.

(1) L. R. 45 I. A. 130: s. c. 22 C. W. N. 1033 (1918).

(2) L. R. 47 I. A. 71 (1919).

(4) L. R. 11 I. A. 126 at pp. 130, 133 (1884).

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[MR. AMEER ALI.—Your opponent's point is that it is not a decree for sale but for foreclosure.]

See *Mirza Yadalli Beg v. Tukaram* (8).

Under *Gokuldas v. Rambux* (4) and sec. 101 of the Transfer of Property Act, the law is not to be restricted. I stand on *Matru Mal v. Durga Kunwar* (2) and with regard to foreclosure I stand on the difference between secs. 87 and 89 and on *Mirza Yadalli Beg v. Tukaram* (8).

As regards accounts there seems to have been no question of this raised in the Court below.

Mr. K. V. L. Narasimham in reply.—There is no difference between sec. 87 and sec. 89. The mortgagor can never sue. Hence the difference in the wording. There is no need to add the word "security" in the latter section. *Matru Mal v. Durga Kunwar* (2), really confirms *Het Ram v. Shadi Lal* (1). Lays stress on the fact that it is the decretal amount and not the mortgage amount.

Mirza Yadalli Beg v. Tukaram (8) was the case of a transferee from the mortgagors. My case is that I am the mortgagee.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—This is a suit by a mortgagee, Musammat Sukhi, to sell a property called Rasulpur. The facts out of which the suit arises are as follows:—

Nand Ram and others, the owners of the property in question and of other properties, executed on the 3rd January 1874, and the 10th June 1875, two simple mortgages in favour of Kirpa Ram, now deceased, the husband of the Plaintiff.

(1) L. R. 45 I. A. 130; s. c. 22 C. W. N. 1038 (1918).

(2) L. R. 47 I. A. 71 (1919).

(4) L. R. 11 I. A. 126 (1884).

(8) L. R. 47 I. A. 207 at pp. 210, 212; s. c. 25 C. W. N. 247 (1920).

Subsequently, on the 15th January 1883, they executed another mortgage of the property in question alone by way of conditional sale in favour of the first Respondent, Ghulam Safdar Khan and another person whom the second and third Respondents now represent. These mortgages were all duly registered. In 1886, Kirpa Ram, the mortgagee, raised an action for payment and sale, but he omitted to implead the holders of the mortgage of 1883. In that suit he obtained a decree for sale. The property was sold and Kirpa Ram himself purchased at the judicial sale. Kirpa Ram died leaving a Will dated in 1895 in favour of his widow, the Plaintiff. She obtained probate in 1898. She thereafter made a gift of the properties to which she had succeeded including the property in question to Jag Ram and Net Ram, her nephews. They at the same time covenanted to pay her Rs. 1,200 a year for maintenance and in security of this obligation they hypothecated the properties including the property in question by way of mortgage. The mortgage was dated the 14th October 1902, and was duly registered.

In 1910 the Respondents, the mortgagees in the mortgage of 1883, brought a suit on their mortgage against Jag Ram and Net Ram, but omitted to implead the Plaintiff. Jag Ram and Net Ram put forward the mortgages of 1874 and 1875 as a shield and accordingly the Respondents had to pay into the Court the sum of Rs. 2,954. Having so done and Jag Ram and Net Ram not choosing to redeem, the Respondents were adjudged owners of the property. This was finally settled in 1913.

In 1914, the Plaintiff raised the present suit in respect of her mortgage, the sums due under the agreement to pay maintenance amounting to over Rs. 10,000. It was not defended by Jag Ram and Net

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Ram, but appearance was made for the Respondents who held the property in virtue of the decree they had obtained in 1913, upon their mortgage of 1883. The Subordinate Judge decreed the suit, but on condition that the Plaintiff repaid to the Respondents the sum of Rs. 2,954 which they had paid to the first mortgagees. On appeal the High Court altered this by adding the condition that the Plaintiff should also pay the sum of Rs. 8,649-13-7, being the sum found due to the Respondents in the suit of the mortgage of 1883, in respect of which they were given the foreclosure decree of the property. Appeal has now been taken to His Majesty in Council.

The Appellant's counsel relied entirely on the case of *Het Ram v. Shadi Lal* (1). In that case a property had been twice mortgaged by way of simple mortgage, one in 1880, and another in 1881. Het Ram purchased the property from the mortgagee (?) in 1883. In 1885 the mortgagee of 1880 obtained against the mortgagor and Het Ram a decree absolute for sale under sec. 89 of the Transfer of Property Act, 1882. He did not implead the mortgagee under the mortgage of 1881. He took no further steps under the decree and the property was not brought to sale. He died, and was succeeded to by Het Ram as his heir. In 1910, the mortgagee under the mortgage of 1881 instituted the suit. It was held that Het Ram could not set up the mortgage of 1880 as a shield, because the decree of 1885 was (1) barred by limitation, (2) inoperative as against the Plaintiff who had not been made a party to the suit and because the mortgage itself was gone because of the terms of sec. 89 of the Transfer to Property Act, 1882. The Appellant urged that the same result followed in this case.

The mortgagor of 1883, having omitted to implead the Appellant, she was not bound by the decree. The mortgage of 1883 was no longer available because it was merged in the decree.

The Respondents on the other hand relied on the case of *Matru Mal v. Durga Kunwar* (2). In that case a property had also been the subject of two mortgages of 1872 and 1879 respectively. The mortgagee of 1872 obtained in 1884 a decree for sale under the same sec. 89 of the Transfer of Property Act, 1882, but omitted to implead the second mortgagee. A lady who was an assignee of the second mortgage raised suit in 1909. The owner resisted the decree unless he was paid the whole amount due under the first mortgage with interest calculated at the rate stipulated therein. The Plaintiff offered to pay the amount under the decree of 1884, but refused to pay the amount of the mortgage so calculated. The Subordinate Judge gave effect to the condition of the owner. The High Court altered and gave effect to the offer of the Plaintiff. The owner then appealed. The Board adhered to the judgment of the High Court.

It will be noticed that the Plaintiff there offered to pay the sum in the decree of 1884. *Het Ram's* case (1) had not at the date of the High Court judgment been decided, and it does not appear to have suggested itself to the Plaintiff that she could argue that the effect of sec. 89 was to destroy the mortgage of 1872 and prevent its ever being set up again. The head-note of that case, however, bears that it was held that the condition upon which the second mortgagee was entitled to a sale decree was the payment to the decreeholder of the amount due under the decree in respect of the first mortgage. If this

(1), L. R. 45 I. A. 130; s. c. 22 C. W. N., 1083 (1918).

(1) L. R. 45 I. A. 130; s. c. 22 C. W. N., 1083 (1918).

(2) L. R. 47 I. A. 71 (1919).

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were really so, it would be necessary to consider how far such a pronouncement could stand beside the decision in *Het Ram's case* (1). In their Lordships' view it is not necessary to consider that question. The decision in *Het Ram's case* (1) is based on two propositions. The first is that the puisne mortgagee is not barred by the decree and the sale following thereon. That in *Het Ram's case* (1) is based on two points which are, it must be admitted, alternative and not cumulative: (1) that the decree was useless in respect of limitation and (2) that the second mortgagee had not been impleaded. Although the first point has no application to this case, the second has. But the second proposition which was absolutely necessary for the judgment was that the mortgage was gone for ever so soon as the decree of sale was obtained; and that was based on the express words of sec. 89 of the Transfer of Property Act, 1882, which ends after providing for the decree "and thereafter the Defendants' right to redeem and the security shall both be extinguished." Now the group of secs. 85-90 inclusive of the Transfer of Property Act, 1882, were repealed by the Code of Civil Procedure of 1908, and were replaced by the rules under Or. XXXIV. In these rules the words above quoted are omitted in the rule which corresponds to sec. 89. They do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of Or. XXXIV, which are limited to providing for the extinction of the debt.

The difficulty which had arisen as to these words in several cases, e.g., *Vanmikalinga Mudali v. Chidambara Chetty* (3) which case it may be mentioned does not seem to have been brought to the

notice of the Board in *Het Ram's case* (1), therefore no longer arises. The decree in this case was in 1910, and was, therefore, under the Code of Civil Procedure Rules and not under the section of the Transfer of Property Act, 1882.

Now the words being gone their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, viz., that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield. From this it follows that the omission by the Respondent Ghulam Safdar Khan to make the Plaintiff a party to the suit instituted by him to execute his mortgage of 1883 does not prevent him from setting up that mortgage in cases where he would have been so entitled before the Act of 1882; and the present dispute is within the benefit of this ruling.

But then there is the question of the position due to the original mortgages of Rs. 2,924, and unfortunately this seems not to have been very carefully considered in the judgment below. The Subordinate Judge held that the Defendants were entitled to set up this as a shield because the Defendants had paid this sum to the original first mortgagees as a condition of getting the property; and that as the Plaintiff's title flowed from the first mortgagees, she could have no higher right than the first mortgagees, and must be bound by anything done by them. The High Court seemed to think that the same arguments that applied to the mortgage of 1883 also applied to the earlier mortgages.

The situation, however, must be looked

(1) L. R. 45 I. A. 130: s. c. 22 C. W. N. 1033 (1913).

(3) L. L. R. 29 Mad. 37 (1905).

(1) L. R. 45 I. A. 130: s. c. 22 C. W. N. 1033 (1913).

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at more closely than this. The general principle is stated rightly by the High Court. It is this:—"The Plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the Court to give the Plaintiff the opportunity of occupying the position which she would have occupied if she had been a party to the former suit." Now the original mortgagee having bought the estate at the sale in the suit was the owner of both the mortgage and the equity of redemption merged in one by the decree of the Court. He was succeeded by his widow and she made the gift to Jag Ram and Net Ram. When they in turn mortgaged to the widow, the present Plaintiff, they mortgaged both the original mortgage and the equity of redemption merged as aforesaid. When in the suit of the present Defendants on the mortgage of 1883, Jag Ram and Net Ram, so to speak, revived the original mortgage as a shield, they revived something which in a question with the widow they had mortgaged. Whether the decision of the Court that the sum in the prior mortgages should be made a condition of the decree in the suit was right or wrong—for if *Net Ram's* case (1) had been decided it would have been wrong, the sale having taken place in 1886—is immaterial, for the present Defendants acquiesced in and paid under the judgment. If the widow had been made a party to the suit, as she ought to have been, she would have been entitled in right of her mortgage to have been put in possession of the amount which was being put forward as a shield by Jag Ram and Net Ram against the then Plaintiffs and the present Defendants. She was not made a party and the result was that owing to the laches of the present Defendants Jag

Ram and Net Ram were allowed to carry off in money the part of the estate represented by the value of the first mortgage which they had really impledged by their mortgage to the widow. It follows that to carry out the general principle expressed above, the widow must not be deprived of the rights which had she been called she could have made good.

The result must be that unless the Defendants pay the Plaintiff Rs. 2,925 with interest thereon at 6 per cent. from 3rd December 1914, the Plaintiff must get her decree for sale of so much of the estate as will realise that sum. If, however, the Defendants pay that sum or the said sum is realised by sale of part of the estate then the Plaintiff can only have decree and sale of the rest of the estate on condition that she pay to the Defendants Rs. 8,649-13-7, being the sum in the decree of 1883 as brought out by the High Court. The Defendants will have a right to recover from Net Ram and Jag Ram the sum wrongly carried off by them in fraud of their own mortgage to the present Plaintiff, but the right cannot be given effect to in this suit.

Neither party should have any costs in the Courts below and any costs paid on order of the Courts below should be returned; the Appellants will have the costs of the appeal to His Majesty in Council.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor: *Mr. Henry S. L. Polak* for the Appellant.

Solicitor: *Mr. Douglas Grant* for the Respondents.

R. M. P.

(1) L. R. 45 I. A. 130: s. c. 22 C. W. N. 1033 (1913).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL
JURISDICTION

No. 107 OF 1920.

SANDERSON, C. J. } JEWAN RAM, Appellant,
 RICHARDSON, J. } v.
 1921, } RATAN CHAND KISSEN
 5, May. } CHAND, Respondent.

Transfer of Property Act (IV of 1882), secs. 3, 6 (e).—Bare right to sue, assignment of—Claim for unascertained damages—Comparison between the English and Indian law.

The Defendants entered into a contract with one B undertaking to take delivery of certain goods in accordance with the contract and on their failure to do so the matter was referred to arbitrators who gave an award to the effect that the Defendants were to pay for and take delivery of the goods. B, therefore, resold the goods which fetched a lower amount than that contracted for. He then brought a suit against the Defendants for the balance and then assigned to the Plaintiff all his claim in and the right to proceed with the suit and all advantages and benefits of all proceedings thereof:

Held—That the suit was not maintainable inasmuch as the claim was for unascertained damages for breach of contract and the assignment was an assignment of a mere right to sue.

GLEGG v. BROMLEY (1) referred to.

That there were no materials justifying the application of sec. 107 of the Contract Act and the resale was not justified by the award so that the claim was one for unascertained damages.

That on a true construction of the terms of the assignment the subject-matter of the assignment was not property with an incidental right to sue but a mere right to sue for unascertained damages for alleged breach of contract within the meaning of sec. 6 (e) of the Transfer of Property Act.

Per RICHARDSON, J.—That in England

(1) [1912] 3 K. B. 474.

there is no statutory rule that a bare right of action cannot be assigned. There is a statutory provision making choses in action assignable which is subject to a limitation placed upon it by the Courts that the assignment must not offend the law of maintenance. In India there is an imperative statutory rule prohibiting the transfer of a mere right to sue. But in spite of this difference the results may be in many respects similar. The Indian Legislature when it enacted sec. 6 (e) of the Transfer of Property Act, no doubt had in mind the expressions used in the English cases; and on the question of construction which arises in India the language of Parker, J., in GLEGG v. BROMLEY (1) is at least a valuable guide.

That even assuming that the goods were properly resold and that the claim asserted in the plaint and transferred to the present Plaintiff is a claim to an ascertained sum, it would still be for consideration whether this claim is in the particular circumstances a mere right to sue or property with an incidental remedy for its recovery within the meaning of Parker, J., in GLEGG's case (1).

This was an appeal preferred on the 8th September 1920 against a decree, dated the 24th August 1920, made by Mr. Justice Woodroffe in Suit No. 1606 of 1918.

The facts of the case will appear from the judgment.

Messrs. B. C. Mitter and A. K. Roy for the Appellant.

Messrs. S. K. Das, S. N. Bannerjee and K. P. Khaitan for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J. This is an appeal from the judgment of my learned brother Mr. Justice Woodroffe, whereby he dismissed the Plaintiff's suit on the ground that the suit was not maintainable, and

(1) [1912] 3 K. B. 474 at p. 490.

JEWAN RAM v. RATAN CHAND KISSEN CHAND.

that the plaint did not show a cause of action.

The original Plaintiff in the suit was one Bhairodhan. His name was deleted from the suit and the present Plaintiff, Jewanram, who is alleged to be the assignee of the right title and interest of Bhairodhan was added as a Plaintiff. The Defendants were Ratan Chand Kissen Chand, a firm carrying on business in piece goods in Calcutta.

Bhairodhan made a contract with the Defendants whereby the Defendants undertook to take delivery of 8 Bales of *Dhoti* in accordance with their contract. The Defendants failed to take delivery in accordance with the contract, and it was alleged that thereby the original Plaintiff had suffered loss and damage on the resale of the 8 Bales of *Dhoti*. But before the resale the parties, that is to say, the original Plaintiff Bhairodhan and the Defendants had referred the matter to the Marwari Chamber of Commerce: and the decision of the arbitrators was given on the 9th of October 1918 and the plaint alleged that the award directed that Bhairodhan should resell the said goods and recover the loss suffered thereby from the Defendant firm, as would appear from the order of the said Marwari Chamber of Commerce when produced. It then proceeded to allege that he resold the goods on the 9th of October—the same day as the award was made—and thereby realised a sum of Rs. 15,502-1 and after deducting that sum from the contract price there remained a sum of Rs. 6,716-11 annas, which it was alleged was due to the original Plaintiff Bhairodhan in respect of the breach of contract by the Defendants.

This suit was instituted on the 16th of December 1918, and, on the following day, the 17th of December 1918, Bhairodhan executed an assignment the terms of

which I shall have to refer to in greater detail presently.

The learned Judge came to the conclusion that the Defendants had succeeded in their objection that the suit was not maintainable and that the plaint showed no cause of action. The ground of the learned Judge's judgment was that the claim which was relied upon in this suit by the Plaintiff was a claim for unascertained damages for breach of contract by the Defendants and that it was not assignable, because it was an assignment of a mere right to sue.

The first point taken upon this appeal was that the claim, which was assigned by Bhairodhan to the Plaintiff, was for an ascertained amount. With regard to that it is to be noticed, in the first instance, that the assignment referred to the sum of Rs. 6,716-11 annas "as damages sustained by the assignor on a resale." It is true that the claim in form is for the specified amount of Rs. 6,716-11 together with some sum for interest. But it was alleged, as I have already mentioned, that the resale took place in consequence of a direction in the award. When we look at the award, that allegation turns out to be incorrect; this case was dealt with by the learned Judge upon the plaint, the assignment, the award and some verbal evidence, which is not material for my present purpose. The award does not support the allegation that the resale took place by direction of the arbitrators. The award is as follows: "The books of account of the Defendants and the Plaintiffs have been examined. The goods were lying in the Plaintiff's firm. Therefore, the Defendants to pay for and take delivery of the goods." This award did not direct any specified sum to be paid. It is true that the amount claimed is said to be ascertained by the reason of the resale, but the ground, upon which the resale was based,

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in fact turns out, when the award comes to be examined, to be unsustainable.

It was argued in this appeal that the resale was justified by sec. 107 of the Indian Contract Act. It was admitted by the learned Counsel for the Appellant that the case was not put in the Court below from this point of view. This further is evident from the learned Judge's judgment. He said at the bottom of p. 12 of the paper-book, dealing with the award as follows:—"It" (the award) "did not direct that any specific sum should be paid. The damages still remain unascertained, and in fact were not ascertained until after the award when there was a resale." If we were to stop there it might be urged that the learned Judge was of opinion that there was an ascertained sum when the resale took place. But when we read on it is clear that the learned Judge was of opinion, that the claim was not for an unascertained sum. He went on to say "on that again" (i.e., on the resale) "the suit is brought for damages which are said to have been ascertained by a resale, which resale is alleged to have been justified by directions given in the award. Nothing in short in the award converted this claim for damages into a debt and nothing has since then done so." To my mind, it is clear that the learned Judge's finding was that on the materials before him this claim for unascertained damages had not been converted either by the award or by the resale or by anything else into a debt or a claim for a specified amount.

It is true that the question whether the resale was justified by sec. 107 was not investigated by the lower Court but no attempt was made by the Plaintiff to suggest or to prove that sec. 107 of the Contract Act applied. Further than that, there is no ground of appeal against the learned Judge's finding that the claim for damages

was not converted into a debt. I think the 4th ground of appeal goes to show that the point, which is now relied upon, was neither taken before the learned Judge nor relied upon in the grounds of appeal. In my judgment there are no materials before us which would justify us in holding that sec. 107 of the Contract Act is applicable. The Plaintiff's allegation was that the resale was justified, by the award. The award was proved, and when proved, it showed that there was no such direction. The award on the face of it does not itself justify a resale, yet the resale took place on the same day as the award was made. Under these circumstances, in my judgment, for the purpose of this appeal only, we must take it that the resale was not justified and that the claim was one for unascertained damages.

There remains the second point, which the learned Counsel for the Appellant argued, namely, that even if the claim was for unascertained damages arising out of the Defendants' breach of contract, the assignment was not an assignment of "a mere right to sue" within the meaning of sec. 6 (e) of the Transfer of Property Act. The Defendants on the other hand argued that the assignment was an assignment of a mere right to sue, which was not assignable by reason of sec. 6 (e). It was urged on behalf of the Plaintiff, who is the Appellant, that, although the Defendants had failed to perform their contract with the assignor, the contract was still in existence and the obligation on the Defendants to perform it remained, and that the Plaintiff by the assignment obtained the benefit of the contract which was in itself property, and that there was attached to the property the right to sue for the breach of contract. In my judgment this case must be decided upon the terms of secs. 3 and 6 (e) of the Transfer of Property Act. Many English cases were cited to us.

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Some of them are useful for the purpose of ascertaining what meaning has been placed by the English Courts upon expression such as "a mere right to sue" or as it is called in some cases "a bare cause of action" or as in others "a mere right to litigate." I do not intend to refer to more than one, *viz.*, *Glegg v. Bromley* (1), and I desire to refer to the judgment of Mr. Justice Parker who was then sitting in the Court of Appeal. His judgment has been referred to in subsequent cases with approval. In my judgment the principle relating to the present question was therein clearly laid down. The learned Judge said this at p. 489. "Ordinary choses in action were not assignable at law, but were, generally speaking, assignable in equity whether themselves legal or equitable choses. In the former case equity compelled the assignor to allow his name to be used for their recovery in legal proceedings; in the latter case the assignee could sue in equity in his own name. There was one exception to this rule. Equity on the ground of public policy did not give validity to the assignment of what is in the cases referred to as a bare right of action" and this was so whether the bare right were legal or equitable. I have looked at a good many authorities on that point, and I am satisfied that the real reason why equity did not allow the assignment of a bare right of action, whether legal or equitable, was on the ground that it savoured of or was likely to lead to maintenance. There is no doubt in the cases about the rule, and there is no doubt in the cases with regard to the exception, but difficulties often arose in deciding whether a particular right was within the exception or was within the rule. It is to be observed that an equitable assignee of a chose in action, whether it is legal or equitable, could institute proceedings and

maintain proceedings for its recovery. The question was whether the subject matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity." Applying that principle to this case the question is whether the subject-matter of the assignment by the assignor to the Plaintiff is in the view of the Court, property with an incidental remedy for its recovery, or whether it is a bare right to bring an action, or within the words of the act "a mere right to sue." For this purpose it is necessary to look at the term of the assignment.

I have already pointed out that the assignment was dated the 17th December 1918, and the suit was instituted a day before, *viz.*, the 16th. The assignment recited that on the 16th December the assignor had instituted a suit against the Defendants to recover the sum of Rs. 6,783-11 annas damages sustained by the assignor on a resale of eight bales *dhotis* No. 460 of which the firm of Ratan Chand Kissen Chand had failed to take delivery in terms of the *souda* or contract made with the assignor and, dated *Sravan Sudi 18, 1975* corresponding with the 20th August 1918. It then recited the fact that the assignor owed to the assignee a sum of Rs. 6,551, and that the assignor was unable to pay it and that he had requested the assignee to accept in payment of the sum of Rs. 6,500 an assignment and transfer to him of all his claim and costs in the suit. The assignor then transferred and assigned unto the assignee all the claim of the assignor in as well as the right to proceed with the said suit and all the advantages and benefits of all proceedings thereof to hold the same unto the assignee absolutely and for ever. I cannot find in the terms of this document any thing more than an assignment of a mere right to sue,

(1) [1912] 3 K. B. 474 at p. 489.

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or anything more than a mere right to prosecute the claim of the assignor for damages for the alleged breach of contract by the Defendants. The assignment did not in terms purport even to assign the contract or the benefit thereof. In my judgment, there is no ground for holding that the subject-matter of the assignment was property with an incidental right to sue : on the contrary, on a true construction of the terms of the assignment, in my judgment, there was nothing transferred except a mere right to sue for unascertained damages for the alleged breach of contract.

The learned Counsel for the Appellant invited us to come to the conclusion that the decision in the case of *Abu Mahomed v. S. C. Chunder* (2) was wrong. If we acceded to such an argument, a reference to a Full Bench would be necessary. In my judgment, however, there is no necessity for us to express any opinion as to the correctness of that decision. The facts of that case were different from those existing in this case. I base my judgment upon the principle which I have already enunciated, regard being had to the particular terms of the assignment, the true construction thereof and the facts of this case.

A third point was taken by the learned Counsel and that was in respect of parties. In the Court below an application was made for an adjournment to enable the Plaintiff to enquire whether the Official Assignee would be willing to be added as a party so as to represent the estate and interest of the original Plaintiff Bhairadhan, who had become insolvent. The learned Judge refused it for reasons, which he gave in his judgment. In this Court the application was varied and the application was that we should direct that the original Plaintiff Bhairadhan should be added as a Plaintiff. In my judgment this cannot be done. Apart from the

considerations which my learned brother Mr. Justice Woodroffe gave in his judgment, which, as far as I can see, would be just as applicable to a joinder of the original Plaintiff as to a joinder of the Official Assignee representing him, the application is not made on behalf of the original Plaintiff, nor is there any consent of the Plaintiff produced before us to show that he is agreeable to join as a Plaintiff. In these circumstances it is not possible for us to accede to the application of the Appellant that Bhairadhan should be added as a Plaintiff.

For these reasons in my judgment the appeal should be dismissed with costs.

RICHARDSON, J.—I agree and will add a few observations in deference to the argument of Sir Benod Mitter. It seems clear that in England the objection to the assignability of “a bare right of action” is founded on the law of maintenance. Before the Judicature Act of 1873 the Courts of Common Law seem to have applied that law more strictly than the Courts of Equity. “There are undoubtedly” said Cozens-Hardy, L. J., in *Fitzroy v. Cave* (3), “many choses in action which are not and never were assignable either at law or in equity. A right to set aside a deed on the ground of fraud is a typical instance.” Then, further on, he continued :—“There are, however, other choses in action which though not assignable at Common Law, were always regarded as assignable in Equity. A debt presently due and payable is an instance. At Common Law such a debt was looked upon as a strictly personal obligation, and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. Hence the assignment was, with some exceptions which need not be referred to, looked upon as open to the objection of maintenance.

(2) I. L. R. 36 Cal. 345 (1909).

(3) [1905] 2 K. B. 344 at p. 371.

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After a time the Common Law Courts recognised the right of any one who had a pecuniary interest in the debt to sue in the name of the creditor. This, however, was the limit of their departure from the old strict rule, so far as I have been able to discover. But the Courts of Equity took a different view: they admitted the title of an assignee of a debt, regarding it as a piece of property, an asset capable of being dealt with like any other asset, and treating the necessity of an action at law to get it in as a mere incident, they declined to hold such a transaction open to the charge of maintenance."

The Judicature Act assimilated the practice at Common Law to the practice in Equity. In *Tolhurst v. Associated Portland Cement Manufacturers* (4), Lord Lindley said:—"The Judicature Act, 1873, sec. 25, cl. 6 has not made contracts assignable which were not assignable in equity before, but it has enabled assigns of assignable contracts to sue upon them in their own names without joining the assignor."

It still remains, however, that "a Court of Equity is as much bound as a Court of Common Law by the law relating to champerty and maintenance, and if an assignment of a chose in action is obnoxious to that law, it is bad in equity no less than at law. An assignment of a mere right of litigation is bad." [*Per* Sterling, L. J., in *Dawson v. G. N. City Ry. Co.* (5)].

It is with reference to the law of maintenance that the Courts in England have held that some limitation must be put on the generality of the term "chose-in-action" as used in the Judicature Act, sec. 25, cl. 6 [*Torkington v. Magee* (6), *Per* Channell, J.].

The position in England, therefore, differs somewhat from the position in India. In England there is no definite statutory rule that a bare right of action cannot be assigned. There is a statutory provision making choses in action assignable which is subject to a limitation placed upon it by the Courts that the assignment must not offend the law of maintenance. The provision and its limitation are perhaps capable of being moulded in accordance with the nature and substance of particular transactions.

In India the law of maintenance has never obtained in the same absolute form as in England and in the present connection has none but a possible historical relevance. Here there is an imperative statutory rule—a rule which the Court cannot transcend—that a mere right to sue cannot be transferred. The duty of the Courts is confined to the interpretation of the words, "a mere right to sue."

Nevertheless, the results may be in many respects similar. The Indian Legislature when it enacted sec. 6 (e) of the Transfer of Property Act, no doubt had in mind the expressions used in the English cases—"a bare right of action" or "a mere right to litigate." On the question of construction which arises in India, the language of Parker, J., in *Glegg v. Bromley* (1) to which the learned Chief Justice has already referred, is at least a valuable guide. The question in every case is whether the subject-matter of the transfer is, in the view of the Court, "property with an incidental remedy for its recovery" or is "a mere right to sue." I will not stop to discuss the definition in the Transfer of Property Act, sec. 8 of "actionable claims" (the Indian term corresponding to the English term "choses in action") because it seems clear that that definition must be

(4) [1903] A. C. 414 at p. 424.

(5) [1905] 2 K. R. 260 at p. 270.

(6) [1902] 2 K. B. 427 at p. 430.

(1) [1912] 3 K. B. 474 at p. 480.

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construed as excluding "mere rights to sue."

Sir Benod Mitter asked why if a contract might be transferred before breach it should be incapable of transfer after breach. After breach, he said, the contract still subsisted. No doubt a line might be drawn between claims for breach of contract and claim in tort, where the right of personal safety or the right to immunity from fraud, has been violated. But, however valid such considerations might be if the principle of the thing were open to discussion, that is not the position. The policy of the law in India is expressed in the statute and effect must be given to the language according to its true meaning.

Moreover, when an ordinary commercial contract for the sale of goods has been broken and subsists only for the purpose of enforcing a claim to damages, it is to my mind difficult to say that the right to damages is, standing by itself, anything more than a mere right to sue, a right which is not incidental to property but is incidental to an abstract right in respect of contracts comparable to the abstract rights to personal safety and immunity from fraud in the region of tort. At any rate there is authority both English and Indian for the view that a claim to unliquidated damages for breach of contract is not assignable.

Turning to the case before us, I agree that the learned Judge decided, and correctly decided, on the materials placed before him, which included not only the pleadings but also the award of the Marwari Chamber of Commerce, that the suit must be dealt with as in essence a suit for unliquidated damages, though at first sight it appears to be a suit for liquidated damages. If that be so, it follows in my opinion that the claim to these damages being a mere right to sue was not trans-

ferable and that on that ground the suit, as a suit by the transferee, must fail.

But even if it be assumed that the goods were properly resold, and that the claim asserted in the plaint and transferred to the present Plaintiff is a claim to an ascertained sum, it would still be for consideration whether this claim is in the particular circumstances a mere right to sue or property with an incidental remedy for its recovery, within the meaning of Parker, J., in *Glegg's* case (1).

Sir Benod Mitter relied on certain *dicta* of McCardie, J., in *County Hotel and Wine Company v. London and North-Western Railway* (7). The learned Judge says: "In *Torkington v. Magee* (6), Channell, J., in delivering the judgment of the Divisional Court, referred to the above *dicta*, and apparently expressed the view that when a breach of contract had occurred in respect of which the original party to the contract could sue for damages, he could not assign those damages so as to enable the assignee to sue. Again I venture to think that this *dictum*, in view of other decisions, goes too far. I can see no reason why damages for breach of contract should not in some cases be capable of assignment without infringement of the public interest." And then the learned Judge gives an example. "Take, for example," he says, "a case where the contract admittedly fixes the damages for breach at a liquidated sum and provides that it may be sued for as a debt. What reason of public policy should prevent the assignment of such sum if public policy permits the assignment of a disputed debt?"

It must, however, be borne in mind that the observations of the learned Judge were made from the English point of view

(1) [1912] 3 K. B. 474.

(6) [1902] 2 K. B. 427.

(7) [1918] 2 K. B. 260.

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and that even so he did not go so far as to suggest that a claim to liquidated damages would in every case be assignable.

With these observations I agree in the conclusion at which the learned Chief Justice has arrived that this appeal must be dismissed.

Messrs. Dutt and Sen, Solicitors for the Appellant.

Messrs. Khaitan & Co., Solicitors for the Respondent.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]**APPEAL FROM APPELLATE ORDER**

No. 113 of 1920.

CHATTERJEA, J. NEWBOLD, J. 1921, 31, May.	}	HAZARI LAL , Judgment-debtor, Appellant, v. BAIDYA NATH SAHA and ors., Decree-holders, Respondents.
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Civil Procedure Code (Act V of 1908), Or. 21, rr. 6 and 22, application for transfer of decree and for issue of notice upon judgment-debtor—Limitation Act (IX of 1908), Art. 182 (5), latter application to the Court which passed the decree whether "an application in accordance with law or a step in aid of execution."

An application for transfer of a decree was made on the 4th November 1910, in which there was also a prayer for issuing notice on the judgment-debtor. The notice having been twice returned unserved, the decree-holder applied on the 24th January 1911 for issue of another notice which was served and the decree was duly transferred. On the 7th January 1914 an application for execution was made to the Court to which the decree was transferred:

Held—That the application for execution, dated the 7th January 1914 having been made more than three years after the application (for transfer of the decree), dated the 4th November 1910 was barred by limitation.

Or. XXI, r. 22, Civil Procedure Code, provides that the notice upon the judgment-debtor to show cause against execution shall be issued by the Court executing the decree. The Court which transferred the decree had therefore no power to issue that notice. Further, an application for transfer of a decree is not an application for execution.

CHUTTERPAT SINGH v. RAI BAHADUR SAITA SOOMARIMULL (1) referred to.

Therefore the application made by the decree-holder on the 24th January 1911 to issue notice upon the judgment-debtor cannot be held to be an application "in accordance with law" for execution or to take some step in aid of execution of the decree within the meaning of Art. 182 (5) of the Limitation Act and therefore could not suve limitation.

This was an appeal against the order of B. N. Rau, Esq., District Judge of Zillah Murshedabad, dated the 24th January 1920, reversing the order of Babu Jyotish Chandra Neogi, Munsif of Lalbagh, dated the 21st of July 1919, and remanding the case to his Court for disposal after consideration of certain issues.

The facts will appear from the judgment.

Babus Ram Chandra Mazumdar and Khitish Chandra Neogi, for the Appellant.

Babu Sachindra Prosad Ghose (for *Babu Jatindra Lal Banerjee*) for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The question involved in this appeal is whether the application for execution of the decree is barred by limitation.

It appears that the Respondents obtained an instalment decree in the Court of the Munsif of Rampurhat on the 14th February 1907. The decree provided that

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on default in payment of any one instalment, the whole of the amount remaining unpaid would be due. There was default in payment in the very first instalment (payable in Assin 1314). The decretal amount therefore became due in Kartic 1314, (November 1907).

On the 4th November 1910, an application was made to the Rampurhat Court for transfer of the decree to the Court of the Munsif at Lalbagh for execution. A notice was issued to the judgment-debtor which was returned unserved. A fresh notice was issued with the same result. The decree-holders then applied on the 24th January 1911 for issue of another notice, and this time it was served on the 17th February 1911. The Certificate required under Or. XXI, r. 6 (b) was then prepared and the application was disposed of on the 28-3-11.

Application for execution of the decree was then made in the Lalbagh Court on the 7th January 1914, and there were subsequent applications for execution made in that Court and in the Rampurhat Court which it is not necessary to mention.

The contention of the judgment-debtor was that as the application in the Lalbagh Court dated the 7th January 1914 was made more than three years after the application (for transfer of the decree) dated the 4th November 1910 made in the Rampurhat Court, execution of the decree was barred by limitation. The decree-holders rely upon the application dated the 24th January 1911 made to the Rampurhat Court for issuing fresh notice upon the judgment-debtor as saving limitation, and the question for consideration is whether that application was an application "in accordance with law" for execution or to take some step in aid of execution within the meaning of Art. 182 (5) of the Limitation Act.

It appears that the notice which was

applied for by the decree-holder on the 24th January 1911, was taken by the learned District Judge, to be a notice upon the judgment-debtor to show cause why the decree should not be transferred for execution to Lalbagh. The learned Judge was of opinion that though no such notice is required by the Code, the Court thought it proper to issue such a notice which is not prohibited by the Code, and the application for issuing such notice was "in accordance with law." He accordingly held that the execution of the decree was not barred by limitation.

It appears from the application dated the 4th November 1910 that the decree-holders prayed for a certificate under Or. XXI, r. 6 to the Lalbagh Court after issue of notice under Or. XXI, r. 22 upon the judgment-debtor.

The notice issued by the Court on the 25th January 1911 is described as a "notice to show cause why execution should not issue" (secs. 232 and 248 of the Code of Civil Procedure) and it calls upon the judgment-debtors to show cause, if any, why the decree should not be executed. The reference is to sections under the old Code, though the proceedings took place under the new Code, probably because the printed forms had not been changed.

Now under sec. 248 of the old Code, the "Court" which was to issue the notice under the section was "the Court by which the decree was passed, unless the decree has been sent to another Court for execution, in which case it means such other Court." Or. XXI, r. 22 of the present Code, however, expressly provides that the Court executing the decree shall issue the notice. The application to the Rampurhat Court dated the 4th November 1910 appears to have been made in a tabular form, but as stated above the decree-holders prayed for certificate under Or. XXI, (for the transfer of the decree) after issue of

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notice under Or. XXI, r. 22 upon the judgment-debtors, as they had no properties within the jurisdiction of the Rampurhat Court. There was thus no application for execution of the decree before the Rampurhat Court, and no notice could therefore be issued by that Court under Or. XXI, r. 22. In the case of *Chatterpat Singh v. Rai Bahadur Saita Soomarimull* (1) it was held that an application for transmission of a decree is not an application for execution, that no notice under sec. 248 of the Code of Civil Procedure of 1882 can be properly issued upon such an application, and that the notice required by that section must, when the decree has been transmitted, be issued by the Court to which the decree has been sent for execution, and which is the Court to decide whether the application is capable of execution. (See pp. 899-900). That was a case under the Code of 1882. Under the present Code (Or. XXI, r. 22), as pointed out above, it is the Court executing the decree which is to issue the notice. That being so, the Rampurhat Court could not issue the notice under Or. XXI, r. 22, and the application made by the decree-holder to that Court on the 24th January 1911 to issue a fresh notice under Or. XXI, r. 22 cannot be held to be an application "in accordance with law" for execution, or to take some step in aid of execution of the decree, within the meaning of Art. 182 cl. (5). That application therefore could not save limitation. The order of the lower Appellate Court must accordingly be set aside but as that Court did not consider the question of disability under sec. 7 of the Limitation Act, and the question of payment set up by the decree-holders (which were considered by the Court of first instance and decided against them), the case must be remanded to the Court of appeal below for consideration of the

(1) 20 C. W. N. 689 (F. B.) (1916).

said questions and disposal of the case according to law. Costs two gold mohurs to abide the result.

J. N. R.

Appeal allowed.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 2640 OF 1919.

MOOKERJEE, J.

PANTON, J.

1921,

Heard, 8 and

12, August.

Judgment,

12, August.

GONDLI BIBI and ors.,
Plaintiffs, Appellants,

v.

JOYNAL ABDIN (Abadin
in vakalatnama)

SARKAR, Defendant,
Respondent.

Pleadings, court not to entertain a question not raised in—Reason of the rule explained—Test.

Neither party to a litigation can be allowed to set up at the hearing an entirely new and inconsistent case.

ESHAN CHUNDER v. SHAMA CHURN (1) and NORTH-WESTERN SALT COY., LTD. v. ELECTROTYPE ALKALI COY., LTD. (2) referred to.

The reason for the rule is that the Plaintiff might have received no notice that the point would be raised by the Defendant and would presumably be not prepared with the necessary evidence, and, conversely, the Defendant might be seriously embarrassed if the Plaintiff were permitted to spring a surprise upon him in the shape of a new case.

The test to be applied is whether the party aggrieved has really been taken by surprise. So, where the Plaintiffs sought to eject the Defendant on the ground that he was a trespasser and the Defendant answered that he was a tenant at money rent, but the Court determined the nature of the alleged tenancy and came to a conclusion which was not the case of either party:

(1) 11 M. I. A. 7 (1886).

(2) [1914] A. C. 461.

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Held—That the substantial question in controversy between the parties being whether the Defendant was a trespasser or a tenant, the finding that the Defendant was a tenant was a complete answer to the claim for ejectment, and the determination of the nature of the tenancy did not prejudice the Plaintiffs in respect of their claim for ejectment. The question of the nature of the tenancy was, however, left open.

This was an appeal against the decree of Babu Jatindra Chandra Lahiri, Additional Subordinate Judge of Zillah Rungpur, dated the 4th of September 1919, reversing the decree of Babu Narendra Nath Ghose, Munsif, 1st Court at Gaibandha, dated the 4th of June 1918.

The facts of the case are briefly these :— In 1912, the Plaintiffs brought a suit against the Defendant under sec. 9 of the Specific Relief Act I of 1877, which was dismissed with the finding that the Defendant was an *adhiar* under the Plaintiffs. In 1913, the Plaintiffs brought a suit for damages against the Defendants for a moiety share of the crops grown on the disputed land. The suit came up on appeal to the High Court which gave the Plaintiffs a decree for damages for Rs. 10 on the admission of the Defendant as due to the Plaintiffs, but set aside the judgment of the Court of Appeal below in so far as it found that the sum of Rs. 10 payable to the Plaintiffs was for rent or that the relationship of landlord or tenant existed between the parties. In 1917, the Plaintiffs brought this suit in ejectment against the Defendant on the allegation that he was a trespasser on the land in dispute. Defendant alleged *inter alia* that he was a tenant at money rent and had acquired occupancy right and was not liable to be ejected. The suit was decreed by the Court of first instance, but dismissed on appeal by the lower Appellate

Court with the finding that the Defendant was an *adhiar* tenant under the Plaintiffs. Hence the Plaintiffs preferred the present appeal to the High Court.

• Babu Atul Chandra Gupta for the Appellants argued that the Court of Appeal below was wrong in coming to the conclusion that the Defendant was an *adhiar* tenant inasmuch as it was not the case set up by the Defendant who had all along pleaded that he was a tenant at money rent and the said Court was clearly wrong in making out a new case for the Defendant. Further the decision of the High Court in the previous litigation between the parties made the question as to whether the Defendant was an *adhiar* tenant under the Plaintiffs *res judicata* between the parties.

Babu Mrityunjay Chattopadhyay for the Respondent contended first, that if the Court of Appeal below went beyond the pleadings in the suit it was only in so far as it decided the nature of the tenancy. But the real question in controversy was whether the Defendant was a trespasser or a tenant. The Plaintiffs came to Court with the specific case that the Defendant was a trespasser and liable to be ejected, and must stand or fall with it. The decision of the lower Appellate Court was that the Defendant was not a trespasser, and the Plaintiffs were at once out of Court. Secondly, no question of *res judicata* at all arose inasmuch as the effect of the decision of this Hon'ble Court in the previous litigation between the parties was to leave the question of status between the parties open.

Babu Atul Chandra Gupta in reply.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiffs in an action in ejectment. The Plaintiffs alleged that the Defendant had no right of

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possession in the disputed land and was liable to be ejected as a trespasser. The Defendant pleaded that he was an occupancy raiyat under the Plaintiff and held the land at a rental of Rs. 10. Upon these pleadings, the trial Court raised the issue, whether the Plaintiffs had a right to get *khas* possession of the land in suit. The Court came to the conclusion that the Defendant was not a raiyat but a trespasser and decreed the suit. Upon appeal, the Subordinate Judge came to the conclusion that the Defendant was an *adhiar* tenant, that is, a tenant who cultivates the land on condition of payment of one half of the produce to the landlord. In this view the lower Appellate Court held that the Defendant could not be ejected as a trespasser. On the present appeal the decree of the Subordinate Judge has been assailed on two grounds, namely, first, that the case has been decided against the Plaintiffs on a ground not raised in the pleadings, and, secondly, that the decision of the question, whether the Defendant was or was not an *adhiar* tenant was barred by the principle of *res judicata*.

As regards the first point, the contention of the Appellant is not altogether unfounded. The Plaintiffs came into Court on the allegation that the Defendant looked after the cultivation of the land on their behalf, that he betrayed his trust and from 1911 appropriated the crops. The Defendant contended that he looked after the cultivation in his own right because he was an occupancy raiyat of the land and that the amount of annual rent payable by him was Rs. 10. The trial Court accepted the version of the Plaintiffs and found that the Defendant was a trespasser. The Subordinate Judge held that the Defendant was an *adhiar* tenant. This was plainly neither the case of the Plaintiffs nor the case of the Defendant.

On these facts Mr. Gupta has contended that the judgment of the Subordinate Judge is open to just exception. It may be conceded that neither party to a litigation can be allowed to set up at the hearing an entirely new and inconsistent case. The Plaintiff must be held to the state of facts alleged in his plaint or substantially consistent therewith. The Defendant also must be held to the state of facts alleged in his written statement or in harmony therewith. This rule was enunciated by Lord Westbury in *Eshan Chunder v. Shama Churn* (1) and was emphasised by Lord Moulton in *North-Western Salt Coy., Ltd. v. Electrottype Alkali Coy., Ltd.* (2), when he observed that the Court will not entertain a question not raised in the pleadings. The reason for the rule has been stated to be in substance that the parties might otherwise be seriously prejudiced. The Plaintiff might have received no notice that the point would be raised by the Defendant and would presumably be not prepared with the necessary evidence, and, conversely, the Defendant might be seriously embarrassed if the Plaintiff were permitted to spring a surprise upon him in the shape of a new case. Consequently, when an objection of this kind is taken, the test to be applied is whether the party aggrieved has really been taken by surprise. Let us see how the Plaintiffs stand when their case is considered from this stand-point.

The substantial question in controversy between the parties was whether the Defendant was a trespasser or a tenant. If the Defendant was a tenant, that was a complete answer to the claim, because the Plaintiffs have never asserted, that the Defendant was a tenant, that his tenancy was liable to be terminated, that it had been terminated in accordance with law

(1) 11 M. L. A. 7 (1866).

(2) [1914] A. C. 461.

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and that the Defendant was not entitled to continue in possession any longer. The complaint of the Plaintiffs is consequently well-founded to this extent that the Subordinate Judge has determined the nature of the alleged tenancy and has come to a conclusion which was not the case of either party. But that, in our opinion, has not prejudiced the Plaintiffs in respect of their claim for ejectment. Upon the real question in issue, each party understood what he had to prove and what he had to expect from his opponent. We hold accordingly that the conclusion of the Subordinate Judge that the Defendant held as a tenant cannot be assailed.

As regards the second point, namely, whether the decision of the question of status of the Defendant was or was not *res judicata*. We are not prepared to accept the contention of the Appellants. The effect of the ultimate decision in this Court in the previous suit between the parties was to leave the question of status open. We need not examine this point further, because the effect of our decision also will be to leave the question of the nature of the tenancy of the Defendant under the Plaintiffs open for investigation in a future suit, if occasion should arise.

The result is that we affirm the decree of dismissal made by the Subordinate Judge on the ground that at the date of the institution of the suit the Defendant was a tenant under the Plaintiffs. This will in no way affect the decision of the nature of the tenancy in a future litigation between the parties. That the Defendant is a tenant under the Plaintiffs has been decided in this suit, but the nature of that tenancy will be open for investigation hereafter.

The Respondent will be entitled to his costs in this Court.

S. C. C.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD BUCKMASTER.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1921,

17, November.

MUHAMMAD

HAFIZ and anr.,

Appellants,

v.

MIRZA MUHAM-

MAD ZAKARIYA

and ors.,

Respondents.

Civil Procedure Code (Act V of 1908), Or. II, r. 2—Suit for interest on bond—Decree satisfied—Subsequent suit for principal barred.

A hypothecation bond contained a clause stipulating that if interest was not paid for six months the creditor might sue either for interest alone or for both principal and interest without waiting for the expiration of the period fixed for repayment (which was three years) and the debtor was "to have no objection whatever." More than three years after, no interest having been paid, the creditor brought a suit for interest alone and obtained a decree for sale of the mortgaged property. The decretal amount was deposited in Court and satisfaction entered. On a subsequent suit by the creditor for the principal sum and arrears of interest:

Held—That the provisions of Or. II, r. 2 of the Civil Procedure Code were applicable and the subsequent suit was not maintainable.

The cause of action referred to in the rule is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings.

This was an appeal from a decision of the High Court, Allahabad, dated the 2nd May 1917, setting aside a decree of the Subordinate Judge of Agra, dated the 16th March 1915.

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The facts were briefly as follows :—

By a bond, dated the 14th September 1910 Mirza Khadim Husain (since deceased) and his son, the 1st Respondent, mortgaged certain property belonging to them for the sum of Rs. 14,000 and interest at 6 per cent. per annum in favour of the Plaintiffs' ancestor, the money to be repayable at the end of three years. The material clauses in the bond were cls. 2, 3 and 7, which provided as follows :—

“2. We shall pay interest on the amount of this bond to the creditor every month on taking a receipt from him. If for some reason or other, we be not able to pay interest for six months, the said creditor shall be competent to realize only the unpaid amount of interest due to him, or the amount of principal and interest both, by bringing a suit in Court without waiting for the expiry of the time fixed, with costs from us and the property hypothecated and other property moveable and immoveable and from our person, and we or our heirs and representatives shall have no objection whatever.

“3. If after the expiry of the stipulated period of three years the amount of this bond remains unpaid by us, with the consent of the creditor, then even after the expiry of the stipulated period the same rate and mode of payment of interest shall be upheld and maintained.

“7. If we fail to pay the amount of this bond with interest after the stipulated period of three years, the said creditor shall, in case of default be entitled to realize, by bringing a suit, the whole of the amount of principal and interest together with other incidental expenses due to him and costs, and we, the executants, or our heirs and representatives shall have no objection and if we take any objection it shall be false.”

On the 16th April 1914 a suit was brought by the Appellant and Respondents

Nos. 2, 3 and 4, against the 1st Respondent claiming only the arrears of interest unpaid. That suit was decreed in August 1914, and the decree was duly satisfied.

On the 23rd January 1915 the same parties instituted the present suit for the recovery of the principal sum of Rs. 14,000 and accrued interest.

The defence was then raised by the 1st Respondent that the suit was barred under the provisions of Or. II, r. 2 of the Code of Civil Procedure. This contention was overruled by the Subordinate Judge who held that there were two separate and distinct causes of action arising out of one contract.

On appeal to the High Court of Allahabad the decision of the lower Court was reversed and this appeal was now brought before the Judicial Committee to restore the decree of the Subordinate Judge.

The Respondents were not represented before the Board.

Mr. S. Hyam for the Appellants, contended that the provisions of the bond were so framed that Or. II, r. 2 of the Civil Procedure Code did not apply to it, and that the cause of action in the earlier suit was separate and distinct from that in the later.

He referred to the following authorities :—

Yashvant v. Vithal (3), *Pramada Dasi v. Lakhi Narain Mittler* (4), *The Rajah of Pittapur v. Sri Rajah Venkata Mahipati Suriya Row* (2), *Mussummat Chand Kour v. Partab Singh* (1), *Brunsdon v. Humphrey* (5) and *Read v. Brown* (6).

(1) L. R. 15 I. A. 156 : s. c. I. L. R. 16 Cal. 98 (1888).

(2) L. R. 12 I. A. 116 : s. c. I. L. R. 8 Mad. 520 (1885).

(3) I. L. R. 21 Bom. 267 (1895).

(4) I. L. R. 12 Cal. 60 (1885).

(5) L. R. 14 Q. B. D. 141 (1884).

(6) L. R. 22 Q. B. D. 128 (1888).

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Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—In this appeal their Lordships have not had the advantage of hearing counsel for the Respondents, but owing to the full and able argument of Mr. Hyam they have been placed in complete possession of the facts.

The appeal arises out of a mortgage suit. The Appellants and the second, third and fourth Respondents represent together the mortgagee. The first Respondent was himself one of the mortgagors and represents the other. The mortgage deed in question was executed on the 14th September 1910, and was a simple mortgage but it took an unusual form. It created security for the repayment to the mortgagees of Rs. 14,000 principal and interest at the rate of 8 annas per cent. per month, it then provided by cl. 2 that the interest should be paid on the bond as each month went by, and that if the interest was not paid for six months, the creditor should be competent to realise only the unpaid amount of interest due to him, or the amount of principal and interest both by bringing a suit in Court without waiting for the expiration of the time fixed, and that the mortgagors should take no objection to such proceedings. The time fixed was that mentioned in cl. 7, which provided that if the amount secured by the bond, with interest, should not be paid after the expiration of three years, the creditor should be entitled to realise by bringing a suit for the whole of the amount of the principal and interest, together with other incidental expenses, and again the clause concluded by provision that the mortgagors should have no objection, and, if they took objection to such proceedings, it should be regarded as false.

Three years elapsed after the deed had been executed and no interest was paid,

with the result that in April 1914, the mortgagee had the power, so far as the terms of the deed were concerned, either to bring an action for the purpose of realising the security in order to obtain repayment of the full principal money and the interest, or simply of the interest alone. He selected the latter course, and on the 16th April 1914, he instituted a suit which set out, with perfect fairness and clearness, the provisions of the bond and the fact that he had elected to pursue the remedies that the bond gave him in respect only of the interest that was then due. The amount of that interest was Rs. 3,010 and in respect of that sum, and no more, he paid the court fees upon the plaint. The learned Judge before whom this suit was brought made a decree on the 11th August 1914, granting the relief that was claimed, but he appears to have overlooked the peculiar character of the mortgage, for he made a decree which, upon the face of it, was not the decree that the Plaintiff had asked for, and certainly not the decree to which the Defendants could, on any hypothesis, be entitled. What he did was this: He declared that the amount due to the mortgagee for principal, interest and costs was Rs. 3,270-12-0, a statement that the consideration of the plaint itself would have shown to be manifestly inaccurate, for it was perfectly plain from the proceedings that the amount of Rs. 3,010 was the amount claimed as due and this was for interest alone and did not include one single rupee in respect of the principal, which still remained at the sum of Rs. 14,000. He then provided that if the Defendant paid into Court the amount so declared to be due, which was the amount of the interest and costs, on or before the 11th February 1915, the mortgagees should deliver up the documents relating to the property, and if required,

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re-transfer it to the Defendant free from the mortgage and from all incumbrances created by the mortgagees or any persons claiming under them. Paragraph 2 of the decree proceeded upon the same footing, and provided that if the money was not paid in there should be a sale, out of the money realised the claim for Rs. 3,270 should be satisfied, and after that the balance of the money in Court should be paid out to the mortgagor.

The result of this decree would have been that the mortgagor could have secured complete redemption by payment of money which, by common consent, was nothing but interest on the sum that he owed and the costs. It is impossible to consider how it was that such a decree passed either the vigilance of the pleader who was appearing for the Plaintiff or the consideration of the Court, for such a decree was not the decree asked for nor that which, in the circumstances, ought to have been made.

Apparently the money was paid into Court, but the mortgagor never asked for re-transfer of the property, and the property therefore apparently remaining still subject to the mortgage, the representatives of the mortgagee who had died proceeded, on the 23rd January 1915, to institute the proceedings out of which this appeal has arisen, seeking relief similar to, but not the same as, that formerly claimed. It was stated that the amount due on the mortgage was the principal moneys and the interest that had accrued due, less the amount which had been provided by the proceedings formerly taken, and they sought realisation of the security and consequential relief. To that suit objection was taken that it was not competent to the mortgagees by reason of r. 2 of Or. II of the Code of Civil Procedure. The learned Judge before whom the matter came, being obviously impressed by the injustice

which would be done if effect was given to such a defence, decided in favour of the Plaintiffs, but upon appeal to the High Court that judgment has been reversed and judgment entered for the Defendant; from the judgment of the High Court the present appeal lies.

Now the whole question depends upon considering whether the terms of r. 2 of Or. II does really bar the Plaintiffs from the relief that they seek, and no one would be anxious to stretch or strain the language of that rule in order to cover a case where, if it be made applicable, it is obvious that the Plaintiffs may suffer a substantial wrong. The rule runs in these terms :—

(1) "Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."

There are other provisions of the Order to which reference need not be made, because, in their Lordships' opinion, the exact provisions of r. 2, sub-sec. 1, which has been read, covers and fits the present dispute. What was the cause of action that the Plaintiffs possessed when the proceedings were first instituted? It was the cause of action due either to the fact that the interest had been unpaid for more than six months, or that the three years had elapsed, and the principal was also unpaid, and in either case they could have sued for realisation to provide for the whole amount secured by the deed.

The Plaintiffs now purported to proceed under cl. 2 of the deed, but even in that case the non-payment of the interest was the sole cause upon which they were entitled to ask either for the limited relief that was sought or the larger relief which they abstained from seeking. It is also important to point out that the only relief

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that could be sought in both cases was realisation of the mortgage security, for the mortgage was a simple mortgage containing no express covenant for the payment of the principal and the interest.

Their Lordships think therefore that the rule covers the present dispute, and it is only necessary, in deference to the careful argument that is placed before the Board, to refer to one or two of the authorities to which the learned counsel called attention. The first was *Mussummat Chand Kour v. Partab Singh* (1), and that can be dealt with very simply. In that case what happened was that a Hindu widow having sold the whole of the estate, and a suit being instituted to set aside the sale, the proceedings were objected to upon the ground that before the sale was effected other proceedings were instituted to obtain an injunction to prevent the sale taking place. It was pointed out that the actual cause and circumstances which gave rise to the dispute were different in both cases, because in the one all that could be alleged was an intention, and all the relief that could be sought was an injunction. In the other, the matter alleged was an act done and the relief sought was the restoration of the property that had been sold. In the case of *The Rajah of Pittapur v. Sri Rajah Venkata Mahipati Suriya Row* (2), it is said that the cause of action means the cause of action for which the suit is brought, and it does not say that every suit includes every cause of action. Their Lordships see no reason to attempt to qualify or to extend those words, because they are in fact nothing but a repetition of the exact words of the Code; the cause of action is the cause of action which gives occasion for and forms

the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. The case of *Yashvant v. Vithal* (3); really illustrates this view, for there the learned Judge held that both the causes of action and the remedies were distinct.

Their Lordships, in expressing this opinion, have in mind the fact that, owing possibly to faulty advice, or, it may be, to a misapprehension of their strict legal rights, the Plaintiffs are in hazard of losing Rs. 14,000 in respect of a transaction which, so far as can be seen, was a perfectly straightforward transaction effected at a reasonable rate of interest. Whether there be any means now, according to the law in India, of remedying what does appear to be a misapprehension underlying the decree that was made on the 11th August 1914, their Lordships are not prepared to say, but if such opportunity can be afforded consistently with the well-known rules establishing practice in India, their Lordships see no reason to doubt that it will receive considerate attention by the Court before whom it is brought.

Their Lordships will humbly advise His Majesty that the appeal be dismissed.

Solicitor: *Mr. Henry S. L. Polak* for the Appellants.

G. D. M. *Appeal dismissed.*

(3, I. L. R. 21 Bom. 267 (1895).

(1) L. R. 15 I. A. 156: s. c. I. L. R. 16 Cal. 98 (1888).

(2) L. R. 12 I. A. 116: s. c. I. L. R. 8 Mad. 520 (1885).

PRIVY COUNCIL.
[APPEAL FROM MADRAS.]

<p>LORD BUCKMASTER. LORD DUNEDIN. LORD SHAW. SIR JOHN EDGE. 1921, Heard, 22, and 24, February. Judgment, 21, April.</p>	}	<p>MUSTI VENKATA JAGANNADHA SARMA, Appellant, v. MUSTI VEERA- BHADRAYYA, since de- ceased, Respondent.</p>
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Land attached to office of Karnam—Nature of tenure—Land appurtenant to office and impartible—Enfranchisement and inam grant, effect of—Law governing Palayams, not applicable.

In Madras, the Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is member of a particular family. It follows that land appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible.

The enfranchisement of the Karnam lands in 1906, whereby the Inam was confirmed to V, "his representatives and assigns, to hold and dispose of as he or they might think proper," subject to the payment of quit rent, etc., and the reservation of minerals, did not enure for the benefit of the joint family of which V was a member but to him exclusively.

Different considerations apply to the case of a Palayam; for when a Palayam was abolished, in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar in the same manner as if possessed by a zamindar, and the Full Court of Madras were in error in applying the law regarding Palayams by analogy to a Karnam case in *GUNNAIYAN v. KAMAKCHI AYYAR* (8).

(8) I. L. R. 26 Mad. 339 (1902).

The decision of the majority in VENKATA v. RAMA (3) approved.

PINGALA LAKSHMIPATHI v. BOMMIREDDI-PALLI CHALAMAYYA (10) overruled.

This was an appeal from a decree of the High Court of Judicature at Madras, dated the 19th February 1918.

The facts of the case will sufficiently appear from the judgment.

MR. A. M. Dunne, K. C. (with Mr. K. V. L. Narasimham) for the Appellant.—This is a suit for partition of certain properties attached to a service tenure of "Karnam" or accountant in a village. Government have the power to appoint anybody it likes. In 1859 Government provided that, if it chose, it could alter the tenure (Rules of the Inam Settlement). These lands were accordingly enfranchised in 1906. From 1902 the family were separated in food and estate.

Three questions arise:—(1) Can there be co-parcenary interest in property attached to an office?

(2) Did not the Plaintiff's interest, if he has any, cease (The Plaintiff is the younger brother of the new Karnam)?

(3) Upon the complete division of a joint estate, in food, estate, and worship can there still remain a co-parcenary interest?

By the Decree of the Revenue Court in 1902, the then Karnam vindicated the property as his private property.

There have been a number of cases in Madras that these lands are attached to the office and no one else has any right in it.

Then came *Gunnaiyan v. Kamakchi* (8) citing as authority *Narayana v. Chengalamma* (7). They assume that there is an hereditary interest in these service tenures. That is the fallacy.

(3) I. L. R. 8 Mad. 249 (F. R.) (1884).

(7) I. L. R. 10 Mad. 1 (1886).

(8) I. L. R. 26 Mad. 339 (1902).

(10) I. L. R. 30 Mad. 434 (1907).

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[LORD SHAW.—In Palayams is there any right to change the holder.]

No.

There was partition in 1902 and so I have held it adversely from them onwards. I turned them out then.

Bada v. Hussu Bhai (2) and *Srinivasayyar v. Lakshamma* (1). I want to shew that from the earliest times till *Gunnaiyan's* case (8) the law regarding partition of the Karnam was perfectly well-settled in Madras.

The decision in *Gunnaiyan's* case (8), lays down that enfranchisement is not a fresh grant and this rule applies to enfranchisement of Karnam Inams.

Bada Hussu Bhai (2), *Srinivasayyar v. Lakshamma* (1) and *Venkata v. Rama* (3).

[LORD BUCKMASTER.—But see top of page 251 of 8 Madras.]

[LORD DUNEDIN.—See p. 273 (bottom) of 8 Madras.]

You may have a hereditary right to an office, but the property must go to the holder. That an office has certain emoluments attached to it does not give a coparcenary interest in it.

Narayana v. Chengalamma (7) is a case of unsettled Palayam. There it was treated not as a service tenure but as an ancestral estate by both sides, see p. 3. In *Venkatarayadu v. Venkataramayya* (4), again they are acting on the same principle. In *Dharanipragada Durgamma v. Kadambari Virrazu* (5), as in *Venkata v. Rama* (3), the ground is the same. In *Subbaraya Mudali v. Kamu Chetti* (6), a widow en-

franchises. They follow there *Venkatarayadu v. Venkataramayya* (4) and *Dharanipragada Durgamma v. Kadambari Virrazu* (5).

Gunnaiyan's case (8) is against me on one point only and that does not touch me. They dealt there with the case of the son of the man who enfranchised. The position is entirely different from mine. The point against me is Bhashyam Ayyangar, J.'s dictum that an office held like this is exactly on the same footing as Inam lands.

In *Pingala Lakshmipathi v. Bommi-reddipalli Chalamayya* (10), there is the same point that the assumption of a service Inam does not involve the title.

Ramayya v. Joganadhan (11) also proceeds on the assumption that there is a hereditary right. The whole question is—Is it hereditary?

Durga Prasad v. Tribeni (12) refers to Ghatwals, at p. 256.

Subba Row v. Satya Narain (13) is a judgment which refers to a number of unreported cases. It re-affirms the recent view. However it does not touch the case.

Refers to two Acts of the Madras Council.

(1) Madras Act II of 1894 for, village service holding, to be given salaries instead of Inams. See cl. 9 (2), secs. 16, 17 and 20. This statute contemplates succession to the office, and the land goes with the office. It does not seem to give a proprietary right in the land.

(2) Act III of 1895. Sec. 3, cl. 1, sub-cl. (3) applies this to Karnams. Sec. 5

(1) I. L. R. 7 Mad. 206 (1883).

(2) I. L. R. 7 Mad. 236 (1883).

(3) I. L. R. 8 Mad. 249 at p. 255 (F.B.) (1884).

(4) I. L. R. 15 Mad. 284 (1891).

(5) I. L. R. 21 Mad. 47 (1897).

(6) I. L. R. 23 Mad. 47 (1899).

(7) I. L. R. 10 Mad. 1 (1886).

(8) I. L. R. 26 Mad. 339 (1902).

(4) I. L. R. 15 Mad. 284 (1891).

(5) I. L. R. 21 Mad. 47 (1897).

(8) I. L. R. 26 Mad. 339 (1902).

(10) I. L. R. 30 Mad. 434 (1907).

(11) I. L. R. 39 Mad. 930 (1915).

(12) L. R. 45 I. A. 251 at p. 256 (1918).

(13) 40 M. L. J. 31 (1920).

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makes it absolutely impossible that it should be joint property. Sec. 7, cl. (1), secs. 13 and 21 "no Civil Court shall have authority," etc.

Standing orders of the Board of Revenue (Madras) of 1907 at p. 180 shew that these service Inams were not property in the ordinary sense of the word till enfranchised. Describe personal Inams, etc. R. 21, cl. 5 of these rules deals with service Inams.

Mr. K. V. L. Narasimham (following) refers *Gunnaiyan v. Kamakchi Ayyar* (8). Government has right to resume and regrant.

[LORD SHAW.—Did the Regulations of 1907 apply to this case when it was tried.]

Yes.

Venkatarayadu v. Venkataramayya (4) and *Dharanipragada Durgamma v. Kadambari Virrazu* (5) cannot be right, unless the property was not joint, else the widow could not have held.

Even if *Pingala Lakshmipathi v. Bom-mireddipalli Chalamayya* (10) and *Ramayya v. Joganadhan* (11) be right my client is entitled to the land for we cannot go behind 1907 the date of enfranchisement, when there was no joint family. Subordinate Judge refers to *Ramayya v. Joganadhan* (11) only as to the effects of enfranchisement and not on the question of "joint" ownership in them.

Mr. L. DeGruyther, K. C. (with Messrs. B. Dubé and Hyam) for the Respondent.—*Gunnaiyan v. Kamakchi* (8) is the only case in point and there land was held to be for the family. Sec. 17 of III of 1895.

In *Venkata v. Rama* (3), land was held

by a stranger and so the case is wholly different.

In the Fifth Report, Vol. II, p. 11 (Higginbotham & Co.'s reprint) the office of Karnam is described.

Madras Regulation 29 of 1802 is the first Regulation about the duties, etc., of Karnam. Parts of this have been repealed by later statutes. But this illustrates the position of Karnam. Secs. 4 and 5, etc., of this Regulation.

[LORD SHAW.—Look at sec. (9).]

Regulation VI of 18231, secs. 3 and 7.

Here we have property which prior to the Regulation was probably partible and would become so again after enfranchisement.

Act II of 1894 and Act III of 1895, sec. 10, sub-sec. (2), cl. (2).

If on enfranchisement it is ancestral property, then clearly the Plaintiff should succeed.

This is in the same position as a hereditary estate in India, and so when a person succeeds what are the rights of the other members? I say that the younger members are entitled to possession of parts for maintenance. This is also borne out by *Gunnaiyan v. Kamakchi* (8).

As regards the effect of enfranchisement, *Gunnaiyan v. Kamakchi* (8).

Except in the last case, *Subba Row v. Satya Narain* (13), it has never been questioned that the other members have a right.

Mr. A. M. Dunne in reply:—All these cases refer to a "Palayam."

The moment you have a new tenant you have a new right.

There is an earlier Act which makes this clearer. Regulation 25 of 1802, sec. (11), sec. (7) of Reg. 29 of 1802.

(3) I. L. R. 8 Mad. 249 (F. B.) (1884).

(4) I. L. R. 15 Mad. 284 (1891).

(5) I. L. R. 21 Mad. 47 (1897).

(8) I. L. R. 26 Mad. 339 at p. 347 (1902).

(10) I. L. R. 30 Mad. 434 (1907).

(11) I. L. R. 39 Mad. 930 (1915).

(8) I. L. R. 26 Mad. 339 at p. 347 (1902).

(13) 40 M. L. J. 31 (1920).

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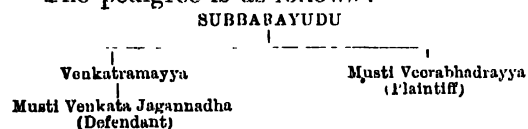
Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a decree, dated the 19th February 1918, of the High Court of Judicature at Madras which reversed a decree, dated the 14th March 1917, of the Temporary Subordinate Judge of Cocanada. This last-mentioned decree remanded the suit so that partition might be decreed in favour of the Plaintiff-Respondent.

The suit was for the recovery of the possession of a one-half share of lands specified in the schedule attached to the plaint. It was admitted that the suit properties had formed the emoluments attached to the office of Karnam or Village Accountant in the village of Pandalapaka.

These lands were enfranchised, as after-mentioned, in the year 1906 by an Inam, a title deed granted to Venkatramayya, the Appellant's father.

The pedigree is as follows :—



The Appellant's grand-father Subbarayudu was removed from his office of Karnam for incapacity due to old age, and his eldest son Venkatramayya was appointed Karnam on 23rd February 1902. Shortly thereafter the former Karnam died.

It is a fact in the case which is admitted that prior to the enfranchisement and Inam grant of 1906 all the family properties which were capable of division were divided into two equal shares between Venkatramayya and Veerabhadrayya. No partition took place of the Service Inam lands which are in suit in the present case.

The Appellant maintains that the Respondent had no right to such lands; that they were not joint family property, and were for that reason not included within

the scope of the division made; and that the enfranchisement of the Karnam lands in 1906 and the procedure with regard thereto are consistent with the view that the lands were impartible and were confirmed as separate property by the then holder of the office of Karnam; while upon the other hand the Respondent maintains that a division of this particular property, although it is undoubtedly Karnam land, must now be decreed and that the enfranchisement of 1906 could not destroy the nature of the property as joint family property and the interest of the Respondent therein.

The Subordinate Judge took the former view and the High Court took the latter. The question in the appeal is which of these views is correct.

The point in issue is compendiously put in the Respondent's case in these terms: "Whether the enfranchisement in the name of the Defendant's father enured for the benefit of the family or to himself exclusively?"

It is admitted that the lands in suit formed the emoluments of the Karnam or Village Accountant. A large body of authority on the subject of the nature of the title to lands so held was cited to the Board. There can be no question of assailing (whatever be the nature of the title to the property itself) the validity of the enfranchisement under the Inam rules. The suit proceeds upon that footing and asks for a division of the property on the assumption that it has been duly enfranchised under the Inam Rules of 1859.

It is, however, highly expedient to note the exact terms of the enfranchisement itself. It is dated the 21st March 1906, and is signed by Mr. J. A. Atkinson, Inam Commissioner. It is thus expressed :—

"No. 1520.

"Title deed granted to Musti Venkatramayya.

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"By order of the Governor in Council of Madras acting on behalf of the Secretary of State for India in Council, I acknowledge your Title to an Inam consisting of the right to a portion of the Government revenue on land measuring (forty-five) 45—83 acres of dry (be the same a little more or less) originally granted for service, and situated in the village of Pandalapaka in the Estate of Pithapur, in the Taluk of Ramchandrapur in the District of Godavari.

"2. This Inam, being held for Karnam Service now otherwise provided for shall now be deemed freed of such service but shall henceforth be subject to the payment of an annual Quit-rent of Rupees (296-8-0) two hundred and ninety-six and annas eight exclusive of Rupees (24-0-0) twenty-four already payable as jodi to the proprietor, which Quit-rent is hereby imposed upon the Inam in commutation both of the said service and of the reversionary interest possessed by Government in the Inam. The Inam is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper, subject only to the payment of the above-mentioned Quit-rent and jodi (which Quit-rent will be liable to revision at the periodical re-settlements of the district), and to the provisions of the next clause.

"3. The right of Government to all minerals, if any, in the land referred to in cl. 1 above is hereby expressly reserved to Government, and the revenue referred to in such clause represents only the right of Government to a share in the surface products of such land.

(Signed) J. A. ATKINSON,
Inam Commissioner."

"Dated 21st March 1906,

"MADRAS.

There can be no question as to the absolute nature of this grant in favour of the Appellant's father. The Inam is confirmed "to you, your representatives and assigns, to hold or dispose of as you or they think proper" subject only to the payment of quit-rent, etc., and to the reservation of minerals.

It is worthy of note first that this en-

franchisement happens also to be in entire accord with the Standing Order of the Board of Revenue of Madras as to Inams, No. 52 of 1897, and second that that Standing Order makes the distinction between grants which are personal or subsistence grants and those which are Service Inams. It is to the latter category that the enfranchisement in the present case properly belongs. By the Standing Order alluded to it is provided by sec. 29 that:—

"XXIX. Inams thus enfranchised, either by the payment of an annual quit-rent, or of a single fixed sum equal to twenty years' purchase of the quit-rent, will, like every other description of property, be subject to the jurisdiction of the ordinary Courts of Justice in all questions of disputed right, succession, etc., and they may be mortgaged, sold and transferred in any manner, at the will and discretion of the inamdar, subject to the payment of quit-rent, if such is not redeemed."

The Board has carefully considered the long series of authorities quoted in argument and it is of opinion as follows:—

(1) The lands comprising the emoluments of a Karnam were attached to the office held by him as such;

(2) When the Karnam for the time being was removed from office he lost all right and title to the lands;

(3) Although in point of fact there might be even a long continuance of the office in a particular family, the right of the Government and the decision of the Revenue authorities to remove a Karnam from office and to appoint another, were not open to question in Courts of Law, and

(4) If this right of selection were exercised in favour of a stranger, there being, for example, within the range of the family (which had been accustomed to have one of its members holding the office of Village Accountant) no person who in the opinion

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of the Revenue Officer was suitable for the position, then the appointment went to the stranger selected and the lands with it as emoluments without any claim thereon as a family right by relatives of former holders of the office.

These propositions seem to their Lordships to have been part of the law of Madras long prior to the Acts of 1894 and 1895, which are now to be referred to; but it is to be observed with regard both to Madras Act No. 2 of 1894, sec. 10, and Madras Act No. 3 of 1895, sec. 10, that eligibility, whether for nomination to the office of Karnam by the proprietor of the village under the former Act or by the Collector under the latter, is a matter personal to the nominee, clearly taking into account such things, not only as sex and age, but also the physical and mental capacity to discharge the office, and even the educational qualifications of the person selected.

It is accordingly clear that since that time in Madras the Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is member of a particular family. It would accordingly appear, apart from the authorities, that lands held as appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible.

It may be, however, that the course of authority leads to a different result from that to which principle and administrative convenience would seem to point. Their Lordships will therefore examine the authorities, which, as will be seen hereafter, are conflicting.

In *Srinivasayyar v. Lakshamma* (1), it was held that where a hereditary village officer who had been dismissed sued to

recover land which had formerly been the emoluments of the office and which had been enfranchised and granted to another person, holding the office at the time of the enfranchisement, such a suit could not lie. Their Lordships quote the judgment of Turner, C. J., as containing a compact statement of law upon the point :—

“The lands were attached to the office of Karnam, as its emolument; when the Appellant was removed from the office, he lost his right to the land.

“The circumstance that money may have been expended on the improvements of the land in the expectation that the office with its emolument would be continued to the family, would not give the Appellant any title to recover the land in the events that have occurred. When he was removed for misconduct, the office and emoluments were conferred on a stranger, and with the decision of the Revenue authority on that question we cannot interfere. While the office was held by a stranger, the Government resolved to sever the lands from the office and to offer them to the then office-holder for enfranchisement; the holder accepted the offer and became the owner.”

The decision, it will be observed, non-suited the former holder of the office from recovering the land. But the same result followed in the subsequent case of *Bada v. Hussu Bhai* (2), in which a member of the family of an office-holder who had never held the office sued to recover a share of the lands, and the same learned Judge put the point thus :—

“The land was appurtenant to the office, and the Government determined to sever it from the office and to allow the office-holder or office-holders for the time being to enfranchise it. The Appellant, who was never the holder of the office, could not have a claim on its emoluments.”

That this was the law of Madras was stated by the Full Court in the year 1884, in *Venkata v. Rama* (3). The judgment

(2) 1 L. R. 7 Mad. 236 (1883).

(3) 1 L. R. 8 Mad. 249 (F. B.) (1884).

(1) 1 L. R. 7 Mad. 206 (1883).

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of Hutchins, J., in referring to the Full Court thus states the point :—

“To ensure the office being held by a qualified person, the Executive was compelled to reserve to itself the determination of all claims.”

Following the line of his dissent, however, he added :—

“But subject to this one condition the absolute right of hereditary succession has been repeatedly recognized.”

He dissented, as has been said, on this point from the judgment of the Full Bench. But in the opinion of their Lordships the judgment then pronounced (and it is observed that Turner, C. J., and Muttusami Ayyar, J., were members of the Court), was clear and sound. The Madras Regulations of 1802, 1806 and 1831 are most carefully considered, and the general result is stated in the following sentences of the judgment of Turner, C. J. :—

“When the emoluments consisted of land, the land did not become the family property of the person appointed to the office, whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office-holder and designed to be the emolument of the officer into whose hands soever the office might pass. If the Revenue authorities thought fit to disregard the claim of a person who asserted an hereditary right to the office and conferred it on a stranger, the person appointed to the office at once became entitled to the lands which constituted its emolument.”

Even on the footing that the Respondent in the present case had established that the office was one in which he as a member of the family had a species of expectation or hereditary right, the decision would equally apply to the present case. The judgment of Muttusami Ayyar, J., upon this point was clear.

“According to the law, therefore, as it stood prior to the enfranchisement of the Inam, a right to the land could only be

legally acquired through the right to the possession of the office, and neither the Respondent's father nor the Respondent had then any vested interest in the office to sustain an action in the nature of an ejectment.”

The same reasoning would have applied to any attempt to partition the lands.

In the opinion of the Board the law of Madras was thus soundly stated and that judgment should not have been disturbed.

It was followed in the case of *Venkatarayadu v. Venkataramayya* (4), and as the judgment of Sir Arthur Collins seems strictly to apply to the present litigation these sentences from it are quoted and are adopted :—

“We think that the decision of the Subordinate Judge is opposed to the principles laid down in the Full Bench decision in *Venkata v. Rama* (3). The land which formed the emolument of the office of Karnam did not become the family property of the person appointed to the office, although he may have had an hereditary claim to the office. The land was designed to be the emolument of the person into whose hand the office of the Karnam might pass and was inalienable by him. The effect of enfranchisement was to free the lands from their inalienable character and to empower the Government to deal with them as they pleased.”

The same result was reached in *Dharani-pragada Durgamma v. Kadambari Virrazu* (5), in which the principle of the Full Bench case was again followed.

In *Subbaraya Mudali v. Kamu Chetti* (6), “lands which had been held by a deceased as moniem service Inam were enfranchised after his death and sold by his widow. On a claim being preferred by the reversioners for a declaration that the sale was inoperative as against them after the expiration of the widow's life estate it

(3) I. L. R. 8 Mad. 249 (F. B.) (1884).

(4) I. L. R. 15 Mad. 284 (1891).

(5) I. L. R. 21 Mad. 47 (1897).

(6) I. L. R. 23 Mad. 47 (1899).

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was held that the right of the widow under the grant was not limited to that of a widow's estate." The case was expressly decided as following the Full Bench decision. Subsequently, with one exception about to be noted, the law of Madras up to the year 1899 followed the consistent line which has just been stated.

The difficulty, however, which appeared in the later decisions sprang from the case of *Narayana v. Chengalamma* (7). It must, however, be observed that that was not a Karnam case. It was the case of a Palayam; and in their Lordships' opinion the error which has appeared has been in the treatment of these two separate cases as governed by analogical principle. Running through the decisions of the Madras Courts the same difficulty more than once appears: it arises from the same cause, namely, that the law of the Palayam is treated as the same as the law of the Karnam. This is carried to the point that in 1902 in the case of *Gunnaiyan v. Kamakchi Ayyar* (8), the Full Court reversed the law that had been laid down by a Madras Full Bench in 1884 in the case of *Venkata v. Rama* (3). This procedure has been, of course, full of perplexity and that perplexity must now, if possible be brought to an end.

The judgment of this Board dealing so fully with the case of a palayam tenure and delivered by Sir John Edge in the case of *Naicker v. Midnapore Zamindari Company* (9), on the 16th March 1921, makes it unnecessary to enter again at length on that topic. The Palayagars were originally "petty chieftains occupying usually tracts of hills or forest country subject to pay tribute and service to the paramount State, but seldom paying either, and more

or less independent." The State policy with regard to Palayagars was definitely announced by the proclamation of Lord Clive in 1801. To all intents and purposes the Palayagars were relieved of military duties; they had to give up possession of fire-arms and weapons of offence and become Zamindars; a certain number of pikemen whose names were to be registered were allowed to these chieftains in deference to their personal feelings and "for the purpose of maintaining the pomp and state heretofore attached to the persons of the said Palayagars." The meaning of the proclamation is that their estates were subjected to assessment "upon the principles of zamindar tenures." Palayagars so treated were dealt with as zamindars with hereditary estates, their ancestors' possessions being secured to them.

It is accordingly not to be wondered at that when a case of this nature was brought before the Courts as in *Narayana v. Chengalamma* (7), already referred to, it should have been held that the Inam title-deed which had been granted to the Palayagar in that case did not confer any new title and that the enfranchisement had no "larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service." The decision forms no authority for the same principle being extended to the case of a Karnam. It was so interpreted, however, in *Gunnaiyan v. Kamakchi Ayyar* (8), and Bhashyam Ayyangar, J., applied the law as laid down as to Palayams as "law bearing upon the enfranchisement of Inams whether they be personal Inams or service Inams." The only difference, said the learned Judge, between that case and the present one "is that in the former the office itself was abolished as unnecessary, whereas

(3) I. L. R. 8 Mad. 249 (F. B.) (1884).

(7) I. L. R. 10 Mad. 1 (1886).

(8) I. L. R. 26 Mad. 339 (1902).

(9) 26 C. W. N. 106 (P. C.) (1921).

(7) I. L. R. 10 Mad. 1 (1886).

(8) I. L. R. 26 Mad. 339 (1902).

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in the present case the office was retained an office, the house being attached thereto in lieu of the Inam. This, of course, can make no distinction in principle."

Their Lordships differ from this view. When a Palayam was abolished, in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar in the same manner as if possessed by a zamindar. It is different with regard to the case of a Karnam. A hereditary right in a Karnam or his family can only, at the utmost, be said to constitute a certain *spes* among persons within the area of selection of those eligible for the office. But it is not, as had already been observed, even so limited. The power of selection rests with the administrative officials, who alone are judges of the eligibility of the Karnam for the time being, and it is the settled law of Madras that the emoluments in the shape of lands followed the office, *ex necessitate*. Otherwise the holder of the lands might be some person other than the holder of the office as already pointed out. The analogy fails.

It was, however, decided in the opposite sense by a Full Bench in the case of *Pingala Lakshmiipathi v. Bommireddipalli Chalamayya* (10). In a brief opinion it is said that "it is difficult to gather any definite principle common to the majority" in the case of *Venkata v. Rama* (3). The case of *Gunnaiyan v. Kamakchi Ayyar* (8) was approved. Their Lordships are of opinion that the Full Bench was in error: that the case of a Karnam stands on its own footing and that the principles applicable thereto were properly decided in *Venkata v. Rama* (3) by the Full Court. The reasons for their Lordships' views have already been sufficiently stated.

To quote and to adopt the judgment of the 25th August 1902, of Mr. Galletti, Acting Sub-Collector, in this case:—

"This is a suit for the recovery of the Karnam service Inam lands of Pandalaka. Plaintiff is admittedly Karnam. The land is admitted Karnam's Inam. Judgment for Plaintiff with costs."

A warrant of execution dated the 24th October 1902, authorising the removal of "any person bound by the decree who may refuse to vacate the same," was also right. It is unnecessary, however, to enter upon questions either of limitation or of *res judicata* which were referred to in the argument because the case has been disposed of on the merits.

When, accordingly, on the 21st March 1906, the title deed already quoted was granted by way of an Inam to the Appellant's father and was in express words confirmed to him, and was, "now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper," the Board is of opinion that that enfranchisement must be given full effect to, and that it is not subject to be eviscerated or altered by the claim for partition or division put forward by way of defence to the present suit.

Their Lordships will humbly advise His Majesty that the appeal should be allowed; that the decree of the Temporary Subordinate Judge of Cocanada, dated the 14th March 1917, be affirmed and that the Appellant be found entitled to costs in the Courts below from the said date and of the costs of this appeal.

Solicitor: *Mr. Douglas Grant* for the Appellant.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Respondent.

R. M. P.

(3) I. L. R. 8 Mad. 249 (F. B.) (1884).

(8) I. L. R. 26 Mad. 339 (1902).

(10) I. L. R. 30 Mad. 484 (1907).

[CIVIL APPELLATE JURISDICTION.]**APPEALS FROM APPELLATE DECREES****Nos. 2816 AND 2817 OF 1916****AND****Nos. 690, 1019-24 OF 1919.**

THE CHAIRMAN, JALPAIGURI MUNICIPALITY,
Defendant, Appellant,
v.

MOOKERJEE, J.
BUCKLAND, J.
1921,
21, June.

THE JALPAIGURI TEA
Co., LD., and anr.,
Plaintiffs, Respondents.

Bengal Municipal Act (III, B. C. of 1884), sec. 85 (a)—“Circumstances and property within the Municipality,” meaning of—Municipal assessment on tea companies, whose gardens and market lay outside the Municipality, when the sale proceeds alone came to Bank within the Municipality, legality of—Separate assessment on several companies who were joint occupants of one holding, if ultra vires—Sec. 87 (d), defect in the assessment list, if vitiates the assessment.

Certain Tea Companies, whose head offices were in one building in the town of Jalpaiguri, had their gardens outside the Municipal limits, and the tea was sent direct from there to Calcutta and sold there. The sale proceeds used to be sent to a Bank in the town of Jalpaiguri, which placed the amounts to the credit of the respective companies after deducting advances, etc., and the net amounts were ultimately distributed as dividends amongst share-holders. The Jalpaiguri Municipality separately assessed each of the said companies with a personal tax at the maximum rate on the basis of the income received at the Jalpaiguri Bank from the sale proceeds of the tea. The assessment list, however, which was prepared under sec. 87 (d), omitted to show the income upon which the tax was imposed, as ought to have been shown according to the provisions of the section :

Held—That the “circumstances and property” of a person depended upon what he got or upon what he spent within the Municipality. In the present case

though the original source of the income may be outside the limits of the Municipality, the entire income is brought to be spent and enjoyed within the Municipality. The term “circumstances” is equivalent to “means.” The proceeds of the sale of tea deposited in the Bank at Jalpaiguri, are “the circumstances and property” of the companies, i.e., their “means and property” within the Municipality, irrespective of questions as to whence the income accrues and so forth, and furnish a just measure of their liability under sec. 85 (a).

DEB NARAYAN P. (CHAIRMAN OF BARUIPUR MUNICIPALITY (3) and KAMESWAR PRÖSAD v. CHAIRMAN OF BHABUA MUNICIPALITY (1) and several other cases referred to.

The tax imposed was the tax upon persons contemplated by sec. 85 (a) and not the tax upon holdings prescribed by sec. 85 (b). Sec. 85 (a) cannot be limited in its application to a case where only one person occupies an entire holding. The companies undoubtedly were persons and they occupied holdings inasmuch as the possession of the holding by each of them was actual, as of right and not of a transient character. There was nothing in the section which saved them from liability because their occupation was joint.

Per BUCKLAND, J.—The tax was in the nature of a poll-tax leviable on persons, according to their “circumstances and property” within the Municipality.

AMBIKA. v. SATIS (9) and GOVINDA v. KAILAS (10) and several other cases referred to.

Held, further—That though the assessment list under sec. 87 (d) was defective, the defect was one of form and did not in-

(1) I. L. R. 27 Cal. 849 (1900).

(3) I. L. R. 39 Cal. 141 (1911) : s. c. I. L. R. 41 Cal. 168; 17 C. W. N. 1230 (1912).

(9) 2 C. W. N. 689 (1898).

(10) 15 C. L. J. 689 (1905).

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validate the assessment. Besides, no proceedings were taken under sec. 113, which provides a remedy in such a case.

CHAIRMAN OF CHITTAGONG MUNICIPALITY v. JOGESH (18) and CHAIRMAN OF CHAPRA MUNICIPALITY v. BASUDEO (19) and other cases referred to.

These were appeals against the decrees of Babu Asutosh Gupta, Officiating Subordinate Judge of Zillah Jalpaiguri, dated the 29th of May 1916, affirming the decrees of Babu Nishi Kanta Banerji, Munsif, 1st Court at that place, dated the 12th of June 1914.

The facts fully appear from the judgments.

Babus Mohendra Nath Roy and Manmatha Nath Roy for the Appellant.

Babus Brojo Lal Chakrabatty and Hemendra Nath Bose for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

'S. A. Nos. 2816 and 2817 of 1916.

MOOKERJEE, J.—These two appeals are directed against the decrees of the lower Appellate Court, made in affirmance of the decrees of the trial Court, in two suits instituted by the Plaintiffs-Respondents to contest the legality of the assessment of personal tax and latrine fee on them by the Commissioners of the Jalpaiguri Municipality. The Plaintiffs are two Companies, the Jalpaiguri Tea Co., and the Chuniajhora Tea Co., which have their registered Offices within the Municipal limits of the Town of Jalpaiguri. The Defendant Municipality in exercise of statutory powers (under the Bengal Municipal Act, 1884) assessed on the Plaintiffs at the last general assessment a personal tax of Rs. 84 each per annum under sec. 85 (a) and latrine fee of Rs. 7-3-0 each per annum under sec. 86 (f). These are

the assessments challenged in the two litigations. Sec. 85 provides that the Commissioners may impose within the limits of the Municipality one or other of the following taxes :—

(a) a tax upon persons occupying holdings within the Municipality according to their circumstances and property within the Municipality :

Provided that the amount assessed upon any person in respect of the occupation of any holding shall not be more than eighty four rupees per annum or

(b) a rate on the annual value of holdings situated within the Municipality :

Provided that such rate shall not exceed seven and a half per centum on the annual value of such holdings, except within the Municipalities of Howrah, Patna, Dacca and Darjeeling, in which it shall not exceed ten per centum on such annual value ; and provided also that no rate shall be imposed on any holding in which the annual value is less than six rupees : Provided that both the taxes shall not be in force at the same time in the same ward.

Sec. 86 provides that the Commissioners may order that a fee for the cleansing of latrines be levied within the limits of the Municipality in addition to either of the taxes mentioned in sec. 85. *

The Plaintiffs attack the tax imposed under sec. 85 (a) as *ultra vires* on three grounds, namely, first, that the amount was assessed on the basis of their circumstances and property outside the Municipality ; secondly, that each of the joint occupants of a holding has been separately assessed at the maximum amount ; and, thirdly, that the statutory procedure for assessment has not been followed. The Plaintiffs challenge the latrine fee as *ultra vires* on the ground that each of two Companies who are joint occupiers of one holding has been separately assessed with

(18) I. L. R. 37 Cal. 44 (1909).

(19) I. L. R. 37 Cal. 374 (1910)

THE CHAIRMAN, JALPAIGURI MUNICIPALITY

the entire latrine fee payable. No further reference will be made to the legality of the latrine fee, as the question, in so far as it has been decided in favour of the Plaintiffs, has not been re-argued in this Court. We are consequently concerned now, solely with the matter of the legality of the tax imposed under sec. 85 (a) which has been pronounced *ultra vires* by the concurrent judgments of the Courts below.

The facts relevant for the determination of this question are not challenged in this Court and may be briefly recited. The Head Office of each of the Companies is situated within the Municipality. Their income is derived from tea gardens in the Western Dooars in the District of Jalpaiguri, beyond the Municipal jurisdiction of the town of Jalpaiguri. The tea is sent direct from the gardens to Calcutta and sold there. The sale proceeds are sent to the Jalpaiguri Banking and Trading Corporation which is the financing bank of the two Companies and its office in the town of Jalpaiguri. The amounts received by the Bank are placed to the credit of the respective Companies. The sums due on account of advances made by it as loan to the Companies are first deducted from the receipts. From the balance, the expenditure is met, and then dividends are declared in a general meeting of the shareholders. It is not disputed that the amount thus received by the Bank to the credit of each Company from outside the Municipal limits exceeds Rs. 30,000 a year, and at the sanctioned rate of one rupee for Rs. 160, would justify the levy of the maximum tax of Rs. 84. On these facts, the Municipality maintains that the income thus received by each Company at Jalpaiguri constitutes its circumstances and property within the Municipality for the purposes of sec. 85 (a), and that it is immaterial that the tea is grown in a garden outside the Municipal limits or is sold in

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a market of Calcutta. This contention has been overruled by both the Courts below. We have arrived at the conclusion that the view taken by the Subordinate Judge whose judgment is under appeal cannot be supported.

There has been much controversy as to the precise meaning of the expression "circumstances and property within the Municipality" used in sec. 85 (a), as is apparent from an examination of the decisions in *Kameswar Prosad v. Chairman of Bhabua Municipality* (1), *Chairman of Giridih Municipality v. Srish Chandra* (2), *Deb Narayan v. Chairman of Baraipur Municipality* (3), *Chairman of Rajpur Municipality v. Nagendra Nath* (4), *Debendra Nath v. Chairman of Taki Municipality* (5), *Chairman of Joynagar Municipality v. Sailabala* (6), *Chairman of Behar Municipality v. Ramdeo Das* (7) and *Mahomed Ali Nawab v. Chairman of Behar Municipality* (8). What constitutes the circumstances and property of a person within the Municipality must in a large measure depend upon the facts of the particular case. In some of the decisions just mentioned, the question arose whether the answer depended upon what the person got or on what he spent within the Municipality. Sometimes it has been urged that the measure of his liability was what he got and not what he spent within the Municipality; this contention was put forward by the assessee in *Chairman of Giridih Municipality v. Srish Chandra* (2)

(1) I. L. R. 27 Cal. 849 (1900).

(2) I. L. R. 35 Cal. 859 : s. c. 12 C. W. N. 709 (1908).

(3) I. L. R. 39 Cal. 141 (1911); s. c. I. L. R. 41 Cal. 168; 17 C. W. N. 1230 (1913).

(4) 23 C. W. N. 475 : s. c. 29 C. L. J. 379 (191).

(5) 25 C. W. N. 45 : s. c. 32 C. L. J. 210 (1920).

(6) 25 C. W. N. 47 (1920).

(7) [1920] Pat. 120; 4 P. L. J. 673.

(8) [1920] 1 Pat. L. T. 591.

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for the purpose of reduction of the assessment. On the other hand, in *Debendra Nath v. Chairman of Taki Municipality* (5) it was urged by the Municipality that the test was what he spent and not what he received, because this would have enabled the Municipality to increase the amount of assessment. It is not necessary for our present purpose to determine whether either of the two tests admits of universal application; here the same result is reached whichever test is applied. It is immaterial that the tea is grown in the interior of the District, beyond the Municipal limits, and is sold in a far distant market. The fundamental fact remains that though the original source of the income may be outside the local limits of the Municipality, the entire income is brought to be spent and enjoyed within the Municipality. As was observed by Sir Lawrence Jenkins, C. J., in *Deb Narayan v. Chairman of Baruipur Municipality* (3) the term "circumstances" in sec. 85 is equivalent to "means." There can be no room for doubt that the sale proceeds of the tea, when they are brought within the Municipal limits and are placed in the Bank to the credit of the Companies may, without undue strain on the language, be described as their "circumstances and property," that is, their "means and property" within the Municipality, and may consequently be taken to furnish a just measure of their liability to assessment under sec. 85 (a). In my opinion, the personal tax is not open to attack as *ultra vires* on the first ground mentioned.

We have next to consider two minor objections, namely, (a) that where two Tea Companies jointly occupy the same holding, each is not liable to be separately

assessed under sec. 85 (a) and (b), that the assessment is vitiated, inasmuch as the list prepared under sec. 87 did not contain all the details enumerated in cl. (d). In my opinion, these objections are groundless.

As regards the former of these points it may be observed that the tax which has been imposed is that tax upon persons contemplated by sec. 85 (a) and not the tax upon holdings prescribed by sec. 85 (b). Sec. 85 (a) cannot plainly be limited in its application to a case where only one person occupies an entire holding. The language does not justify such a restricted interpretation; and there is no good reason why in places where the personal tax is in operation, several persons occupying the same holding should not each be subject to assessment, according to their respective circumstances and property within the Municipality. But, on behalf of the Plaintiffs it has been argued that such a comprehensive construction of sec. 85 (a) may cause hardship and may lead to results not reconcilable with the decisions in *Ambika v. Satis* (9) and *Govinda v. Kailas* (10). In the first of these cases it was held that persons living with a particular individual (the occupier of a holding) by reason of some connection with or relation to him, such as sons or servants, could not be deemed to be occupying the holding within the meaning of sec. 85 (a) and would not be separately assessable by reason of possessing separate incomes. In the second case, it was held that when a Naib of a Zamindar resided on a holding, solely to carry on the business of the Zamindar whose representative he was and who paid the rent therefore to the superior landlord, the Zamindar and not the Naib must be regarded as the occupier liable for payment of the tax. These decisions show that in concrete instances,

(3) I. L. R. 39 Cal. 141 (1911); s. c. 1. L. R. 41 Cal. 168; 17 C. W. N. 1230 (1913).

(5) 25 C. W. N. 45; s. c. 32 C. L. J. 210 (1920).

(9) 2 C. W. N. 689 (1898).

(10) 15 C. L. J. 689 (1905).

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and upon their special facts questions of nicety may arise, as to whether a person may be said to be in occupation of a holding within the meaning of sec. 85 (a). This, indeed, is clear from an analysis of the elements included in the complex notion of occupation, see the judgments of Mellor and Lush, JJ., in *Queen v. St. Pancras Assessment Committee* (11). To determiné, whether in a given set of circumstances a person may be said to be in occupation of a holding for purpose of assessment of rates and taxes, we may have to apply various tests; these need not be exhaustively enumerated, but some illustrations may be mentioned: taking possession as the primary element in occupation, the questions may be asked, is his possession actual, is it transient or temporary, has it a character of permanence, and is it as of right or merely by permissive license. Considerations akin to these may arise in a form of increased complexity where we have to deal with members of joint Mitakshara families. The case before us is, however, free from such serious difficulties. Here the possession of the holding by each of the companies is actual, is as of right, and is not of a transient character. Such possession, if it were exclusive, would undoubtedly constitute "occupying a holding" within the meaning of sec. 85 (a). The only fact which, it is urged, deprives the possession of the characteristics of occupation is that another company is in joint possession in a precisely similar manner. I am of opinion that this circumstance is not material and that each company may, in the eye of law, be regarded as occupying the holding. I am not unmindful that there are expressions in cases reported in the books to the effect that occupation in order to be rateable must be exclusive; *Cory v. Bris-*

tow (12) and *London and N. W. Railway Company v. Buckmaster* (13). But as was pointed out by Lord Herschel, L. C., and Lord Davey in *Holywell Union v. Halkyn District Mines Drainage Co.* (14), the statement that occupation must be exclusive does not mean that nobody else has any right in the premises. The cases show that if a person has only a subordinate occupation, subject at all times to the control and regulation of another, then that person has not occupation in the strict sense for the purposes of rating, but the rateable occupation remains in the other, who has the right of regulation and control. Cases also frequently arise where two persons have rights over the same hereditament, the rights of each qualifying the rights of the other, and both persons are rateable; *Lancashire Telephone Co. v. Manchester* (15), *All Church v. Hendon Union Assessment Committee* (16) and *R. v. St. Georges Union* (17). Where the rate is imposed upon the land itself, it may well be that as land may, so to speak, be subject to different strata of occupation super-imposed one upon another, an occupation of one kind may still be regarded as exclusive although other persons may use the land in some other way, and may even use it in such a way as to render themselves also rateable as occupiers. On the other hand, if the tax is assessed on a person as occupier, it is plain that he does not cease to be occupier because other persons are jointly in occupation with him. The second objection to the legality of the assessment must consequently be overruled as untenable.

As regards the final objection, namely,

(12) 2 App. Cas. 262, 275 (1877).

(13) L. R. 10 Q. B. 70, 434 (1874).

(14) [1895] A. C. 117.

(15) 14 Q. B. D. 267 (1884).

(16) [1891] 2 Q. B. 436.

(17) L. R. 7 Q. B. 90 (1871).

(11) 2 Q. B. D. 581 (1877).

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that the assessment list was not prepared in accordance with the provisions of sec. 85 (d) which requires that the list shall include a description of the holding and of the property within the Municipality and the profession or business of the person assessed, we are informed that the assessment list did not show the income upon which the tax was assessed. In my opinion, this was a defect of form and did not invalidate the assessment; *Chairman of Chittagong Municipality v. Jogesh Chandra Ray* (18). There is clearly no foundation for the sweeping proposition that every defect in the assessment list prepared under sec. 87 destroys the jurisdiction of the Commissioners and renders the assessment *ultra vires*; and unless this is established, the Civil Court has no jurisdiction to interfere; *Chairman of Chapra Municipality v. Basudeo* (19) and *Chairman of Rajpur Municipality v. Nagendra* (4). I hold accordingly that the assessment under sec. 85 (a) is not liable to successful attack on any of the three grounds specified.

The result is that these two appeals are allowed and the suits are dismissed in so far as the Plaintiff seeks a declaration that the assessment under sec. 85 (a) was *ultra vires*. The decrees will stand in so far as they declare that the assessment of the latrine fee was *ultra vires*.

S. A. Nos. 690, 1019-1024 of 1919.

It is conceded that these appeals will be governed by the above judgment in S. A. Nos. 2816 and 2817 of 1916, and similar decrees will be drawn up in these cases.

In each case, the Plaintiff will pay costs in this Court and in the lower Appellate Court to the Defendant Municipality:

(4) 23 C. W. N. 475: s. c. 29 C. L. J. 379 (1910).

(18) I. L. R. 37 Cal. 44 (1909).

(19) I. L. R. 37 Cal. 374 (1910).

but all parties will pay their own costs in the Court of first instance.

BUCKLAND, J.—The facts of these cases are simple. The Respondent companies, with the exception of the Anjuman Tea Company, Limited, which has premises of its own, not shared with any other Company, jointly occupy at Jalpaiguri a building or buildings in which they have their registered offices.

Each of them has been assessed under sec. 85 (a) of the Bengal Municipal Act at the maximum rate allowed thereby. It is not disputed that if they are liable to assessment under that section the maximum rate is not excessive.

They filed suits to have it declared that the assessments were illegal and *ultra vires* and to have them set aside and have succeeded in both the lower Courts.

Three points have been argued on this appeal. The first is that the conclusion as to the companies having property within the Municipality is wrong in law upon the facts as found.

The second is that the companies who jointly occupy a holding cannot all be made liable.

The third is that the provisions of sec. 87 of the Act have not been observed.

As regards the first of these points it is not disputed that the procedure is for the tea, which of course is grown outside Municipal limits, to be sent to Calcutta for sale. The companies are financed by the Jalpaiguri Trading and Banking Co. When the tea has been sold the proceeds which are not paid to the companies or their agents, are credited in the companies' accounts with the Bank after being remitted to Jalpaiguri, where the balance after payment of the Bank's dues becomes available for dividends or for use in the concern as may be decided.

It is quite clear that these proceeds of the sale of tea, deposited in the Bank at

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Jalpaiguri are property within the Municipality. These last four words involve a very simple question and do not necessitate any consideration of questions as to where the income accrues and so forth, such as are to be found in connection with questions of assessment for income tax. It has not been suggested that there are any other "circumstances" which have to be taken into account. This point therefore must be decided in favour of the Appellant.

The second point does not concern the Anjuman Tea Co., for reasons already given. The lower Courts have not in my opinion approached this question from the right point of view. They have held that where more than one company occupies one holding, the definition of which is "land held under one title or agreement and surrounded by one set of boundaries" and does not give rise to any difficulty, the Municipality is not entitled to divide the holding into several holdings and assess the companies accordingly. This has resulted in their not finding it necessary to deal with the point as now presented to us.

The companies undoubtedly are persons. They admittedly occupy holdings. There is nothing in the section which saves them from liability because the occupation is joint. The tax is in the nature of a poll-tax, leviable on persons. Not, however, merely as persons, but according to their circumstances and property within the Municipality. So far as a tax per holding is imposed, that is provided for by sec. 85 (b). Sec. 90 to which we were referred on behalf of the Respondent companies supports this view. It provides the procedure if the aggregate amount of rates assessed on any person in respect of his occupation of two or more holdings, exceeds Rs. 84 per annum. That is to say it deals with assessments

under sec. 85 (a). Were the tax not a personal tax but a tax per holding, clearly this section would have no place in the Act as in that case there would be no reason for abatement as provided by this section. In the course of argument the position of a Hindu joint family under Mitakshara law was referred to, in connection with the liability of an infant son at birth, who would have a share in the holding. The point does not now arise for decision but that a joint occupier was incapable of earning income or did not own property independently of the other joint occupiers might well be a circumstance such as is contemplated by sec. 85 (a) for not assessing him to the full amount. This illustration of a possible application of the section does not affect the principle.

In my judgment the companies though joint occupiers of holdings are each of them liable to the tax under sec. 85 (a).

The third point is one of no substance. The complaint of the companies is that the assessment list contained no description of the property as required by sec. 87 (d). No proceedings were taken under sec. 113 which provides a remedy in such a case. Moreover the point which has been determined in favour of the Respondent companies by the lower Courts is inconsistent with the second point as there taken on behalf of the companies that the Municipality should not have divided the holding into several holdings for the purpose of assessment. I am not prepared to hold that the omission may invariably be negligible, but for the purposes of this appeal I do not think that the defect is fatal to the Appellant. Sec. 338 was referred to in the course of argument but that does not help the Appellant as it only refers to an assessment or rating of tax on property, whereas the tax in question is one on persons.

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For these reasons I concur in the orders to be made in the several appeals.

J. N. R. Appeals allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 236 OF 1919.

<p>MOOKERJEE, J. BUCKLAND, J. 1921, 18, January.</p>	}	<p>ASKARAN BAID, Plaintiff, Appellant, <i>v.</i> GOBORDHAN KOBRA and anr., Defendants, Respondents.</p>
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Transfer of Property Act (IV of 1882), sec. 67—Mortgagee's right to a decree for sale when the mortgage is an English mortgage—Civil Procedure Code (Act V of 1908), Or. XXXIV, r. 6—Mortgagee's right to a personal decree against the mortgagor when after the transfer and redemption clauses in the mortgage deed there is a covenant for payment of the mortgage debt—Appellate Court's power to pass a personal decree in the appellate stage.

Under the provisions of sec. 67 of the Transfer of Property Act, a decree for sale may be made in favour of the mortgagee when the mortgage is an English mortgage.

When the mortgagor covenants to transfer the hypothecated properties indefeasibly to the mortgagee, with the usual clause for redemption, and further covenants to pay the mortgage debt with interest to the mortgagee, his heirs, and assigns, the latter clause is a personal covenant to pay out of properties other than the hypothecated properties, as the latter clause would be entirely superfluous, if the parties had no intention that the mortgagor should be personally liable to pay to the mortgagee the money due to him. Therefore in such cases the mortgagee is entitled to a decree for sale as also to a personal decree against the mortgagor.

NAROTTAM DAS *v.* SHEO PARGASH SINGH

(1) and BUNSEEDHUR SINGH *v.* SUJJAT ALI
(2) distinguished.

A personal decree can be made against the mortgagor at the appellate stage.

JEUNA BAHU *v.* PARMESHWAR NARAYAN MAHATA (3) followed.

This was an appeal against the decree of Babu Asutosh Pal, Subordinate Judge of Bogra in Zillah Pabna and Bogra, dated the 20th of August 1919.

The facts of the case will appear from the judgment.

Babus Bepin Behary Ghose, Dwijendra Nath Mukherjee for the Appellant.

Babus Dwarka Nath Chakraborty, Atul Chandra Gupta for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the Plaintiff in a suit instituted on the 20th September 1918 to enforce a mortgage, dated the 26th July 1916, and repayable on the 21st July 1917. The Subordinate Judge has made a decree for foreclosure. The Plaintiff is not satisfied with this decree and contends that he is entitled to a decree for sale of the mortgaged properties as also to a personal decree against the mortgagors. We are of opinion that the contention of the Appellant is well-founded.

In view of the provisions of sec. 67 of the Transfer of Property Act, there can be no doubt that a decree for sale may be made in favour of the mortgagee when the mortgage is an English mortgage as in the present case. This has not been contested by the Respondent and for an obvious reason. If the hypothecated properties are brought to sale and the sale proceeds prove more than sufficient to satisfy the dues of the mortgagee, the surplus will re-

(1) I. L. R. 10 Cal. 740 (1884).

(2) I. L. R. 16 Cal. 540 (1889).

(3) I. L. R. 47 Cal. 370: s. c. 23 C. W. N. 49 (P. C.) (1918).

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main for the benefit of the mortgagors. On the other hand, if the properties are valuable and are foreclosed, the mortgagors will be seriously prejudiced. The real contention between the parties is, whether the mortgagee is entitled to a personal decree. The answer depends upon the solution of the question, whether the mortgage contract contains a personal undertaking by the mortgagor to pay the mortgagee out of his personal estate or any estate other than the hypothecated properties. Reliance has been placed on behalf of the Respondent upon the decision of the Judicial Committee in *Narottam Das v. Sheo Pargash Singh* (1) which was applied by this Court in *Bunseedhur Singh v. Sujat Ali* (2); but the case before us is clearly distinguishable from the two cases mentioned. In the present case, there can be no doubt upon a consideration of all the clauses contained in the mortgage deed that there is a personal covenant to pay out of properties other than the hypothecated properties. The mortgagor covenants in the first place to transfer the hypothecated properties indefeasibly to the mortgagee. This is followed by the redemption clause which provides that if the mortgagors repay the dues on the 21st July 1917, the mortgagee would reconvey the hypothecated properties. Next comes the following clause; "And the said mortgagors do hereby, for their heirs, executors, administrators, representatives and assigns covenant with the said mortgagee his heirs and assigns that they the said mortgagors, their heirs, executors, administrators, representatives and assigns shall and will on the 21st day of July 1917 pay unto the said mortgagee, his heirs, executors, administrators, representatives or assigns, the said sum of Rs. 45,609-9-8 or any portion thereof then remaining due

and will also pay interest for the same in the meantime and until repayment at the rate of 9 per cent per annum payable by equal yearly instalments and compound interest at the rate aforesaid, in case of default in payment of any one successive instalments of interest aforesaid and all taxes and impositions in respect of the premises duly conveyed and that they shall pay all costs and charges which the said mortgagee shall incur or be liable to pay in and about the recovery of the moneys hereunder or for the protection of the premises hereby conveyed or otherwise in relation to this security or for the realisation of the said sums or debts described in Schedule B as between attorney and client."

It is manifest that this clause would be entirely superfluous if the parties had no intention that the mortgagor should be personally liable to pay to the mortgagee the money due to him. In the two prior clauses the property had been transferred to the mortgagee and there was the corresponding provision for redemption; if repayment was made on the date fixed the property would be reconveyed; with regard to the subsequent clause, it is impossible to attribute to the parties any intention other than to make the mortgagors personally liable even though the property had been conveyed to the mortgagee. We are clearly of opinion that in the present case the mortgagee was entitled not merely to a decree for sale but also to a personal decree; such personal decree can be made at this stage as is clear from the decision of the Judicial Committee in *Jeuna Bahu v. Parmeshwar Narayan Mahata* (3).

The result is that this appeal is allowed and the decree of the Subordinate Judge modified. The decree will direct that the hypothecated properties will be sold for

(1) I. L. R. 10 Cal. 740 (1884).

(2) I. L. R. 16 Cal. 540, (1889).

(3) I. L. R. 47 Cal. 370; s. c. 23 O. W. N. 490 (P. C.) (1918).

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the realisation of the mortgage dues and that if the sale proceeds are not sufficient to satisfy the judgment-debt, there will be a personal decree for the balance against the mortgagor in terms of Or. XXXIV, r. 6, C. C. P. The mortgagors will have six months from this date for redemption. The Appellant is entitled to the costs of this appeal. We assess the hearing fee at ten gold mohurs.

BUCKLAND, J.—I agree.

J. N. R.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1396 of 1919.

CHATTERJEE, J.

PANTON, J.

1921,

Heard,

22, November.

Judgment,

23, November.

SM. SARASHIBALA DAS,
Plaintiff, Appellant,

v.

CHUNI LAL GHOSH,
Defendant, Respondent.]

Indian Contract Act (IX of 1872), sec. 201—Termination of agency—Sec. 209—After the principal's death, if agent is to be treated as a trustee—Indian Limitation Act (IX of 1908), Art. 89 or 120, applicability of, where an agent is sued for accounts after the principal's death.

C. acted as gomastha under J. until the latter's death in July 1912, and then he acted as agent under J.'s widow. The widow, more than three years after her husband's death, brought a suit against the agent for accounts from 1894 to 1915:

Held—That Art. 89 of the Limitation Act applied to the case and the claim for accounts for the period up to the death of J. was barred by limitation as under sec. 201 of the Contract Act the agency was terminated on J.'s death and as the suit was brought more than three years after J.'s death.

MADHU SUDAN SEN v. RAKHAL CHUNDRA

DAS BASAK (1) and NABIN CHANDRA BARUA v. CHANDRA MADHAB BARUA (2) followed.

That as C was not sued for any act done by him after the death of his late principal, which he might have done as a trustee, sec. 209 of the Contract Act or Art. 120 of the Limitation Act did not apply to the case.

This was an appeal preferred on the 14th July 1919 against a decree of the Subordinate Judge of Howrah (Babu Bejoy Gopal Chatterjee), dated 5th April 1919, modifying a decree of the Munsif of Howrah (Babu Hem Chandra Bose), dated 19th February 1918.

The facts of the case are as follows:—

One Golak Ghosh, died in 1299 B. S., leaving him surviving two daughters, named Kumarmani and Kshetramani, as heiresses to his properties. Kumarmani was married to one Ambika and died during the life-time of her sister Kshetramani leaving a son named Jotindra Kumar, the husband of the Plaintiff Sarashibala. Jotin died on 8th Sraban, 1319 B. S., (corresponding to 25th July 1912). The Defendant-Respondent Chuni Lal Ghosh was the son of Kshetramani. The Plaintiff's case was that Chuni lived at the house of his maternal grandfather; that Ambika acquired certain properties in the same village, but lived in Calcutta and finding it inconvenient to realise rents and profits, etc., himself, he appointed Chuni as an agent to manage his properties to realise rents, etc., and to render accounts to him. After the death of Jotin which occurred on 25th July 1912, Chuni continued in his office to collect rents; but when asked to render accounts and make over the collection papers he refused to do so; hence the Plaintiff instituted the present suit for accounts, from 1301 to 1321 B. S. The

(1) I. L. R. 43 Cal. 248: s. c. 19 C. W. N. 1070 (1915).

(2) I. L. R. 44 Cal. 1: s. c. 21 C. W. N. 97 (P. C.) (1916).

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defence was that the properties belonged to his maternal grandfather, that his mother was the heiress and he was not the Plaintiff's agent, nor her husband's, and further that the claim was barred by the law of limitation. The Munsif decreed the suit. On appeal the learned Subordinate Judge held that the claim from 1301 to 1319 was barred by limitation under Art. 89 of the Limitation Act, but he upheld the other findings. From that decision the present second appeal was preferred to the High Court.

Dr. Sarat Chandra Bysak (with *Babu Kshitish Chandra Chakravarti*) for the Appellant.—The learned Subordinate Judge was wrong in holding that the claim from 1301 to 1319 B. S., i.e., up to the time of the death of the Plaintiff's husband was barred. Having regard to sec. 209 of the Contract Act the Defendant must be regarded as a trustee by implication; the section says that after the death of the principal the agent must take proper care of the properties and take the necessary steps for safe-guarding his interest, etc. Therefore by construction of law he ought to be treated as a trustee: and therefore Art. 120 applied.

Referred to *Nabin Chandra Barua v. Chandra Madhab Barua* (2). It was not necessary for counsel to argue the case of a trustee in *Madhu Sudan Sen v. Rakhal Chundra Das Basak* (1); this aspect of the case was not considered.

Babu Manmatha Nath Ganguly for the Respondent.—The learned Subordinate Judge was quite correct in holding that the claim was barred under Art. 89; the Defendant cannot be both an agent and a trustee; it was not the Plaintiff's case that he was a trustee.

Sec. 209 of the Contract Act does not contemplate such things; it was an amplification of sec. 189, it might have provided for certain other contingencies; the agent may and ought to do certain things after the death of the principal, and those acts may not be altogether void; besides there is no authority cited for the proposition that he is to be treated as a trustee. There is no case which lays down that on the death of the principal, Art. 89 would be applicable. Arts. 89 and 120 have been considered in a series of cases and it was held that in such cases Art. 89 applied. Referred to *Madhu Sudan Sen v. Rakhal Chundra Das Basak* (1), *Mahendra Nath v. Jadu Nath* (3), *Jogendra Nath v. Deb Nath* (4) and *Nabin Chandra Barua v. Chandra Madhab Barua* (2).

Babu Kshitish Chandra Chakravarti for the Appellant in reply.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for accounts against an agent, and the question involved in the appeal is whether the claim for accounts from 1301 to 9 Srabon 1319 corresponding to 25th July 1912 is barred by limitation.

The Defendant acted as *gomasta* under the Plaintiff's husband Jotindra until his death which took place on the 25th July 1912. He then acted as the Plaintiff's agent. The suit having been brought more than three years after the death of Jotindra, the claim for accounts for the period before the death of Jotindra has been held to be barred under Art. 89 of

(1) I. L. R. 43 Cal. 248: s. c. 19 C. W. N. 1070 (1915).

(2) I. L. R. 44 Cal. 1: s. c. 21 C. W. N. 97 (P. C.) (1916).

(1) I. L. R. 43 Cal. 248: s. c. 19 C. W. N. 1070 (1915).

(2) I. L. R. 44 Cal. 1: s. c. 21 C. W. N. 97 (P. C.) (1916).

(3) 9 C. L. J. 107 (1908).

(4) 8 C. W. N. 113 (1903).

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the Limitation Act. As provided by sec. 201 of the Contract Act, an agency is terminated by either the principal or agent dying, and a suit against the agent for the period during which he acted as agent under the deceased must therefore be brought within three years of the death as laid down in Art. 89 of the Limitation Act. [See *Madhu Sudan Sen v. Rakhal Chundra Das Basak* (1) and *Nabin Chandra Barua v. Chandra Madhab Barua* (2)].

It is, however, contended on behalf of the Appellant that the case comes under sec. 209 of the Contract Act. That section lays down that when an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him. It is contended that the Defendant was in the position of a trustee so far as the interest of the deceased was concerned and that the suit for accounts against him would be in time if instituted within six years from the death of the Plaintiff's husband under Art. 120 of the Limitation Act.

There is however no question here of suing the Defendant for any act done by him after the death of his late principal, which he might have done as a trustee. The suit is for accounts on the ground that he was bound to render accounts to his late principal during his life-time, which he did not render. That would be a suit for accounts under Art. 89 of the Limitation Act.

We think the Court below is right in holding that the claim for the period prior to the death of Jotindra was barred by limitation.

(1) I. L. R. 43 Cal. 248 : s. c. 19 C. W. N. 1070 (1915).

(2) I. L. R. 44 Cal. 1 : s. c. 21 C. W. N. 97 (P. C.) (1916).

The appeal accordingly fails and is dismissed with costs.

J. N. R.

'Appeal dismissed.

'PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1921,

Heard, 17 and

18, November.

Judgment,

18, November.

NABAKISHORE
MANDAL and ors.,
Appellants.,

v.

UPENDRAKISHORE
MANDAL and anr.,
Respondents.

Hindu Law—Widow—Power to make permanent lease—Benefit of estate—Acquisition of tenant's rights—Accretion to husband's estate—Onus on Appellant to show error in judgment appealed from.

A permanent lease executed by a Hindu widow does not bind the reversioners unless legal necessity and benefit to the estate are proved. The mere fact that the rent and purchase price represent the fair market value does not of itself prove necessity.

Tenant rights acquired by a Hindu widow are, in the absence of proof that they were acquired out of the accumulated savings of her income and were dealt with as her separate property, accretions to her husband's estate and as such cannot be sold by her so as to give a title as against the reversioners.

The burden of showing that the judgment appealed from is wrong lies on the Appellant.

This was an appeal from a judgment and decree of the High Court of Bengal, dated the 5th August 1918, which modified a decree of the Court of the Subordinate Judge of the 24-Pergannahs, dated the 29th June 1915.

The litigation related to the estate of

NABAKISHORE MANDAL v. UPENDRAKISHORE MANDAL.

one Madhusudan who died in 1867 leaving a widow Prasanna Kumari entitled to two-thirds of the family properties.

On the 17th September 1869, Prasanna Kumari—in conjunction with Bamakali who was entitled to the other one-third—executed a permanent *ijara* in favour of her nephew Khetramohan Samanta. On the 15th August 1895, the *ijara* right of the lessees was sold by the Court in execution of a decree to the predecessor in title of the Appellants. On the 5th May 1895, Prasanna Kumari sold to the Appellants certain lands alleged to have been purchased out of her *stridhan*. Prasanna Kumari died in 1907 and in 1912 Nilkanta and Srikanta Mandal claiming to be reversioners of Madhusudan repudiated the alienations made by Prasanna Kumari and executed a permanent lease of all the properties of Madhusudan in favour of the Plaintiff-Respondent Upendrakishore Mandal. In 1913 the present suit was brought in the Court of the Subordinate Judge of the 24-Pergannahs. A portion of the original claim was compromised and the present appeal was confined to the claim of the Appellants to possess the properties in suit under the permanent *ijara* of 1869 and the deed of sale of 5th May 1895. The Plaintiff-Respondent contended that the alienations made by Prasanna Kumari were invalid as being neither beneficial to the estate nor justified by legal necessity. The lower Court held that the *ijara* of 1869 was *bonâ fide* and for legal necessity and beneficial to the estate in her hands and that the sale by Prasanna Kumari in 1895 was of property owned by her personally and he accordingly dismissed the suit. On appeal to the High Court, it was held that the Defendants had not discharged the onus of proving legal necessity or benefit to the estate and that the *ijara* was invalid as against the reversioners. With refer-

ence to the sale of 1895 the learned Judges held that it was not binding on the reversioners inasmuch as the property comprised therein was an accretion to, and formed part of, the estate of Madhusudan, and they modified the decree of the lower Court accordingly.

From this judgment the present appeal was brought before His Majesty in Council and was heard on November 17th and 18th, 1921.

Mr. B. Dubé for the Appellants.—The main question for decision is whether a Hindu widow is justified in making an alienation. Both Courts have found that the deceased had debts but the High Court say that I have not discharged the onus on me of proving legal necessity. The debts were paid off after the *ijara* and the *ijara* money must have been used in liquidating them. All that I have to show is that the *ijara* was a transaction which would have been undertaken by an ordinary prudent man in the management of his own property—*Dayamani Debi v. Srinibash Kundu* (1). A widow is only bound to act fairly to the expectant heirs, [*Chimnaji Govind Godbole v. Dinkar Dhondev Godbole* (2)].

[LORD CARSON.—How can the taking by her of a premium be an act fair to the expectant heirs?]

Both the recitals in the sale deed and the evidence generally tend to show that the sale of 1895 was of property belonging to the widow in her personal right.

Reference was made to :—*Banga Chandra Dhur Biswas v. Jagat Kishore Chowdhuri* (3), *Isri Dut Koer v. Hansbutti Koerin* (4) and *Sheo Lochun Singh v.*

(1) I. L. R. 33 Cal. 842, 845 (1906).

(2) I. L. R. 11 Bom. 320 (1886).

(3) L. R. 43 I. A. 249; s. c. I. L. R. 44 Cal. 188; 21 O. W. N. 225 (1916).

(4) L. R. 10 I. A. 150; s. c. I. L. R. 10 Cal. 324 (1883).

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Saheb Singh (5). Mayne's Hindu Law, para. 634.

Mr. DeGruyther, K. C. (with him *Messrs. Parikh and Palat*) for the Respondents.—In regard to the sale of 1895, certain tenants fell into arrears with their rent. The tenant right was purchased by Prasanna and Bama-kali. The tenant right and proprietary right would then both be in the same person. It is inconceivable that Prasanna intended to hold that tenant right quite separate from her proprietary right. The landlord's interest was part of the estate, and the tenant's right, so to speak, merged into it. What is purported to be conveyed by the sale deed is the proprietary right not merely the tenant right. He referred to:—*Kula Chandra Chakravarti v. Bama Sundari Dasee* (6).

Mr. B. Dubé replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—A person who deals with a Hindu widow having a limited estate must be aware that he may be called upon to establish the facts which justify the transactions under which he claims. The Appellants in this case, who are the successors in title of one Rajkishore Mandal, find themselves in that position.

Rajkishore Mandal entered into two transactions, in the one case with two Hindu widows, and, in the other case, with one. These transactions are now impeached, and the burden of proving them valid lies on the Appellants. The first was a lease of the 17th September 1869, which was executed by two Hindu widows, Prasanna Kumari Dasi and Bama-kali Dasi. Their estate in the property arose in the following way. Prasanna was

the widow of Madhusudan and Bama-kali was the widow of Harinarayan his brother. Harinarayan, when he died, was entitled to an undivided third share in properties held jointly, and Madhusudan, who died in 1867, was entitled to the remaining two-thirds. The case that is suggested is that this lease was required for the purpose of raising the money necessary for the payment of debts and the performance of the shradh in connection with Madhusudan. Now Madhusudan had died on the 13th August 1867, and certainly a period had not elapsed so long as to render it probable that the debts must have been paid; but, fortunately, the circumstances connected with his estate are not unknown, and there is information that enables their Lordships to recast what that position was. There is no doubt that before his death he had been borrowing money, sometimes in small sums and sometimes in large, but at the date of his death the debts are nowhere put as exceeding Rs. 15,000 or Rs. 16,000, which is probably a very liberal estimate. On the other hand, there is evidence, part of which was called on behalf of the Appellants themselves, to show that he had moveable property to the extent of Rs. 20,000. The petition of the widow showed that he had debts owing to him to the extent of Rs. 9,000, which, it may be, were included in the Rs. 20,000 of moveable property. In addition to that, there can be no doubt that part of the property of the testator had been disposed of shortly after his death, because, although the actual deed of sale is not produced, a deed of sale from the person who purported to have bought is, and that shows that property belonging to Madhusudan had in fact been disposed of. There therefore was not, upon the evidence as it stands, any reason whatever why the property included in the lease

(5) L. R. 14 I. A. 63: s. c. I. L. R. 14 Cal. 387 (1887).

(6) I. L. R. 41 Cal. 570 (1914).

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should have been used for the purpose of paying debts, and, indeed, if such necessities were the real justification for the transaction it is not probable that it would take the form of a permanent lease, but would have been an out-and-out sale. Their Lordships have no hesitation in saying that the proof of the necessity required to justify the lease of the 17th September 1869, is not forthcoming.

It is then said that this lease must have been a lease for the benefit of the estate, and that it can be supported upon that ground. It is not easy, and in this case it is not necessary, to define what is exactly the character of the transaction entered into by a Hindu widow, which can be supported on the ground that it enured for the benefit of the estate. It is sufficient to say that the mere fact that the rent reserved was a fair market rent, or the price obtained was a fair market price, cannot alone and in themselves be regarded as sufficient, and in the present case there is nothing more suggested.

In their Lordships' opinion the lease was not executed because it was for the benefit of the estate, nor because circumstances arose which rendered it necessary; the true explanation is that it was granted to a man, Khetramohan Samanta, who was the nephew of one of the widows, Prasanna, by whom he had been brought up and with whom he had lived for many years.

Their Lordships think there is no need to add anything further to the very careful and reasoned judgment of the High Court upon this point, with the criticisms contained in which they are in agreement.

There remains only the transaction which was entered into later on the 5th May 1895. That was entered into by the survivor of the two widows, Prasanna Kumari. The alleged justification for this depends on different considerations. It is

said that the property sold had been acquired by the widow out of her stridhan, and that consequently she was quite free to deal with it as she thought best. Now there can, their Lordships think, be no doubt that whatever stridhan she possessed was due to the accumulated savings from the income of the property which she received from her husband's estate, and though it is true that when that property had been received it would be possible for her so to deal with it that it would remain her own, yet it must be traced and shown to have been so dealt with, and in this case there is no sufficient evidence of this having been done. Further, in this particular case it appears that part, at least, of the property had been purchased from the tenants of the estate itself. This does not mean that the inheritance had been so acquired, but that, owing it may be to difficulties which had arisen in connection with the occupiers, their tenant rights had been bought in part by the release of the arrears of rent and in part by a payment of cash; and having so acquired their interest, it was the property which they had formerly occupied which was sold under the kobala of the 5th May 1895. If that be the true transaction no question could arise about the right of the widow in connection with her stridhan, because the tenant rights so acquired would be an obvious accretion to the husband's property, which, if it were possible for her to segregate, would require some more unequivocal act for the purpose than anything to be found in this evidence. The evidence of the deed itself leads once more to the conclusion that not only was this property the husband's property, but that the widow knew it and that she was attempting to support the deed by a further effort to urge the necessities of debts and the costs of litigation as a justification. No other explanation

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can be offered of the fact that the deed contains recitals which, upon the hypothesis that the property was the widow's own, would have been quite unnecessary.

Their Lordships hold with regard to this also that the Appellants have failed to establish, what once more the burden lay on them to prove, that the widow was in a position to deal with this estate. This opinion differs from that formed by the learned Subordinate Judge, but is in agreement with that of the High Court at Fort William, from whose decree this appeal has been brought.

The only further observation that their Lordships desire to make is to call attention once more to the fact that in appeals the burden of showing that the judgment appealed from is wrong lies upon the Appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded. It is not necessary to invoke that doctrine against the Appellants in the present instance because, for reasons that have already been stated, their Lordships think they have failed, but it is a matter which would be well for Appellants to bear in mind.

Their Lordships think that this appeal should be dismissed, and that the first Respondent who alone appeared should have his costs, and they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. W. W. Box & Co.* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM OUDH.]

VISCOUNT HALDANE.	}	NARINDRA BHADUR
LORD ATKINSON.		SINGH, Appellant,
SIR JOHN EDGE.		v.
1921,		THE OUDH COM-
Heard, 9, May.		MERCIAL BANK,
Judgment,		LIMITED, FYZABAD,
9, May.		Respondent.

Mortgage suit—Mortgagor's estate taken over by Court of Wards after preliminary decree—Decree absolute for sale passed against Court of Wards representing the mortgagor—Release of estate thereafter—Release not shown to have had retrospective operation—Refusal of Government to produce correspondence leading to release—Decree absolute if bound mortgagor.

A preliminary decree was made in a suit for sale of mortgaged properties on 15th June 1915. On 21st July 1915, the Court of Wards declared the mortgagor a disqualified proprietor and assumed superintendence of his estate under United Provinces Act IV of 1912. On 21st February 1916, a decree absolute for sale was passed against the Court of Wards representing the mortgagor on the application of the mortgagee. On 12th September 1917, the estate of the mortgagor was released from the superintendence of the Court of Wards under an order of the Local Government which was made under the direction of the Central Government for reasons of State. The correspondence which passed between the two Governments upon the matter was not produced and its production could not be compelled by Court:

Held.—That *prima facie*, the Local Government acted within its powers in putting the Court of Wards in charge of the mortgagor's estate and it could not be presumed until the contrary was shown that the order of release operated retrospectively.

That the Court in India was therefore

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right in holding that the decree absolute bound the mortgagor.

This was an appeal from the Court of the Judicial Commissioner of Oudh.

The facts of the case will appear from the judgment.

Messrs. Upjohn, K. C. and J. M. Parikh for the Appellants.—On 31st October 1912, preliminary decree was passed for account and sale under the mortgage (under Or. 34, r. 4). This decree was subject of an appeal and was varied by order of 15th June 1915. This order of the appeal Court reduced the rate of interest. On 21st July 1915 declaration was made by Court of Wards under Court of Wards Act, United Provinces Act IV of 1912. On 17th January 1916 application was made under r. 5, Or. 34 by bank for decree absolute. This was not served on Appellant but was served on Court of Wards. On 26th February 1916 decree absolute was made. This decree is the subject of appeal. It was not served. There are two reasons why the decree was not good. *First*, the declaration of Court of Wards was entirely discharged by an order of the Supreme Government of India. We were not allowed to adduce evidence under sec. 11 of Act IV of 1912. Both Courts said it was irrelevant to consider the question. I say, I was bringing to the attention of the Court that the declaration of the Supreme Government had set aside the declaration of the Local Government. The exact date of the order of the Supreme Government is unknown to us, as we were not allowed to have this. It was done sometime before May 1915. The character of this is shewn by letter of 27th February 1915. Sec. 8, sub-sec. (1), cl. 4 of the Court of Wards Act, sub-para. (a) proviso, “no such declaration shall be made, etc.” The order is illegal and *ultra vires* because the amount payable is less than 1/3 of the income. Again the

amount payable to the bank was still *sub judice* at the time of the order.

Sec. 11 means only this: If the Local Government makes an order, I cannot go to the Civil Courts, but must go to the superior Government.

[LORD HALDANE.—Let us see what the Courts say on this.]

[LORD ATKINSON.—You wish to shew that the Local Government had no jurisdiction. *Prima facie* they have, and you have to prove your proposition.]

Refers to sec. (12) d of the Act IV of 1912. There was mis-rejection of evidence. When the bank took out its decree against the Ward it was proceeding against the Ward. Until the Court of Wards is got rid of only the Court of Wards could sue or be sued.

Refers to difference in the language in sec. 55 and sec. 59, where the action is brought against a man who later becomes *sui juris*. There is no provision that no proceedings could be taken against him by sec. 55. My point is that proceedings taken should be against him and the Collector and not against either singly.

Messrs. DeGruyther and Dubé for the Respondents were not called on.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—The question on this appeal is whether the Respondents can enforce a decree made a good while ago in a suit for sale of certain mortgaged properties. The preliminary decree was made on the 15th June 1915, on appeal to the Court of the Judicial Commissioner from a decree, dated the 31st October 1912, of the Subordinate Judge of Lucknow. A few days later, on the 21st July 1915, the Court of Wards purported to declare the mortgagor a disqualified proprietor, and assumed superintendence of his estate under the United Provinces

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Court of Wards Act (Act 4 of 1912). On a date which is variously stated, but appears to have been the 21st February 1916, the decree was made final. On the 14th June 1916, the mortgagor applied for the estate to be released and on the 12th September 1917, the estate was released from the superintendence of the Court of Wards under the direction of the Local Government, which had been set in motion and in some way directed to bring that about by the Central Government of India.

The Appellant is now resisting the execution of the decree, because, he says, the decree absolute is not binding on him, inasmuch as the Court of Wards had no jurisdiction to represent him in the proceedings.

The contention of the Respondents and the view taken by the Court below is that the action of the Court of Wards while its superintendence continued to exist was operative, and that it cannot be treated as having been a nullity; it was good until set aside by the Local Government, acting on the directions of the Central Government of India.

Their Lordships' attention has been drawn to certain sections of the United Provinces Court of Wards Act IV of 1912, to the effect that no declaration made by the Local Government under sec. 8 or by the Court of Wards under sec. 10 is to be questioned in any Civil Court, and there are analogous provisions to those providing for other cases which cover the kind of proceedings which are before their Lordships.

The material facts are these: As has been said, the preliminary decree for sale was obtained on the 31st October 1912, the mortgage having been executed a long time previously, in 1894. The decree stood in substance, although it was modified on appeal, and then there were rather

complicated questions raised as to interest which were the subject of proceedings, and they are in form before their Lordships. But as to that the matter was disposed of in the course of the petition that was presented to the Board for a stay of execution. The result is that the question with regard to the interest is not now before their Lordships; the only question that is before them being whether the Court of Wards validly represented the Appellant in the substantial proceedings in regard to the decree itself.

On the 21st July 1915, the Court of Wards assumed superintendence of the estate of the Appellant. The Bank then applied for a decree absolute for sale against the Court of Wards, representing the Appellant, and it was made on the 21st February 1916. Then there were arrangements made between the Court of Wards and the Bank for the postponement of the execution of the terms of the decree with which their Lordships are not concerned, and there were certain questions as to whether there should be an appeal to the Privy Council from the decision in India as to the validity of the decree for sale, but the Court of Wards was unwilling to appeal to His Majesty in Council, and ultimately no appeal was brought. Then by an order of the Local Government made on the 16th May 1917, under the order of the Government of India, the estate of the Appellant was directed to be released upon payment by him of the sum of Rs. 57,000. On the 29th June 1917, the mortgagor paid that sum and on the 12th September 1917, his estate was, as already stated, released from the superintendence of the Court of Wards. On the 3rd July 1917, the Bank made a second application for the execution of the final decree of the 21st February 1916, by which it was declared that the mortgaged properties were to be sold, and the only

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question before their Lordships is whether the decree absolute is one that was binding on the Appellant, inasmuch as it was made against the Court of Wards, which it is now said had no jurisdiction to act. Their Lordships have not before them the terms of the order made by the Government of India, nor the correspondence which took place between the Central Government and the Local Government. For reasons of State, these documents are not produced and their production cannot be compelled, but there is no reason to infer that they would make the matter in any way different from what it *prima facie* appears to be. The Local Government put the Court of Wards in charge of the Appellant's estate and *prima facie* that was within their powers. It continued to be under their control until the Local Government released it. It is not to be presumed, unless it is clearly proved by the Appellant, that the release operated retrospectively, so as to invalidate all the multitudinous acts which must have been done while the Court of Wards was in superintendence. Their Lordships are, therefore, unable to take any view different from that taken by the Court below. In the Court below reference was made to the terms of the United Provinces Court of Wards Act of 1912, and particularly to secs. 8, 11 and 12, and to Chap. VII, which contains secs. 53 to 60, all of which point to what is a stringent provision that no one is to investigate the motives or review the discretion of the governing body which is being dealt with, or to question what it has done in the Courts.

Without proof that the proceedings of the Court of Wards were a nullity, their Lordships are not in a position to look into the matters which have been sought to be discussed before them. It is enough to say that their Lordships agree with the judgment of the Court below, and they

will therefore humbly advise His Majesty that this appeal be dismissed with costs.

Solicitor: *Mr. E. Delgado* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

R. M. P.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 926 OF 1920.

RANKIN, J.
1921,
22, July.

•SANJIB CHANDRA
SANYAL
v.
SANTOSH KUMAR LARIRI
and ors.

Admissibility of an unregistered lease—Lease and agreement to lease—Indian Registration Act (XVI of 1908), secs. 2, 3, 17, 49—Agreement followed by possession, effect of—Doctrine of part performance, if applicable—Statute of Frauds—Transfer of Property Act (IV of 1882), sec. 107—Suit for specific performance—Estoppel against a statute, if available.

An agreement to lease intended to operate as a present demise is a lease within the meaning of cl. (d) of sec. 17 of the Registration Act, 1908, and as such is inadmissible in evidence in a suit for specific performance of its terms, under sec. 49 of the Act, if it is not registered even though the tenant is in possession under the said agreement.

Cases of part performance under sec. 4 of the Statute of Frauds have no application to those arising under sec. 49 of the Registration Act, 1908, as the positions under the two Acts are quite different.

The Plaintiff who was in possession of certain premises under a previous tenancy expiring in December 1916, on the expiry of the said tenancy entered into negotiations for a further tenancy with the landlords, the Mondol Defendants, the terms of which were reduced into writing. This document, dated 15th January 1917, which was unregistered, purported to be

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in form a memorandum of agreement but was intended to operate as a present demise of the said premises to the Plaintiff for five years from 1st January 1917 and was held to be a lease within the meaning of cl. (d) of sec. 17 of the Registration Act, 1908. In May 1919 the Mondol Defendants sold the said premises to the Lahiri Defendants who had full notice of the unregistered instrument of 15th January 1917 and of its terms. On the 29th May 1919, the Plaintiff was given notice by the Lahiri Defendants to quit by the 30th June 1919 on the allegation that he was a monthly tenant. The Plaintiff brought a suit for the specific performance of the said agreement in terms of the unregistered document:

Held—That the document, dated 15th January 1917, was not admissible in evidence in a suit for specific performance, under sec. 49 of the Registration Act, as it was not registered.

Held, also—That as there was no other evidence before the Court of the terms of the said agreement, there could not be a decree for specific performance.

Per RANKIN, J.—“If I admit the document at all it seems to me that I would be receiving it as evidence of a transaction affecting the property. If upon its true construction it is meant to take effect as a present demise I cannot treat it as something else or as evidence of a transaction different from this in nature and so avoid the statute. My opinion is that against the prohibition of the statute no estoppel avails and that there is nothing in WALSH v. LONSDALE (1) or the cases under the Statute of Frauds to cover the Plaintiff in this case.”

RANI HEMANTA KUMARI DEBI v. MIDNAPUR ZEMINDARY CO., LTD. (6) and PORT

CANNING AND LAND IMPROVEMENT CO., LTD. v. SM. KATYANI DEBI (11) *relied on.*

WALSH v. LONSDALE (1), BIBI JAWAHER KUMARI v. CHUTTERPUT SINGH (2), MADDISON v. ALDERSON (3), KEDARNATH v. POORASUNDARI (4), SM. BARANASHI DASSI v. PAPAT VELJI (5), SHYAM KISHORE v. UMESH CHANDRA (7), MUHAMMAD MUSA v. AGHOR KUMAR (8), SARAT CHANDRA v. SHYAM CHAND (9) and PUCHHA LAL v. KUNJA BEHARI (10) *referred to.*

Judgment of Rankin, J., dated the 22nd July 1921, passed in the exercise of the Ordinary Original Civil Jurisdiction.

The facts of the case will appear fully from the judgment.

Mr. Langford James (with him Mr. P. N. Chatterjee) for the Defendants.—A lease includes an agreement to lease by sec. 2 of the Registration Act and this is so when the document is intended to create a present interest in the land. Under sec. 49 such a document is inadmissible in a suit such as the present when specific performance of its terms is asked. No oral evidence of its terms is admissible as the terms were reduced into writing (see sec. 92, Evidence Act). If oral evidence is admitted, sec. 49 is rendered nugatory. The fact that Plaintiff is in possession does not alter the position. Doctrine of part performance has no application as there is no evidence before the

(1) 21 Ch. D. 9 (1882).

(2) 2 C. L. J. 343 (1905).

(3) L. R. 8 A. C. 467 (1883).

(4) 11 C. L. J. 548 (1909).

(5) 25 C. W. N. 220, 229 (1919).

(7) 24 C. W. N. 463; s. c. 31 C. L. J. 75 (1919).

(8) L. R. 42 I. A. 1; s. c. I. L. R. 42 Cal. 801; 19 C. W. N. 250 (1914).

(9) I. L. R. 39 Cal. 663; s. c. 16 C. L. J. 71 (1912).

(10) 18 C. W. N. 445; s. c. 19 C. L. J. 213 (1912).

(11) I. L. R. 47 Cal. 280; s. c. 24 C. W. N. 369 (P. C.) (1919).

(1) 21 Ch. D. 9 (1882).

(6) I. L. R. 47 Cal. 485; s. c. 24 C. W. N. 177 (P. C.) (1919).

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Court as to what the agreement was. The Statute of Frauds does not render any evidence inadmissible but says that no judgment could be passed unless there is a written memorandum produced before judgment. In this case there is no other evidence of the terms of the agreement. Refers to cases cited in the judgment.

Mr. H. D. Bose (with him *Mr. A. K. Ghose*) for the Plaintiff.—In this case the Plaintiff is in possession and the Lahiri Defendants purchased this property with knowledge that the Plaintiff was in possession under an agreement to lease for five years, that being so the Defendants are bound by it and must recognise the Plaintiff's right to be in possession in terms of the agreement. Refers to *Walsh v. Lonsdale* (1) and other cases. Here the agreement is followed by possession and so any defect in title has been cured by possession which amounts to part performance. The document is admissible to prove that there was an agreement to lease on such and such terms, though it may not be admissible as a lease. In any event the Defendants are estopped from raising the question as to the existence of the agreement to lease inasmuch as they have admitted the agreement in their written statement.

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—In July 1915 certain proprietors of a business called the "Minerva Library" were in occupation of a shop-room at 54, College Street, Calcutta and by them the Plaintiff was put in possession on his own behalf of the shop and business. It appears that these parties were holding under an unregistered instrument of tenancy which purported to demise the premises for five years ending in December 1916. However, the Plaintiff

and his predecessors occupied the premises for the full period of five years, and at the expiry of this period Defendants Nos. 6 to 9, whom I will call the Mondol Defendants, were the landlords. The Plaintiff entered into negotiations with them for a further term and these negotiations resulted in a written instrument, dated 15th January 1917. This the Plaintiff tenders in evidence but it is objected to by Counsel for Defendants Nos. 1 to 5 (whom I will call the Lahiri Defendants) on the ground that it comes within sec. 17 of the Registration Act (XVI of 1908) and is hit by sec. 49. Having regard to the issues in the case and the state of the decisions it seemed to me advisable to reserve the question whether the document is admissible in evidence until the whole case was before me.

Apart from the document there is not on the evidence proof of the terms of the intended tenancy. It is not open to me apart from the document to find any prior or independent oral agreement in January 1917. In my opinion what took place between the Plaintiff and the Mondol Defendants at that time was merely a treaty or negotiation for a further tenancy the terms of which were intended to be reduced into writing and were concluded only in that form. The document tendered purports to be in form a memorandum of agreement but in its operative clauses it uses the language of a present demise. From its terms and from the admitted circumstances I think it clear that it was intended to operate as a present demise to the Plaintiff for five years from 1st January 1917 and I must hold it to be a lease within the meaning of cl. (d) of sec. 17 of the Registration Act. One of its provisions is this :—"And be it known hereby that if the lessors transfer this house by sale before this term of five years then a notice will have to be given to me

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six months beforehand and the *salami* money which is paid for a period of five years will have to be returned to me proportionately taking into consideration the number of months before the expiry of which the house is sold." Considerable time and space might be occupied in setting out the various possible meanings of this clause, but I do not think it can be contended nor was it contended before me, that it prevents the document from being a "lease" for a term exceeding one year. It is therefore within sec. 49 of the Act.

The Plaintiff continued his occupation thereunder without interference or dispute until May of 1919. In that month the Mondol Defendants sold the property to the Lahiri Defendants. The conveyance dated 28th May 1919 is in evidence. The Lahiri Defendants had full notice of the unregistered instrument of 15th January 1917 and of its terms. Neither they nor the Mondol Defendants gave any notice whatsoever to the Plaintiff prior to the transfer, but on the 28th May the Plaintiff was given notice (Ex. No. 1) that the transfer had been made, and on the next day, 29th May 1919, he was given notice to quit by the 30th June on the allegation that he was a monthly tenant (Ex. No. 2). It is clear to me that the advisers of both sets of Defendants were of opinion that the unregistered document of 15th January 1917 was one under which the Plaintiff could maintain no rights. Acting somewhat brutally upon this view they were faced with the question of returning part of the Rs. 500 which the Plaintiff had paid as *salami*. They solved the difficulty in this way, namely, Rs. 250 were paid by the Mondol Defendants to the Lahiri Defendants on an oral agreement between them that the latter would pay to the Plaintiff when he vacated the premises a proportion of the

original *salami* commensurate with the period that should then remain unexpired of the five years. The Plaintiff has alleged that between the two sets of Defendants there was at this time an agreement, of which he was informed, that the Lahiri Defendants would allow him to remain for the rest of the five years. In my opinion there was no such agreement and the Plaintiff was not so informed. The Plaintiff alleges also that the Lahiri Defendants received the sum of Rs. 250 on the footing that the whole of it was to be paid by them to him independently of the date at which he might give up possession. Whether or not this be the Plaintiff's right as between himself and the Mondol Defendants on a true construction of the instrument of 15th January 1917, I am of opinion that no such arrangement was made between the two sets of Defendants at the time of the transfer.

On the 9th June 1919, the Plaintiff in reply to the notice to quit wrote referring to this stipulation for six months' notice and asking for even longer notice. On the same day the Lahiri Defendants brought a suit for ejectment against him in the Small Cause Court, which has no jurisdiction to decree specific performance. The suit was decided on 12th September 1919 and resulted in a decree for ejectment but the Plaintiff was given time by the decree until the 20th May 1920 to vacate the premises. The Plaintiff waited until the 12th May 1920 and then filed the present suit.

The first question I think is one which was not argued before me, namely, whether on a true construction of the clause which I have quoted from the document of 15th January 1917 the Plaintiff was entitled to specific performance on the 12th May 1920. The Plaintiff has not at any time been given a notice to vacate in six months. Nor was he given a notice of

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intention to sell six months before the sale. In September 1919 the Small Cause Court gave him more than six months in which to vacate but this was on the footing that he had no rights under the document of 15th January 1917. The Plaintiff on the 12th May 1920 had had more than six months' notice of the sale. I read the clause in question as one giving to the landlords a right to determine the tenancy. The exercise of such a right is a matter *strictissimi juris* and though the Lahiri Defendants have shown every disposition to be as inconsiderate to the Plaintiff as possible and have met with but small success I cannot see that the Plaintiff's tenancy, if he can claim a tenancy under the document, has been validly determined by virtue of the clause.

Coming therefore to the question whether the Plaintiff can get specific performance of the terms of the unregistered document, I find the matter complicated by the state of the pleadings. The Plaintiff pleads "a fresh agreement" without stating that it was in writing. The Lahiri Defendants instead of applying for particulars or saying that they do not admit the alleged agreement and will rely on sec. 49 of the Registration Act, plead that they admit that on 15th January 1917 the Plaintiff in writing entered into an agreement . . . purporting to create a demise for a period of five years . . . and so on, setting out their version of the document. On this Plaintiff's Counsel naturally contends that where there is admission there is no need of evidence and that cl. (c) of sec. 49 is thus got over. I cannot give effect to this contention, however, because in the circumstances and taking the written statement as a whole (see para. 6 thereof) the Plaintiff's advisers cannot at any time have been in doubt that these Defendants in this suit as in the Small Cause Court were relying

upon the provisions of sec. 49. Although I do not regard them as fit objects of any special sympathy, I would, if necessary, rather allow them to amend than allow the rights of the parties to depend upon the comparative skill of their advisers in the lost art of pleading. In any case cl. (c) of sec. 49 would remain.

In the result therefore and to my regret I must endeavour to apply the Registration Act to this case and must decide whether it is any answer to the Plaintiff. The suit is one for specific performance of an agreement to lease which agreement is by secs. 3 and 17 (1) (d) brought within sec. 49. The special feature of the case is that unless the document is admissible in evidence the Plaintiff although he has been in possession cannot and does not pretend to prove the length of time for which he was to hold or the conditions upon which his tenancy was determinable.

Now the Legislature in the Registration Act has made such provision as it was minded to allow for preventing sec. 49 taking effect upon documents which merely create a right to obtain another document as the substantive transfer or upon agreements to lease which are not intended to confer an immediate interest. Moreover oral agreements for leases are allowed by the law. If any such concluded agreement, written or oral is not followed by any more formal or effective transfer, or is only followed by the execution of a document which comes within sec. 49, there would seem to be no difficulty in such statutory provisions as that contained in sec. 107 of the Transfer of Property Act in the way of applying the rule in *Walsh v. Lonsdale* (1) and *Bibi Juwahir Kumari v. Chutterput Singh* (2) by granting a decree for specific performance of the original agreement. But a serious difficulty

(1) 21 Ch. D. 9 (1882).

(2) 2 C. L. J. 343 (1905).

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arises if it is said that in cases where there has been entry and possession, the document hit by sec. 49 can be treated as a document of a nature not within the section, or as evidence of an oral agreement to the same effect as its terms. *Walsh v. Lonsdale* (1) has no bearing on this question. It merely decided that when a valid agreement is proved and possession is shown to have been taken under it and the agreement is such that specific performance can be given in the suit, then the parties will be treated exactly as though the title had been perfected from the commencement. But proper proof of a valid agreement is the very first condition. In the same way I cannot profess to see how the cases on part performance under sec. 4 of the Statute of Frauds—cases of which *Maddison v. Alderson* (3) is the chief—can have any application under sec. 49 of the Registration Act. The Statute of Frauds makes nothing inadmissible in evidence. It makes no oral agreement and no written agreement invalid as affecting property or otherwise. Its provision is that no party to a contract or sale of lands shall be charged upon—i.e., shall suffer judgment for the enforcement of—such contract unless either at the time of the contract or at any time before suit he or his agent has authenticated by signature a written statement of the terms. A casual letter to a third party written the day before suit may satisfy the statute. The object of the Statute of Frauds is neither revenue nor registration: it is simply to take away temptation to perjury in Courts of Justice by enacting what in a large sense may be called “*evidentia rei*.” Lord Selborne’s reasoning in *Maddison v. Alderson* (3) may be put in four propositions :—

(1) “The contract is not a nullity, there

is nothing in the statute to estop any Court from enquiring into and taking notice of the truth of the facts.”

(2) “When the statute says that no action is to be brought to charge any person on a contract concerning land it has in view the simple case in which he is charged upon the contract only and not that in which there were equities resulting from *res gestae* subsequent to and arising out of the contract.”

(3) “So long as the connection of these *res gestae* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestae* themselves, justice seems to require some limitation of the scope of the statute.”

(4) “The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract and as sufficient to authorise an enquiry into the terms.”

It may be argued that the second of these four propositions has some analogy to the meaning of the phrase “affecting the property”: but in all other respects the position under sec. 49 of the Registration is as different as possible from that under the Statute of Frauds.

In *Kedarnath v. Poorasundari* (4), Fletcher, J., held that notwithstanding secs. 3, 17 and 49 of the Registration Act an unregistered *kabuliyat* was admissible in evidence for the purpose of proving the oral agreement sought to be specifically enforced. In *Sm. Baranashi Dassi v. Papat Velji Rajdoo* (5), Woodroffe, J., put two questions and left both questions open. “It by no means follows that an agreement to lease, that is an obligation to transfer, is a transaction affecting the pro-

(1) 21 Ch. D. 9 (1882).

(3) L. R. 8 A. C. 487 (1888).

(4) 11 C. L. J. 548 (1909).

(5) 25 C. W. N. 220, 229 (1919).

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perty. Nor is it necessary to determine whether an unregistered document void as a lease may be used to establish an agreement to lease." Shortly afterwards the Privy Council in *Rani Hemanta Kumari Debi v. Midnapur Zemindari Co., Ltd.* (6) had before them a suit for specific performance of an agreement to grant *jote* settlement of certain lands. Their Lordships expressly held as I understand the decision that if the agreement in that case had been intended as creating a present and immediate interest in the lands so as to be an "agreement to lease" within sec. 3 and therefore a "lease" within sec. 17 (1) (d), the document could not have been received in evidence. I collect from this case the further ruling that the same result would arise in the case of a document falling within sec. 17 (1) (b) unless it was saved by one or other of the exceptions mentioned in sub-sec. 2 of sec. 17.

In no one of the three cases already cited had the Plaintiffs been let into possession, but it seems to me that the Privy Council case would exactly cover the case before me unless the fact of the Plaintiff's entry and possession makes a difference in the application of cl. (c) of sec. 49.

What then is the effect of possession under a document hit by sec. 49? Is the document evidence in a suit for specific performance of its provisions? Is it evidence of an oral agreement leading up to it? Can a decree be made for specific performance of its terms?

In *Shyam Kishore v. Umesh Chandra* (7), it was said by Mookerjee, J. "It is well settled, as the result of a long series of decisions in this Court that when in pursuance of an agreement to transfer property the intended transferee has taken

possession though the requisite legal documents had not been executed and registered, the position is the same as if the documents had been executed provided specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined These decisions are based on the well-known doctrine of equity enunciated in *Walsh v. Lonsdale* (1), that under certain circumstances, equity regards that as done which should have been done. The result attained in these cases was reached by the Judicial Committee in the case of *Muhammad Musa v. Aghor Kumar* (8) by the application of the doctrine of part performance enunciated in *Maddison v. Alderson* (3)." The passage cited and other passages in the judgment refer to an "agreement to transfer property" and there is some reference also (p. 77) to "the contract of sale" but I cannot find from the report, which consists only of the judgment, any facts other than these, that on 9th June 1906, the auction-purchaser executed a conveyance of the property to one of the mortgagors, that this conveyance was not registered as required by law, but the original owners (mortgagors) continued in occupation.

On examining the line of decisions referred to, I find that in *Bibi Jawaher Kumari v. Chutterput Singh* (2), there was no difficulty in proving the agreement. In 1910, Fletcher, J., followed this case and applied the rule in *Walsh v. Lonsdale* (1) to protect Defendants who were in possession under purely verbal agreements. To an objection that Defendants were in

(6) I. L. R. 47 Cal. 485 : s. c. 24 C. W. N. 177 (P. C.) (1919).

(7) 24 C. W. N. 463 : s. c. 31 C. L. J. 75 (1919).

(1) 21 Ch. D. 9 (1882).

(2) 2 C. L. J. 343 (1905).

(3) L. R. 8 A. C. 487 (1883).

(8) L. R. 42 I. A. 1 : s. c. I. L. R. 42 Cal. 801; 19 C. W. N. 250 (1914).

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possession under verbal leases; that these were void by sec. 107 of the Transfer of Property Act; he replied that even so they might be specifically enforced as agreements on the analogy of English cases under 8 and 9 Vic., c. 106. In *Sarat Chandra v. Shyam Chand* (9), an agreement to recognise the Defendant as Plaintiff's tenant at a certain rent was made in writing by way of settling a suit about other property. It was included in the consent decree. Subsequently Plaintiff sued for the rent agreed on. The Court held that the decree must be ignored but that the petition of compromise though as a lease hit by cl. (d) of sec. 17 of the Registration Act was "admissible as indicating the existence of an oral agreement to grant the lease." In *Puchha Lal v. Kunja Behari* (10), the only facts appearing are that an owner of lands executed an unregistered *kobala* to A who paid the purchase money and entered into possession. The owner in the next year sold the lands to the Plaintiff who knew of the previous transaction. Jenkins, C. J., says: "So we have the position that the Defendant first party was in possession of the lands under a contract of sale" and the rule in *Walsh v. Lonsdale* (1) was applied.

In a recent case before the Privy Council [*Port Canning and Land Improvement Co., Ltd. v. Sm. Katyani Debi* (11)], the Plaintiff sued for enhancement of rent. The Defendants or their predecessors had gone into possession of the lands under a memorandum of agreement and on this account it was held by their Lordships that the document was a lease

within sec. 17 (1) (d) of the Registration Act. The question in issue was the nature of the tenancy: whether the rent was liable to enhancement or not. The decision as to the document was: "Being unregistered, it is inadmissible in evidence and no effect can be given to it." The nature of the tenancy was decided on other evidence.

It is certainly true that no question of specific performance arose in that case or was discussed at any stage so far as it appears. But this decision makes it extraordinarily difficult to suppose that possession taken under a document can make any difference to its admissibility.

I come last to the case of *Mahomed Musa v. Aghor Kumar Ganguli* (8). In 1873 a suit to enforce a mortgage was compromised on the terms that the encumbered properties should be divided up between the mortgagor and two sets of mortgagees in a certain manner, the mortgagees releasing their security and the mortgagor agreeing to execute deeds of transfer to give effect to the arrangement. A *razinama* recording the arrangement was filed in Court but was not stamped or registered: the decree of the Court did not recite the document but simply "ordered that the suit be decided in pursuance of the *razinama*." No conveyance was made by the mortgagor as promised but by the law of India as it then stood no written conveyance was necessary. The parties for years acted on the compromise and dealt with their own shares thereunder as their own. Thirty or forty years afterwards representatives of the mortgagor sued the representatives of the mortgagees for redemption of the original mortgage. The Defendants were met with an objection that the *razinama* was not registered and the decree did not recite it. To this they

(1) 21 Ch. D. 9 (1883).

(9) I. L. R. 39 Cal. 668: s. c. 16 C. L. J. 71 (1912).

(10) 18 O. W. N. 445: s. c. 19 C. L. J. 213 (1913).

(11) I. L. R. 47 Cal. 280: s. c. 24 C. W. N. 369 (P. C.) (1919).

(8) L. R. 42 I. A. 1: s. c. I. L. R. 42 Cal. 801; 19 O. W. N. 250 (1914).

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replied that there was an oral agreement. There was on the record ample other evidence of the agreement which in the previous suit had been put before the Court in the form of the *razinama*. The question being whether an equity to redeem still remained with the Plaintiffs, their Lordships, having given more than one answer in the negative, go on to say that "even although the *razinama* and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption the actings of the parties have been such as to supply all such defects." And their Lordships proceed to refer to *Maddison v. Alderson* (3) and to passages from Bell's commentaries which had been cited by Lord Selborne in that case. It was certainly argued that the *razinama* could not be put in evidence but this is nowhere upheld in the judgment. In any case the judgment is in no part embarrassed by the contingency that the document could not be looked at and there is no discussion of the 49th section of the Registration Act (VIII of 1871), I am inclined to think that the hypothesis as to the *razinama* and decree being defective or inchoate had reference to the fact that the arrangement itself provided expressly for a formal transfer and to the contention that a mortgage could not be modified or the equity effectively released save by a formal transfer. The passages from Bell's commentaries cited by Lord Selborne in *Maddison v. Alderson* (3) were again referred to by their Lordships of the Judicial Committee in *Lakshmi Venkayamma Rao v. Narasimha Appa Rao* (12) in similar language. The meaning of "inchoate or incomplete" is made plainer. The words are

used as descriptive of a case where a conditional offer made is not shown to have been accepted in terms but performance of the condition is to the knowledge of the party offering made upon the footing of his proposal.

In my opinion the decisions of the Judicial Committee in the case of *Rani Hemanta Kumari Debi v. Midnapur Zemindari Co., Ltd.* (6) and *Port Canning and Land Improvement Co., Ltd. v. Sm. Katyani Debi* (11) make it impossible for me to hold that the agreement in this case can be put in evidence or that its terms can be specifically enforced. If I admit the document at all it seems to me that I would be receiving it as evidence of a transaction affecting the property. If upon its true construction it is meant to take effect as a present demise I cannot treat it as something else or as evidence of a transaction different from this in nature and so avoid the statute. My opinion is that against the prohibition of the statute no estoppel avails and that there is nothing in *Walsh v. Lonsdale* (1) or the cases under the Statute of Frauds to cover the Plaintiff in this case.

As regards the claim for a refund of the balance of the *salami*, if I am right as to the agreement which was made between the two sets of Defendants in May 1919, I cannot see that the Plaintiff has any present right on the facts to recover against the Lahiri Defendants. As against the Mondol Defendants I think that the non-registration of the document will not stand in his way in an action for money had and received to his use. The question is whether he is entitled to Rs. 250 as the proportionate part due to

(3) L. R. 8 A. C. 467 (1883).

(12) I. L. R. 39 Mad. 509, 525; s. c. 20 C. W. N. 1054 (P. C.) (1916).

(1) 21 Ch. D. 9 (1882).

(6) I. L. R. 47 Cal. 485; s. c. 24 C. W. N. 177 (P. C.) (1919).

(11) I. L. R. 47 Cal. 280; s. c. 24 C. W. N. 369 (P. C.) (1919).

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him at the time the house was sold or whether on vacating the premises he will become entitled to a refund of a part proportionate to the time by which his occupation will fall short of five years. If the latter be the true position then at the date of this suit he had no cause of action. I think the language of the document of 15th January 1917 is in favour of the former alternative and as between the Plaintiff and the Mondol Defendants I see no reason why his precarious possession maintained in spite of the Lahiri Defendants and after the Mondol Defendants had ceased to be the landlords should be regarded as a reason why the Mondol Defendants can retain the *salami* which was apportionable from the beginning. I give judgment against the Mondol Defendants for Rs. 250 with one-third of the costs of suit. I must leave them to take such steps as they may be advised to adjust matters with the Lahiri Defendants. In the result the Lahiri Defendants are successful and I cannot say that there is sufficient judicial reason for refusing to them their costs.

Messrs. Dutt and Sen, Solicitors for the Plaintiff.

Messrs. Dey and Kshetrya, Solicitors for the Defendants.

M. N. K.

*
[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER

No. 236 of 1920.

MOOKERJEE, J. PANTON, J. 1921, 25, July.	{	CHOWDHURY AJODHYA NATH PAHARY, Decree- holder, Appellant, v. CHOWDHURY SRINATH CHANDRA PAHARY, Judgment-debtor, Respondent.
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Limitation—Execution, application for—Objection on the ground that decree had been satisfied out of

Court—Objection and application both dismissed for default Subsequent application for execution, if in continuation of previous application

A decree-holder after applying for execution filed processes and process-fees as directed by the Court. Thereafter the judgment-debtor objected to the issue of execution on the allegation that the decree had been satisfied out of Court. On a subsequent date on which both the application for execution and the objection had been fixed for hearing, the latter case was dismissed for default, and the Court recorded the further order: "the decree-holder has no objection to his case being dismissed provided he gets his costs. The execution case is dismissed for default. The decree-holder will get his costs":

Held—That the order dismissing the execution case must be treated as equivalent to an order for striking off the case or removing it from the file for the convenience of the Court; and a subsequent application for execution made more than three years after the date of the first application was therefore to be regarded as one in continuation or revival of the previous application.

This was an appeal against the order of M. Yusuf, Esq., District Judge of Zillah Midnapore, dated the 31st of March 1920, affirming the order of Babu Bistupada Ray, Munsif, 3rd. Court at Contai, dated the 16th of January 1920.

Appellant applied for the execution of a decree, dated the 26th June 1915, on the 24th June 1916. On the 5th August 1916 the Judgment-debtor Respondent objected to the issue of execution on the allegation that the decree had been satisfied out of Court. The objection case was dismissed for default on 9th December 1916 and on the same day the Court recorded the following order in respect of the execution case: "The

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pleader for the decree-holder has no objection to his case being dismissed provided he gets his costs. The execution case is dismissed for default. The decree-holder will get his costs." The present application for execution by Appellant was made on 27th November 1919. Both the lower Courts were of opinion that the present application was barred.

Babus Karunamoy Bose and Bimala Charan Deb for the Appellant.

Babu Phanindra Nath Das for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the decree-holder against an order of dismissal made on an application for execution of a decree. The decree was made by consent of parties on the 26th June 1915. The first application for execution was made on the 24th June 1916. Thereupon a writ of attachment was issued. The writ was returned unserved and on the 4th August 1916 the Court directed a fresh attachment to issue in the following terms: "The decree-holder is to file process and process-fees within five days." This order was carried out. But on the very next day, the judgment-debtor filed a petition under Or. 21, r. 2 of the Code of Civil Procedure to the effect that the decree had been satisfied out of Court and consequently no execution could issue on the basis thereof. This objection was numbered as a separate case. The two cases were adjourned from time to time and on the 9th December 1916 the objection case as well as the execution case came up for consideration. The objector applied for further time but the Court refused adjournment on the ground that the case was already very old. The pleader for the objector thereupon stated that he had no further instructions. The objection case was consequently dis-

missed for default. We find thereafter the following entry in the order sheet. "The pleader for the decree-holder has no objection to his case being dismissed provided he gets his costs. The execution case is dismissed for default. The decree-holder will get his costs." Subsequently, on the 27th November 1919 the present application was made. The judgment-debtor objected that the application was barred by limitation inasmuch as it had been presented more than three years after the 24th June 1916, when the previous application for execution had been made. We are of opinion that this contention should have been treated as unsustainable. It is plain that the execution proceedings which had been initiated on the 24th June 1916 had been suspended by reason of the objection by the judgment-debtor. During the period the objection remained under consideration of the Court, execution could not obviously proceed. As soon as the objection was abandoned on the 9th December 1916, it became the duty of the Court to proceed with the application for execution. The decree-holder had done everything that he was required to do to enable the Court to proceed with the case. He had filed processes and had paid process-fees as directed on the 4th August 1916. The order for dismissal made on the 9th December 1916 must accordingly be treated as equivalent to an order for striking off the case or removing it from the file for the convenience of the Court. [*Kishen Lal v. Charat Singh* (1), *Puddomonee v. Muthoora Nath* (2), *Peary Lal v. Chandi Charan* (3), *Daud Ali v. Ram Prasad* (4) and *Yakub Ali v. Durga Prasad* (5)]. In

(1) I. L. R. 23 All. 114 (1900).

(2) 12 B. L. R. 411 (1874).

(3) 11 C. W. N. 163 (1906).

(4) I. L. R. 37 All. 542 (1915).

(5) I. L. R. 37 All. 518 (1915).

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these circumstances, the principle applicable is that stated in the case of *Madhabmani Dasi v. Lambert* (6). "An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objection and claim subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction." In support of this view, reliance may be placed on the decision of the Judicial Committee in *Quamaruddin Ahmed v. Jawahir Lal* (7), which has been recently applied in *Rameshwar Singh v. Homeswar Singh* (8).

We are of opinion, therefore that this appeal must be allowed. The order of the lower Appellate Court is set aside and the case is sent back to the Court of first instance in order that the execution may proceed.

The decree-holder will get his costs throughout. We assess the hearing-fee in this Court at one gold mohur.

Appeal allowed;
Case remanded.

H. D. C.,

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 1794 AND 1805 OF 1917.

CHATTERJEA, J.

PANTON, J.

1920,

Heard,

11, February.

Judgment,

13, February.

GOPENATH MOONSHI,
Plaintiff, Appellant,
v.

CHANDRANATH MOONSHI
and anr., Defendants,
Respondents.

Contribution suit—Co-sharer's right to be reimbursed when money realised by creditor by coercive

(6) I. L. R. 37 Cal. 795 : s. c. 15 C. W. N. 337 (1910).

(7) L. R. 32 I. A. 102 : s. c. I. L. R. 27 All. 334; 9 C. W. N. 601 (1905).

(8) L. R. 48 I. A. 17 : s. c. 25 C. W. N. 337 (1920).

process—Limitation Act (IX of 1908), Arts. 61, 99 120—Time from which limitation runs.

The Plaintiff and the Defendants were owners of five different jotes. In execution of one of the decrees obtained by the landlord in respect of the five jotes one of the jotes was put up to sale and purchased by the Plaintiff. The landlord took out the amount of his dues in respect of that jote out of the sale proceeds and in respect of the other jotes he attached the balance and ultimately withdrew it. The sale of the first jote was set aside, but the Plaintiff failed to obtain restitution of the sale proceeds. The Plaintiff thereupon sued the Defendants for contribution :

Held—That the joint liability of the Plaintiff and the Defendants having been discharged by the money of the former there was no doubt that the Defendants obtained the benefit of the same.

That although under sec. 173 of the Bengal Tenancy Act, the Plaintiff being one of the judgment-debtors could not purchase at the sale, the Plaintiff and the Defendant having bid for the jote and the Plaintiff's bid having been accepted the purchase by the Plaintiff was not void but only voidable. In any case after the sale was set aside the money deposited became the money of the Plaintiff alone and should be treated as having been lawfully paid or appropriated in payment of the decree for rent.

That so far as the right of contribution against co-sharers is concerned it does not matter whether the money is actually handed over by the party seeking contribution or is realised from him by coercive process by the creditor. In either case the right to contribution arises from the fact that one of the co-sharers has paid in excess of his share and the joint liability of all the co-sharers has been discharged.

That the suit was not barred under

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Arts. 61 or 99 of the Limitation Act, having been brought within three years of the setting aside of the sale or under Art. 120, having been brought within six years of the date of payment.

These were appeals preferred on the 21st August 1917, against a decree of Babu Bepin Chandra Chatterjee, Subordinate Judge of Zillah Jessore, dated the 20th June 1917, reversing a decree of Babu Banku Behary Chatterji, Munsif at Magura, dated the 30th June 1916.

The facts of the case will appear from the judgment.

Babus Ram Chandra Majumdar and Bhudhar Haldar for the Appellant.

Dr. D. N. Mitra and Babu Satish Chandra Singh for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

These two appeals arise out of two suits for contribution. The Plaintiff and the Defendants are owners of five different *jotes*. The landlord obtained decrees for rent in respect of these five *jotes*. In execution of one of these decrees one of the *jotes* was put up to sale on the 29th March 1909 and was purchased ostensibly by Defendant No. 4 but really for the Plaintiff for Rs. 1,600. The sale was confirmed on the 7th November 1909. On the 2nd March 1911 the landlord took out Rs. 564-14 as. 9 pies out of the sale proceeds in satisfaction of his decree for rent in respect of that *jote*. In execution of the decrees obtained by the landlord in respect of the four other *jotes*, the landlord attached the balance of the sale proceeds and withdrew a sum of Rs. 963-3 as. 9 pies on the 24th February 1912. The sale of the first *jote*, however, was set aside on the 9th December 1912. The Plaintiff, thereupon, attempted to get a refund of the amount realised, from the landlord but failed, as he was one of the

judgment-debtors. The Plaintiff then brought these suits for contribution against Defendants Nos. 1 and 2. No relief was claimed against Defendant No. 3 as he agreed to pay his share amicably to the Plaintiff. The Court of first instance found that the Defendants were benefited by the payments or rather by the satisfaction of the decrees, and gave a decree to the Plaintiff. That decree was set aside by the learned Subordinate Judge on appeal; and the Plaintiff has appealed to this Court.

Now the Plaintiff and the Defendants were jointly made liable under the decrees for rent and that joint liability having been discharged with the money of the Plaintiff, there is no doubt that the Defendants have obtained the benefit of the same. The learned Subordinate Judge held against the Plaintiff on the ground that the payment of Rs. 1,600 into Court was not lawful and that the character of the payment was not altered by the subsequent setting aside of the sale. This has reference to the fact that the Plaintiff, being one of the judgment-debtors, could not, having regard to the provisions of sec. 173 of the Bengal Tenancy Act, purchase at the sale. It appears, however, that the Plaintiff as well as the Defendant bid for the *jote* and that it was the Plaintiff's bid that was accepted. The purchase by the Plaintiff was not void, but was only voidable. However that may be, after the sale was set aside, the money deposited became the money of the Plaintiff alone, and we do not see why after the sale was set aside the money should not be treated as having been lawfully paid, or appropriated in payment of the decrees for rent.

It is contended on behalf of the Respondents that it is not in every case that a man has benefited by the money of another, that an obligation to repay that money

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arises. Reference was made to the cases of *Ram Tuhai Sing v. Bisheswar Lal Sahoo* (1), *The Ruabon Steamship Company, Ltd. v. The London Assurance* (2) and *Abdul Wahid Khan v. Shaluka Bibi* (3). These cases, however, are distinguishable. The first case was not a case between co-sharers, nor a suit for contribution. There was no obligation to pay any joint debt in that case. In the case of *Ruabon Steamship Company, Ltd. v. The London Assurance* (2), the Lord Chancellor referring to the observations made by the learned Judges in the cases referred to in the judgment, observed that "the liability of each of the persons held to be bound to contribute is assumed to exist either by contract or by some obligation binding them all to equality of payment or sacrifice in respect of that common obligation; but this is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons, except that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound and the duty to contribute is alleged to arise only on some general principle of justice that a man ought not to get an advantage unless he pays for it." The Lord Chancellor referring to the case of *Dering v. Lord Winchelsea* (4) stated that the principle established in that case was universal, and that the right and duty of contribution was founded on doctrines of equity and that it did not depend upon contract. His Lordship further said "If several persons are indebted and one makes the payment, the

creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. So in the case of land descending to co-parceners, subject to a debt, if the creditor proceeds against one of the co-parceners, the others must contribute."

In the case of *Abdul Wahid Khan v. Shaluka Bibi* (3), there was no joint liability. The Defendant in that case had spent money in prosecuting certain suits for his own benefit, and without any authority express or implied from the Plaintiffs, and it was held that the fact that the result was also a benefit to the Plaintiff did not create any implied contract or give the Defendant any equity to be paid a share of the costs by the Plaintiffs.

It is also contended on behalf of the Respondents that at the time the money was paid there could not be any question of intention of benefiting any body by paying money "without intending to do so gratuitously." This is true, because at the time when Rs. 1,600 was paid into Court, it was paid as purchase money, and so long as the sale was not set aside the property purchased remained in the Plaintiff, and the money which was taken by the decree-holder therefore was the money which belonged to all the co-sharers, and it was only after the sale was set aside that the money became the Plaintiff's money and then only the question of any intention of payment not gratuitously would arise. The payment must, therefore, be taken to have been made on behalf of the Plaintiff on the date on which the sale was set aside.

It is further contended on behalf of the Respondents that as a matter of fact the money was not paid by the Plaintiff as it was realised in execution by the creditor. We do not think that that makes any

(1) L. R. 2 I. A. 731: s. c. 23 W. R. 305 (1875).

(2) [1900] App. Cas. 6 at p. 12.

(3) I. L. R. 21 Cal. 498 (P. C.) (1893).

(4) [1787] 1 Cox. 318; 2 B. & P. 270; 1 R. R. 41.

(3) I. L. R. 21 Cal. 498 (P. C.) (1893).

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difference in principle. So far as the right of contribution against the co-sharers is concerned, it does not matter whether the money is actually handed over by the party seeking contribution, or is realised from him by coercive process by the creditor. In either case, the right to contribution arises from the fact that one of the co-owners has paid in excess of his share, and the joint liability of all the co-sharers has been discharged. We may refer in this connection to the cases of *Matangini Debya v. Prasannamayee Debya* (5), *Rajah of Vizianagram v. Rajah of Setracharlu* (6), *Ibn Hasan v. Brijbhukan* (7) and *Dhakeshwar Prasad v. Harihar Prasad* (8).

We now come to the question of limitation. Art. 61 of the Indian Limitation Act lays down a period of three years (in a suit for money payable to the Plaintiff for money paid for the Defendant) from the date when the money is paid, and under Art. 99 the period of three years commences from the date of the payment in excess of the Plaintiff's own share. Where the money is realised in execution and there is no actual payment of the money by the party, it has been doubted whether it is a payment within the meaning of Art. 61 or Art. 99. See *Fuckorudin Mahamed Ahsan v. Mahima Chunder* (9); see also *Marrivada v. Veerapurain* (10), although in *Rajah of Vizianagram v. Rajah Setracharlu* (6), a different view has been taken. If Art. 61 or Art. 99 applies then the cause of action for the suit must be taken to have arisen when the sale was set aside. In the case of *Matangini Debya v. Prasannamayee Debya* (5), Maclean, C. J., observed :

(5) 2 C. L. J. 93 (1905).

(6) I. L. R. 26 Mad. 486 (1903).

(7) I. L. R. 26 All. 407 (435) (1904).

(8) 21 C. L. J. 104 (110) (1914).

(9) I. L. R. 4 Cal. 529 (1870).

(10) 1 M. W. N. 839 (1910).

"When a *putni* is purchased under circumstances such as the present, namely, by one of the defaulters, there is nothing in the regulation to make the sale absolutely void, though it is voidable, but, until it is avoided, the property would remain in the purchaser. If it be held that the purchase in this case was voidable and was not avoided until the 12th June 1899, seeing that, on the 5th September 1898, when the payment was made, the Plaintiff was the owner of the *putni*, the payment must be regarded as made on his own account, and not for the *co-putnidars*. In this view the statute would not begin to run until after the 12th June 1899. The Plaintiff would have no cause of action against the Defendants until the 12th June 1899. To revert, for a moment, to Art. 61, it cannot be said that there was any money paid for the Defendants until the sale had been set aside. Up to that time, the money must be taken as paid by the Plaintiff on his own account." But even if the cause of action is taken to have arisen on the date of actual payment to the decree-holder, the payment of Rs. 963 odd was made within three years of the suit and so far as that amount is concerned it is not barred by limitation. It is otherwise with the sum of Rs. 564 which was paid more than three years before the institution of the suit. We are of opinion, however, that if Art. 99 or Art. 61 applies, then the cause of action must be taken to have arisen when the sale was set aside. If neither of the two articles applies, then Art. 120 would apply. Art. 120 gives six years' period within which the suit is to be brought. Here both the payments were made within six years of the suit. Under the circumstances we think, that the suit is not barred by limitation.

There are, however, certain issues in connection with the third and fourth ques-

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tions set out in the judgment of the lower 'Appellate' Court which have not been gone into. They must be gone into before the cases are disposed of.

The result is that the decrees of the lower Appellate Court are set aside and the cases are remanded to that Court for disposal after the decision of the two points referred to above.

Costs will abide the result.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 848 OF 1921.

NEWBOULD, J.	}	HAJARI SONAR,
GHOSE, J.		Accused, Petitioner,
1921,		v.
8, November.		THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), secs. 237, 227—Charge under sec. 457, I. P. C., of house-breaking by night with the object of committing theft, conviction under sec. 456, for house-breaking by night with the object of carrying on intrigue with the complainant's wife—Propriety of conviction, without amendment of charge—Indian Penal Code (Act XLV of 1860), secs. 456, 457.

The accused was tried on a charge under sec. 457 of the Penal Code of breaking open at night the door of the complainant's house with the object of committing theft and was convicted under sec. 456 for having committed the offence of house-breaking by night with the object of carrying on an intrigue with the complainant's wife:

Held—That though it cannot be laid down as a general rule that in all cases a prosecution for house-trespass with the alleged object of theft must fail if that object is not proved, when a charge has been definitely framed in which theft is alleged as the object the accused cannot be convicted of house-trespass with some other object without an amendment of the original charge unless the Court is satisfied that he has not been in any way prejudiced

in his defence by the omission to amend the charge.

That in the circumstances of the case the conviction was liable to be set aside.

This was a Rule granted against an order of the Honorary Magistrate of Serampore, dated 16th June 1921, convicting the Petitioner under sec. 456, I. P. C., and sentencing him to undergo three months' rigorous imprisonment and to pay a fine of Rs. 25, an appeal from which order was dismissed by the Sessions Judge of Hughly, dated 31st August 1921.

The facts of the case will appear from the judgment.

Babu Narendra Krishna Bose for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

The accused Petitioner was tried on a charge of breaking open the *khirki* door of one Ram Lakhan Sonar to commit theft of property to the value of Rs. 30-4-0 when he was caught red-handed and thereby of committing an offence punishable under sec. 457, I. P. C. The finding of the trying magistrate and also of the Appellate Court is that the prosecution has failed to establish that theft was the object with which the accused entered into the complainant's house. They have both held that he came to complainant's house to carry on an intrigue with his wife and following the decisions of this Court in the cases of *Kailash Chandra Chakrabarti v. Queen-Empress* (1), *Balmakandram v. Ghansamram* (2) and *Premnand Saha v. Brindaban Chung* (3), they have convicted the accused of the offence punishable under sec. 456, I. P. C.

Though it cannot be laid down as a general rule that in all cases a prosecution

(1) I. L. R. 16 Cal. 657 (1889).

(2) I. L. R. 22 Cal. 391 (1894).

(3) I. L. R. 22 Cal. 994 (1895).

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for house-trespass with the alleged object of theft must fail if that object is not proved, we think, as was held by a Bench of this Court in the cases of *Jharu Sheikh v. King-Emperor* (4) and *Mohomed Hossain v. Emperor* (5), that when a charge has been definitely framed in which theft is alleged the accused cannot be convicted of house trespass with some other object without an amendment of the original charge unless the Court is satisfied that he has not been in any way prejudiced in his defence by the omission to amend the charge. In the present case had the Petitioner been called upon to answer the charge of the offence of which he has been convicted he might have been able to establish his innocence. If an amended charge had been framed an important point which would have to be decided would be whether the accused came to the complainant's house at the invitation of his wife or not. That is a point to which no enquiry appears to have been directed and there is no distinct finding on this point by either of the Courts.

We therefore hold that the Rule succeeds on the first ground on which it was issued and we accordingly make this Rule absolute. We do not think it necessary to direct a retrial and the accused is accordingly acquitted. His fine, if paid, will be refunded and the bail-bond discharged.

S. C. M.

(4) 16 C. W. N. 696 (1912).

(5) I. L. R. 41 Cal. 743: s. c. 18 C. W. N. 1247 (1914).

[PRIVY COUNCIL.]
[APPEAL FROM BENGAL.]

CHANDRA KANTA DAS, since deceased
(now represented by
Manindra Nath Das
(and ors.), Appellants,
v.
PARASULLAH MULLICK, Respondent.

Indian Contract Act (I of 1872), sec. 27—Rival businesses in plying ferry boats—Sale of good-will of one to the owner of the other—Agreement not to start similar business by vendor, if in restraint of trade.

The Respondent plied passenger ferry boats on a river. The Appellant started a similar business and gained an advantage over the Respondent by securing better landing places and negotiating facilities for collecting dues. In 1910, the Appellant purported to sell to the Respondent the goodwill of his trade in plying the ferry boats and every description of interest and ownership which the Appellant had acquired in the several landing places as well as settlements obtained for the collection of tolls. By a separate document the Appellant undertook to close the business of plying the particular ferry boats and that if he ever carried on the business again he would return the whole amount of consideration:

Held—That the transaction amounted to a sale of a real goodwill within the meaning put on the expression in *CHURTON v. DOUGLAS* (1), *TREGO v. HUNT* (2) and *INLAND REVENUE COMMISSIONERS v. MULLER* (3) and as used in the same sense in sec. 27 of the Contract Act.

This was an appeal against a decree, dated the 31st January 1917 of the Calcutta High Court, varying a decree, dated

(1) [1859] Joh. 174.

(2) [1896] A. C. 7.

(3) [1901] A. C. 217.

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the 27th January 1912, of the Subordinate Judge at Khulna.

The facts of the case will sufficiently appear from the judgment.

Mr. Meyer, K. C. (with Mr. H. N. Sen) for the Appellants stated the facts.

[LORD ATKINSON.—Referred to *Bishop v. Kitchin* (4).]

If there is a sale of good-will proviso to sec. 27 of the Contract Act applies.

Trego v. Hunt (2) and *Inland Revenue Commissioners v. Muller* (3).

He had the legal right to occupy the landing stages and use them.

It cannot be said that there is no *ad idem* as both the parties have signed the agreement.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—The question in this appeal arises in a suit by which it was sought to have decided that the Plaintiff who is the Appellant, was entitled to recover a sum of Rs. 5,400, with interest amounting to Rs. 67-8, as due to him under certain agreements. The defence was a charge of fraud in obtaining the agreements, and as a separate defence, that the main agreement was invalid as being in restraint of trade. The learned Additional Subordinate Judge of Khulna in Bengal, who tried the case, decided it in favour of the Appellant for the modified amount of Rs. 5,280, the difference being given on the footing that the Respondent (being the Defendant) was entitled to a small amount for compensation, on the ground of partial failure of consideration. As to this difference, no substantial controversy has been raised, and their Lordships do not think that any question is before them for decision in relation to it.

(2) [1896] A. C. 7.

(3) [1901] A. C. 217.

(4) 38 L. J. Q. B. 20 (1868).

When the case went on appeal to the High Court at Fort William, the decree of the Subordinate Judge was reversed. Chatterjee, J., held that the parties were never *ad idem*, the Respondent having been misled by the Appellant, and further that there was no real goodwill to assign, such as was the basis of the agreement on the part of the Appellant. But he thought that as the Respondent had entered into possession on the footing of the agreement, although inoperative, he ought to make compensation to the Appellant to the extent of Rs. 1,000. Walmsley, J., the other member of the Court of Appeal, was of opinion that there was nothing fraudulent to render the agreement inoperative on that ground. But he held that it was void as contravening sec. 27 of the Indian Contract Act, which makes every agreement by which anyone is restrained from exercising a lawful profession, trade or business, void. The trial Judge had been of opinion that the case came within the exception to the section which provides that it is not to apply where there is a sale of the good-will, but Walmsley, J., held otherwise, on the ground that there was no real goodwill.

The appeal comes before their Lordships *ex parte*, and they have scanned the case presented for the Appellant with some closeness. But, particularly having regard to the fact that the learned Judge who tried the suit found that there was nothing to establish fraud on the part of the Appellant in obtaining the agreement, and that this opinion met with the concurrence of Walmsley, J., and also because of the character of the evidence itself, they are of opinion that the agreement was, apart from the point of law arising under the Contract Act, a valid agreement.

All that it is necessary to observe is that

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there was a dispute between the Appellant and the Respondent. Each of them had passenger ferry boats on a river. The Respondent had entered on this business first. But he had not been prosperous, and the Appellant gained an advantage over him by securing better landing-places and negotiating facilities for collecting dues. In 1910 the parties, who had had controversies, entered into agreements for putting an end to them. Under one of these, called the Kistibandi bond, executed by the Appellant in favour of the Respondent, the former purported to sell to the latter the goodwill of his trade in plying the ferry boats, and every description of interest and ownership which the Appellant had acquired in several river landing-places for plying the boats, as well as the settlements obtained for the collection of tolls. The price was to be Rs. 5,400, payable by instalments, with interest, and if default was made in payment of any instalment the entirety was to become due at once. No question of title was to be raised by the Respondent.

Default in payment was made, and the Appellant has instituted the present suit. Much evidence was taken on the question of fraud, but for the reason already given their Lordships do not think it necessary to enter on this question. It has been, in their opinion, satisfactorily disposed of in the Courts below. The question that remains is that raised as to the operation of sec. 27 of the Contract Act. This section has, under the express exception which it contains, no application if there was here a genuine sale of the goodwill of the business. It ought to be observed that, in addition to the transfer of goodwill and other assets already referred to, there was an agreement or *kobala* executed about the same date by the Appellant in favour of the Respondent. Under this document the Appellant contracted that,

in consideration of the Rs. 5,400, he sold his rights in the landing-places and settlements and in the goodwill of the business of plying the ferry boats, and that he ceased to have any rights thereto. The Respondent was to be able to enjoy and possess these rights by exercising whatever right the Appellant had in them, and the latter was not to be able to make any obstacle in the Respondent's enjoyment of the same. The Appellant further undertook to close the business of plying the particular ferry boats, and that if he ever carried on the business again he would return the whole amount of the consideration.

Their Lordships are of opinion that this transaction amounted to a sale of a real goodwill, and they are unable to agree with the views expressed in the judgment of the High Court. They entertain no doubt that what took place was a sale of the good-will, within the meaning put on the expression in such cases as *Churton v. Douglas* (1), *Trego v. Hunt* (2) and *Inland Revenue Commissioners v. Muller* (3) and used in the same sense in sec. 27 of the Indian Contract Act. Accordingly they are of opinion that the decree of the Subordinate Judge must be restored, and that the Appellant is entitled to his costs of this appeal and in the High Court. They will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Geo. and Wm. Webb* for the Appellants.

R. M. P.

(1), [1859] Joh. 174.

(2) [1896] A. C. 7.

(3) [1901] A. C. 217.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD BUCKMASTER.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

1921,

19, December.

THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL, Appellant,

v.

SRI PUSAPATI VIZIA-
RAMA GAJAPATHIRAJU,
RAJA OF VIZIANA-
GRAM and anr.,
Respondents.

Alluvion—Lanka formed in the Godavari—Accretion—Concurrent findings of fact—"Gradual, low, and imperceptible," test how applicable to Indian rivers.

A lanka formed by alluvion in the river Godavari was claimed by the Maharajah of Vizianagram as being an accretion to his pre-existing land. This claim was denied by the Government on the ground that the lanka was a vertical accretion to the bed of the river:

Held—That both the lower Courts had found as a fact that the lanka was a lateral extension of the Maharajah's property and the Board saw no reason to dissent from their findings.

Held, also—That the question whether the accretion was "gradual, slow, and imperceptible" had not been raised in the pleadings or issues and it was doubtful whether the contention could be raised now. On the assumption that it could,

Held—That the accretion was "gradual, slow, and imperceptible."

In the English rule which provides that all accretions must be "gradual slow and imperceptible" the words "slow" and "imperceptible" are only qualifications of the word gradual and this word with its qualifications only defines a test relative to the conditions to which it is applied. The actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India.

REX v. YARBOROUGH (2), explained.

This was an appeal from a decree of the High Court, Madras, dated the 15th November 1916, confirming a decree of the temporary Subordinate Judge of Rajahmundry, dated the 27th September 1913.

The suit was instituted against Government for a declaration of the Plaintiff's (Respondent's) title to an island in the Godavari river comprising about 1,000 acres and for other relief. The island in question was an alluvial formation on the bed of the Godavari where the stream is tidal and navigable.

On the northern bank is the village of Kotipalli belonging to the Respondents: adjoining it on the east is the Government village of Kota.

During the flood season the river rises and carries with it large quantities of soil and deposits it on the banks and islands which it submerges or in new formations on the river bed. These formations are known as *lankas*.

The Maharajah owned a lanka called Betaru to the south and south-east of Kotipalli and Government owned the Kota Seri lanka to the south-west of Kota.

In 1850 a lanka known as the Thoorpu or Velapu lanka was formed between the Betaru and Kota Seri lankas and after prolonged litigation between the Maharajah and the Government this lanka was in 1868 decreed to the former.

The Maharajah was also the owner of two lankas known as Chiguru and Voota which were accretions to Betaru. In the course of time the river formed this mass of lankas into two portions and in 1909 the Government claimed the Eastern portion.

The Maharajah refused to admit the Government's claim and Government thereupon imposed a penal assessment under Madras Act III of 1915, on the Eastern part.

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The present suit was then brought by the Maharajah claiming a declaration of title to the eastern portion and when Government in their written statement denied his title to the western portion also, he amended his claim so as to have the latter included in the declaration.

The Maharajah contended that the *lanka* in suit belonged to him as being an accretion to his *lankas*. Government disputed the claim on the ground that it was an island emerging in a navigable river and contended that even if formed contiguously with lands belonging to the Maharajah yet it vested in Government as a vertical accretion to a navigable river. They further argued that the evidence showed that the growth was so rapid as to be perceptible.

The suit was decreed by the Subordinate Judge who gave the declaration prayed for and on appeal the High Court of Madras affirmed his decision.

From these decrees Government appealed to His Majesty in Council.

Mr. L. DeGruyther, K. C. (with *Mr. Kenworthy Brown*) for the Appellant.—

The bed of a river is admittedly Crown property where the river is both tidal and navigable and Government claim the *lanka* as an accretion to the river bed. I contend also that this was not a gradual and imperceptible accretion.

Both lower Courts agree as to facts but they say the law in England is different and inapplicable to local conditions and they adopt American decisions.

[LORD BUCKMASTER.—Can you apply English rules and law to something England never contemplated?]

[SIR JOHN EDGE.—You have no rivers in England comparable to the Godavari or the Ganges.]

I agree, but you have the sea—The Godavari is described in *Ramalakshamma v. The Collector of Godavari Dis-*

trict (1). My contention is that this was not a gradual and imperceptible accretion.

[LORD BUCKMASTER.—The law of accretion is the common law but that common law has been brought in India into conditions very different to those operating in England. The same and very similar conditions have been found in America and I presume reference is made to American decisions in order to see how the common law has been interpreted in those altered conditions.]

The principle of “gradual, slow, and imperceptible” has been recognised in India in, *e.g.*, the cases of *Sardar Jaggot Singh v. Rani Brijnathi Kunwar* (4) and *Thakurain Ritraj Koer v. Thakurain Sarfaraz Koer* (5). The reasoning adopted in *Lopez v. Muddun Mohun Thakoor* (6) does not apply to the Godavari. Too much reliance has been placed by the High Court on *Srinath Roy v. Dinabandhu Sen* (3).

There the Board were considering a set of circumstances in which the Indian Courts had always taken a slightly different view to the English Courts. It is not so with regard to accretion. The cases and authorities in India on the point are all reviewed in *Raikrishan Chandra v. Saidar Bibi* (7) and *Narendra Bahadur Singh v. Achhaibar Shukul* (8).

Mr. Kenworthy Brown (following *Mr. DeGruyther, K. C.*).—Lord Sumner in *Srinath Roy v. Dinabandhu Sen* (3),

(1) L. R. 26 I. A. 107; s. c. I. L. R. 22 Mad. 464; 5 Mad. L. J. 244; 3 C. W. N. 777 (1899).

(3) L. R. 41 I. A. 221 at p. 246; s. c. I. L. R. 42 Cal. 489 at p. 531; 18 C. W. N. 1217 (1914).

(4) L. R. 27 I. A. 81; s. c. I. L. R. 27 Cal. 768; 4 C. W. N. 555 (1900).

(5) L. R. 32 I. A. 165; s. c. 9 C. W. N. 889 (1905).

(6) 13 M. I. A. 467 (1870).

(7) I. L. R. 28 All. 286 (1905).

(8) I. L. R. 28 All. 647 (1906).

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points out that property in soil is one thing, profits a *prendre* in flowing water another thing. There is an attempt here to use Lord Sumner's judgment to make an entirely new law. Reference was also made to the following:—Madras Civil Courts Act, III of 1873, sec. 16, Madras Act, III of 1905 and Bengal Regulation, XI of 1825. *Nogender Chunder Ghose v. Md. Esof* (9), *Hirsuhai Singh v. Syad Lootf Ali Khan* (10), *New Orleans v. U. S. A.* (11), *Morris v. Brooks* (12) and *Ramalaksamma v. Collector of Godavari* (1).

Mr. Upjohn, K. C. (with *Sir G. R. Lowndes, K. C.* and *Mr. E. B. Raikes*) for the Respondents.—The suit *lanka* originated before 1850 and there has been gradual accretion and gradual erosion ever since. The western part of the suit *lanka* was Betaru which was the property of the Maharajah before 1850: Thoorpu is an addition to Betaru and was decreed to us in 1868. The *lanka* is an accretion to the western portion of Betaru. The Appellant has based his case entirely on reformation. This is a case of alluvion. The contention that the ownership of the river bed goes *quâ* river bed wants cutting down. If you accept the argument that the bed of the river remains the bed of the river even when thrown up above the water surface you do away with all title by alluvion or accretion. The meaning of "gradual" is given in *Rex v. Yarrowborough* (2). In the Bengal Regulation, XI of 1825, the principle of which holds

(1) L. R. 26 I. A. 107; s. c. I. L. R. 22 Mad. 464; 5 Mad. L. J. 244; 3 C. W. N. 777 (1899).

(2) 3 Barn. & Cress 91 (1824).

(3) L. R. 41 I. A. 221 at p. 246; s. c. I. L. R. 42 Cal. 489 at p. 531; 18 C. W. N. 1217 (1914).

(9) 10 B. L. R. 406, 416 (P. C.) (1872).

(10) L. R. 2 I. A. 28 (1874).

(11) 10 Peters 662.

(12) 53 American Rep. 206.

good in Madras and in *New Orleans v. U. S. A.* (11), the word "imperceptible" is left out because it adds nothing to "gradual" and the same thing is found in Lord Sumner's judgment in *Srinath Roy v. Dinabandhu Sen* (3).

[LORD BUCKMASTER.—Isn't the onus on you to prove "gradual?"]

No. We came to trial on the issue as to whether the suit *lanka* was formed in contiguity to our land, or as an island. This point as to gradual accretion was raised in the Court of Appeal and was only dealt with by that Court, as it was immaterial since they were in my favour on this point also. The Government acquiesced in my possession for a number of years therefore the onus is on the Government to prove that I am in unlawful possession so as to justify their penal assessment. *Haidar Khan v. Secretary of State* (13).

The pleadings and issues contain no reference to the Government's contention in regard to "gradual" and it was not raised in the memorandum of appeal. Even if the onus is on me there is uncontradicted evidence by which I have discharged it. The doctrine of accession is meant to apply to big rivers. This appears from the preamble to Bengal Regulation, XI of 1825. The rule is the same in Bengal and Madras. The preamble shows that the Common Law on this point was recognised in India but in Bengal for greater clarity it was codified. In the law dealing with rivers of this type the word "gradual" must include anything that is added to the land by the ordinary action of the river, unless it can be shown that a large portion of land was torn off from one place and deposited somewhere else.

(3) L. R. 41 I. A. 221 at p. 246; s. c. I. L. R. 42 Cal. 489 at p. 531; 18 C. W. N. 1217 (1914).

(11) 10 Peters 662.

(13) I. L. R. 36 Cal. 1 at p. 18 (P. C.) (1908).

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Reference was also made to :—*Attorney General of Nigeria v. Holt* (14).

Sir G. R. Lowndes, K. C. (following) : On the question of "gradual," there is no statutory law, therefore you must apply justice equity and good conscience and that consists of the English law so far as it is applicable to India.

The formation has been created by a "gradual" deposit of particles.

Mr. DeGruyther, K. C., in reply : Bengal Regulation, XI of 1825, does not apply to Madras.

Ramalakshamma v. Collector of Godavari District (1). In the Madras High Court the rule applied was that where accretion was gradual slow and imperceptible it went to the riparian owner. The argument before the Privy Council was that there was no law of accretion in Madras at all and that it was only present in Bengal owing to the Regulation. The remarks of the Board when the case came before them in *Ramalakshamma v. Collector of Godavari District* (1) only state that this is a wrong argument. The law of India on accretion is exactly the same as the law of England. Even under the Bengal Regulation the rule of "incrementum latens" is recognised and that is the real test. There is no difference between "gradual" and "slow and imperceptible." *Haridas Acharya v. Secretary of State* (15). There is no common law in India which this Regulation embodies. The Madras view is found in *Secretary of State v. Kadirikutti* (16).

The Madras rule is justice equity and good conscience under sec. 16 of the Madras Civil Courts Act, III of 1873.

(1) L. R. 26 I. A. 107; s. c. I. L. R. 22 Mad. 464; 5 Mad. L. J. 244; 3 C. W. N. 777 (1899).

(14) [1915] A. C. 599.

(15) 26 O. L. J. 590 (P. C.) (1917).

(16) I. L. R. 13 Mad. 359 (1890).

The formation was not gradual because the Maharajah's accounts show that 600 acres were formed in a single year.

[LORD BUCKMASTER.—There is no evidence to show the meaning of the accounts.]

In order to be gradual it must be slow and imperceptible. This rule was affirmed in *Ramalakshamma v. Collector of Godavari* (1), where the Court refers to "acquisition by gradual slow and imperceptible increase" as the basis of the well-known principle applicable. This case lays down that the rule of English law is the rule to follow. I say further that this was not an accretion at all owing to its sudden formation.

[LORD CARSON.—I can find no trace of this contention throughout your case. The whole question that has been thrashed out has been the question of accretion.]

On the question of onus I submit that this is part of the river bed until it is shown to be otherwise, therefore it is Crown property and the onus is on anyone claiming title to prove such title. *Secretary of State v. Chelikani Rama Rao* (17).

Their LORDSHIPS' JUDGMENT was delivered by

LORD CARSON.—The question in dispute in this action is as to the ownership of a certain *lanka* formed by alluvion in the bed of the river Godavari. It consists at the present time of an island being surrounded on all sides by the river, and in extent consists of about 1,000 acres. At the place where this *lanka* is situated the Godavari is both navigable and tidal, and it is not disputed that the bed of the river at that place belongs to the Government of India. The extent of the river

(1) L. R. 26 I. A. 107; s. c. I. L. R. 22 Mad. 464; 5 Mad. L. J. 244; 3 C. W. N. 777 (1899).

(17) L. R. 47 I. A. 198; s. c. I. L. R. 39 Mad. 617; 20 C. W. N. 1311 (1916).

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and the operation of its currents in forming alluvial tracts during the flood season must be borne in mind with reference to questions arising in this case. A description of this river will be found in *Ramakshammamma v. The Collector of Godavari District* (1).

The Maharajah of Vizianagram, the first Respondent, has for some years been in possession of this property; the other Respondent is a trustee of the Vizianagram estates.

The Defendant (Appellant), as representing the Government of India, treating the Maharajah and his tenants as being in unlawful occupation of the lands in question, proceeded to levy penal assessment in respect of them amounting to Rs. 9,020. This sum the Maharajah paid under protest and has brought the present action claiming a declaration of title to the said lands and repayment of this penal assessment.

The main questions raised by the pleadings and issues, and to which the evidence was directed in the trial Court before the Temporary Subordinate Judge, were whether the *lanka* in question was an accretion formed laterally as an adjunct to or in continuity with any *lanka* or other property belonging to the Maharajah and became his property, or was formed vertically as an island in the bed of the Godavari and was therefore the property of the Government.

The Subordinate Judge before whom the action was tried held that the *lanka* in question was formed by alluvion in contiguity with the Maharajah's land and was subsequently separated therefrom by the river and gave a decree for the Respondents.

On appeal the High Court of Judicature

at Madras, on the 15th November 1916, confirmed the decree of the lower Court and dismissed the appeal, concurring with the finding of the Temporary Subordinate Judge that the land in dispute was formed as a lateral extension of the Maharajah's *lanka*, or at least of the site of his *lanka*.

There are therefore concurrent decisions upon this the main question raised, and their Lordships see no reason for dissenting from the conclusion arrived at. The further question, however, and indeed the main one argued on behalf of the Appellant before this Board, was that even if the lands in question were accretions to lands of the Maharajah the process of accretion was not such as to give him title to them.

In dealing with the great rivers in India and comparing them with the rivers in this country, it is necessary to bear in mind the comparative rapidity with which formations and additions take place in the former.

It was claimed by the Appellant's Counsel that by the settled law of England, which he argued was the law applicable to Madras, land to be an accretion must be formed by gradual, slow and imperceptible degrees as laid down in the case of *Rex v. Yarborough* (2) and other English authorities, and he alleged that the accretions in the present case were not formed by "gradual, slow and imperceptible degrees." On the other hand, the Board were referred to sec. 4 of Bengal Regulation XI of 1825, the only requirement of which is that this accretion should be "gradual"—not that it should be slow or imperceptible. That Regulation was promulgated to be in force throughout the Provinces subject to the Presidency of Fort William, and did not apply to the Presidency of Madras. It has, however, been contended that this regulation em-

(1) L. R. 26 I. A. 107; s. c. I. L. R. 22 Mad. 464; 5 Mad. L. J. 244; 3 O. W. N. 777 (1899).

(2) 3 Barn. & Cress. 91 (1824).

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bodies the law of accretion as applicable generally to the rivers of India. Their Lordships do not find it necessary to decide whether the law as to accretions promulgated in the Bengal Regulation coincides with the law as to accretions in the Presidency of Madras or elsewhere in India, nor to discuss the exact meaning of the word "perceptible" in the English rule which provides that all accretions must be "gradual, slow and imperceptible," for assuming the applicability of the English rule, "slow" and "imperceptible" are only qualifications of the word "gradual," and this word with its qualifications only defines a test relative to the conditions to which it is applied. In other words, the actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India. The application of the rule is, in their Lordships' opinion, correctly laid down in the judgment of Mr. Justice Ayling in the present case when he says :—

"It seems to me the recognition of title by alluvial accretion is largely governed by the fact that the latter is due to the normal action of physical forces; and the different conditions of Indian and English rivers is such that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former, as pointed out by their Lordships of the Privy Council in *Srinath Roy v. Dinabandhu Sen* (3)."

Their Lordships observe that neither in the plaint nor the Defendants' written statement, or what is still more important in the issues as settled, is there any question raised as to the accretions being "gradual," "slow" or "imperceptible."

Further, in their memorandum of appeal to the High Court, the Government did not make the decision on this point a

(3) L. R. 41 I. A. 221 at p. 246; s. c. I. L. R. 43 Cal. 489 at p. 531; 18 C. W. N. 1217 (1914).

ground of objection. An examination of the evidence given before the trial Judge, shows that although several of the witnesses proved that the said *lankas* or parts of them "arose gradually" or increased "gradually," or "gradually extended," or "had been gradually growing in size," no question challenging this evidence was put upon cross-examination, nor was any evidence given on behalf of the Appellant to attempt to displace such evidence.

Some attempt was made to show by a comparison of farm leases and accounts of different years (which were put in evidence on behalf of the Maharajah to prove contiguity) that there must have been extensive accretions at a particular date, but such a comparison does not when examined show the contents of the *lanka* but only what land in the place was cultivated in each year.

Further, the judgment of Mr. Justice Srinivasa Aiyangar has pointed out that throughout the long dispute which has led to the present suit the Government had never suggested that the land in question "was not an accretion in the sense of a gradual formation." Their Lordships doubt whether under these circumstances it is open to the Appellant to raise the contention under consideration, but assuming that it is, their Lordships see no reason to doubt that, applying the principles already explained, the accretion must be held to have been "gradual, slow and imperceptible," and to be the property of the Maharajah. The order appealed for must therefore be confirmed, and this appeal dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor : *Solicitor India Office* for the Appellant.

Solicitor : *Mr. Douglas Grant* for the Respondents.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM ORIGINAL CIVIL****JURISDICTION****No. 1 of 1920.**

MOOKERJEE, C. J.] KASIRAM PANIA,
FLETCHER, J. Defendant, Appellant,
1920, v.
Heard, 8, April. HURNUNDROY FUL-
Judgment, CHAND, Plaintiff,
22, June. Respondent.

Usage, evidence of—Admissibility—Adding to the terms of a written contract—Repugnancy—Whether such usage makes the contract insensible, inconsistent or unreasonable—Due date falling on a Sunday—Contract if may be performed on Monday following—European importer.

Evidence of well-known trade usage is admissible to add to the terms of a written contract when such usage does not make the written contract insensible, or inconsistent or unreasonable.

In a contract, to which both parties were Indians, for the sale of piece-goods imported by a European firm, the due date fell on a Sunday :

Held—That according to the well-known usage in the market the due date would be the Monday following.

RICHARDSON v. GODDARD (1), LALCHAND v. KERSTEN (2), JUGGOMOHAN GHOSE v. MANIK CHAND (3), GIBSON v. SMAIL (4), BROWN v. BYRNE (5), ROSS v. SHAW (6), CUTEBERT v. CUMMING (7), PRODUCE BROKERS Co. v. OLYMPIA OIL AND CAKE Co. (15) and WESTFOOT v. HAHU (16), and the other cases referred to.

Appeal from the judgment of Buckland, J., dated the 2nd December 1919 passed in the exercise of Ordinary Original Civil Jurisdiction.

(1) [1859] 23 Howard 29.

(2) 1 L. R. 15 Bom. 338 (1890).

(3) 7 M. L. A. 263 (1859).

(4) [1853] 4 H. L. C. 353, 397.

(5) [1854] 3 El. & Bl. 703, 715.

(6) [1917] 2 I. R. 367.

(7) [1855] 11 Exch. 405 (408).

(15) [1916] 1 App. Cas. 314.

(16) [1919] 1 K. B. 495.

The facts of the case will appear from the judgment.

Mr. B. L. Mitter (with *Mr. A. K. Roy*), Counsels for the Appellant.

Sir B. C. Mitter (with *Mr. S. N. Banerjee* and *Mr. R. N. Mitter*), Counsels for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, C. J.—This is an appeal from the judgment of Mr. Justice Buckland in a suit for damages for breach of a contract for the sale of goods. The terms of the written agreement between the parties made on the 9th August 1918, were as follows :—

“ This is written to Bhai Harnand Boyjee Fulchand by Kasiram Pania with their compliments. Further, we have bought from you 45 bales, of Grey Shirtings No. B 5-456/15-15 of Mahadeo Company, at Rs. 26-8 annas, ready goods ; godown due 90 days from the 29th July ; allowance and all conditions are according to the outside contract, (that is contract with European firm), interest and cooly charges are according to the inside customs, (i.e., the customs prevailing amongst the Indian Merchants). Broker Meghrajee Ramkumar Serowgee.”

The case for the Plaintiffs is that as the due date of delivery, namely, the 27th October 1918, (the ninetyeth day from the 29th July 1918) was a Sunday, the contract could be performed on the following day, according to a well-known usage in the market which was described in the following terms :—

“ There is a well-known usage in the market in connection with European importing firms that if the due date falls on a Sunday or on a public holiday the same is excluded and the following day is taken as the due date. The Plaintiff firm and the Defendant firm are well aware of the said usage and have always acted in conformity thereto.”

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The Plaintiffs allege that, according to this usage, the due date for delivery under the contract was the 28th October 1918, when they tendered the goods to the Defendants who refused to accept delivery. The Plaintiffs accordingly claim damages on the basis of the difference between the contract rate and the market rate on the due date. The Defendants repudiate the claim on the ground that the usage alleged by the Plaintiffs has really no existence and assert that transactions are carried on according to a different practice which they describe as follows:—

“In transactions with the European firms, if the due date falls on a Sunday, delivery is taken and given on the previous Saturday and not on the following Monday. In transactions between Indian firms, the due date is adhered to, irrespective of its being a Sunday or a week day, and delivery is given and taken on the Sunday if that be the due date.”

The Defendants thus maintain that the due date under the contract was, as stated in the document itself, Sunday the 27th October 1918, and they add that they offered to take delivery on that day, but the Plaintiffs failed to give delivery as they had not the goods and were really not in a position to perform their part of the contract. Mr. Justice Buckland has rejected as untrustworthy the evidence adduced by the Defendants to establish the alleged demand for delivery and tender of the price on Sunday the 27th October 1918. He has further held that the Plaintiffs have proved the existence of a usage that in respect of imported goods, to be delivered from the godown of the importing firm, if the due date falls on Sunday or on a holiday, delivery is given on the following working day. On this basis, Mr. Justice Buckland has held that the due date under the contract in suit was the 28th October 1918, and that although

the Plaintiffs were ready and willing to deliver the goods on that date, the Defendants refused to accept delivery. The claim has accordingly been decreed with costs. The Defendants have now appealed against this decree.

We may state at the outset that we see no reason to doubt the correctness of the conclusion that there was no demand for delivery and tender of the price by the Defendants on the 27th October 1918, as alleged by them. The market on that date was against the Defendants, and apart from contradictions in the oral evidence, it is extremely improbable that they would, of their own motion, offer to carry out the bargain on their part and thereby be involved in a heavy loss. We reject this part of the story of the Defendants without hesitation as wholly unreliable. The real controversy in the appeal is, was there a valid trade usage as alleged by the Plaintiffs, and, if so, what was its effect upon the contract between the parties?

According to the Plaintiffs, there is a well-known usage in the market in connection with European importing firms that if the due date for delivery of goods falls on a Sunday or on a public holiday, the following day is taken as the due date. As regards transactions with European firms, there can be no doubt that the alleged usage is fully proved. Mr. Zallichi, manager of the piece-goods department of Ralli Brothers, states that they have a custom by which when the goods (ready or forward) fall due to be delivered on a Sunday or holiday, they deliver them on the next following day. Mr. Barker, who is in charge of the piece-goods department of Graham & Co., states that when the due date for delivery on a contract for sale of goods falls on a Sunday, his firm gives delivery on the following working day, that is, on the first working day after Sunday. Mr. Morgan, who is

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in charge of the piece-goods department of the Bombay Company deposes that when the due date under a contract for delivery of piece-goods falls on a Sunday, delivery is given, according to usage, on the Monday following. In our opinion, the evidence is conclusive that in transactions with European firms, on the sale of piece-goods, if the due date for delivery falls on a Sunday, the delivery is given on the next following day, and by usage this is regarded by all concerned as due performance of the contract. This is also clearly consistent with the probabilities, as European firms, *prima facie*, would not be kept open for business on Sundays. The next point for consideration is, whether the same usage prevails with regard to transactions between Indian dealers, when the subject-matter of the sale is goods purchased from a European firm of importers. The balance of evidence, in our opinion, points to the conclusion that the question should be answered in the affirmative. Mr. Zallichi, to whose evidence we have just referred, after stating the usage of his firm, adds that Indian merchants who deal with them recognise the usage. To the same effect is the evidence of Lakshminarayan and Loonkaran who are members of respectable firms of piece-goods dealers and who confirm the testimony on oath of Mulchand, the Manib Gomasta of the Plaintiffs. The existence of the usage alleged by these witnesses is highly probable, because if the goods are lying in the godown of the importing firm, it is impracticable to give delivery on a Sunday; in such circumstances one would expect that delivery would be accepted if given on the next following working day, just as in the case of direct transactions with European firms. We are not unmindful that there is some evidence to show that delivery may be had on a Sunday, even from a European firm, by previous arrangement; but it is plain

that such delivery, where given, is in the nature of a concession for the convenience or accommodation of the purchaser. Our attention has also been drawn to a ruling given by the Bengal Chamber of Commerce on the 25th June 1902, in the following terms:

“Sundays and Charter Party Holidays in relation to Mercantile Contracts—Goods falling due for delivery on Sunday or on a Charter Party and shipping Holiday must be delivered on the day previous to the Sunday or the Charter Party and shipping Holiday, as the case may be.”

No evidence has been adduced to show the circumstances under which the ruling was given; it is clear, however, that this has not been regarded as universally or even generally binding by mercantile firms and has not been observed by such firms as Ralli Brothers and Graham & Co. It is further worthy of note that it is not the case for the Defendants that they demanded delivery on Saturday the 26th October 1918 as the due date. Their allegation is that Sunday was the due date; consequently the ruling of the Bengal Chamber of Commerce just mentioned can be of no possible assistance to them. This takes away from the value of the evidence of Mr. Fildes, who is piece-goods salesmaster of David Sassoon & Co., (presumably a firm of non-Christian Jews) and who states that his firm has followed the Chamber of Commerce ruling. A similar observation applies to the evidence of Mr. Oldfield of the Overseas Export and Import Co., a firm which has acted on the Chamber of Commerce ruling. It is not necessary to refer in detail to the other evidence on the record, as, on the whole we agree with Mr. Justice Buckland that the usage alleged by the Plaintiffs covers not merely direct transactions with European firms but also transactions relating to goods imported by European firms and delivered

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from their godowns. In the case before us, as the Defendants were aware, the Plaintiffs were the benians of the Bombay Company, an importing firm whose goods were the subject-matter of the contract. In such circumstances, the usage, if valid in law and not inconsistent with the written contract, would be applicable so as to make Monday the 28th October 1918, the due date for delivery.

It is well-settled that, in the absence of statutory provision or trade custom or usage to that effect, the fact that the performance of a contract falls due on a holiday does not alter the rights of the parties by suspending the transaction of private business. This is well-illustrated by the case of *Richardson v. Goddard* (1) where a ship arrived in port with a cargo of cotton and on a holiday discharged the goods, which were destroyed by accidental fire before they were removed. The question arose, whether there had been good delivery. It was ruled by the Supreme Court of the United States that in the absence of proof of statutory or customary prohibition of the transaction of business on a holiday, the delivery must be deemed to have been valid so as to throw the loss on the consignee. Substantially to the same effect is the decision of Farran, J., in *Lalchand v. Kersten* (2). Consequently, in the present case, the Plaintiffs have to establish that they were entitled to perform the contract on the day following the Sunday, by reason of the existence of a valid usage which may be deemed to have been incorporated in the contract between the parties. As was pointed out by Sir John Coleridge in *Juggomohan Ghose v. Manik Chand* (3), such mercantile usage, though it needs not either the antiquity, the uniformity or the notoriety of custom, must

be so well-known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. To the same effect is the observation of Baron Parke in *Gibson v. Small* (4).

"The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural and others which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable."

It is consequently plain that the usage of which evidence is received must not be repugnant to or inconsistent with the written contract. This view is lucidly expressed by Coleridge, J., in *Brown v. Byrne* (5).

"In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding. Evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten. But in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less." [See also *Ross v. Shaw* (6)].

(1) [1859] 23 Howard 28.

(2) 1 L. R. 15 Bom. 388 (1890).

(3) 7 M. I. A. 263 (1859).

(4) [1853] 4 H. L. C. 353, 397.

(5) [1854] 3 El. & Bl. 703, 715.

(6) [1917] 2 I. R. 367.

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But in order that the material incident which it is sought to annex should fail within the exception of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent or thoroughly unreasonable. See the observations of Coleridge, J., in *Cuthbert v. Cumming* (7), of Lord Campbell, C. J., in *Humfrey v. Dale* (8), of Cockburn, C. J., in *Dale v. Humfrey* (9), of Keating, J., in *Russian S. N. Co. v. Silva* (10), of Lord Esher, M. R. in *Aktieselskab v. Ekmand* (11), of Stephen, J., in *Barrow v. Dyster* (12) and of Kennedy, J., in *Gulf Sine v. Laycock* (13). These cases show that the real difficulty in interpreting transactions of this character, lies in the reconciliation of two conflicting principles, namely, first, that evidence of usage is admissible on the presumption that the parties did not mean to express in writing the whole of the contract by which they intended to be bound but contracted with reference to those usages, and secondly, that the evidence received must not be of a term which is repugnant to or inconsistent with the written contract. The distinction is well put by Mr. Justice Story in *The Reeside* (14).

“The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of

a particular word or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary or contradict the most formal and deliberate declarations of the parties.” To the same effect is the decision of the House of Lords in *Produce Brokers Co. v. Olympia Oil and Cake Co.* (15) and of the Court of Appeal in *Westcott v. Hahu* (16).

The Plaintiffs must consequently not only prove the existence of a trade usage but also establish that the usage when read into the written contract does not make it insensible or inconsistent. We must, in this connection, bear in mind that the mere fact that the usage varies the apparent contract is not of itself sufficient to exclude the evidence, for it is manifestly impossible to add any material incident to the written terms of a contract without altering its effect, more or less. The test is, whether the incident, if expressed in the written contract, would make it insensible or inconsistent or unreasonable.

(7) [1855] 11 Exch. 405 (408).

(8) [1857] 7 El. & Bl. 286; 110 R. R. 507.

(9) [1858] El. Bl. & El. 1004; 113 R. R. 964.

(10) [1863] 13 C. B. N. S. 610 (618).

(11) [1897] 2 Q. B. 83 (87).

(12) 13 Q. B. D. 635 (1884).

(13) [1901] 7 Com. Cas. 1.

(14) [1837] 2 Summer 567.

(15) [1916] 1 App. Cas. 314.

(16) [1918] 1 K. B. 495.

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Examined in the light of the principle thus understood, the case of the Plaintiffs is free from difficulty. The written contract states explicitly that the due date of delivery is ninety days from the 29th July 1918, that is, the 27th October 1918. We have then to read into the contract the proviso that if such date falls on a Sunday, the due date will be the day following. It may be conceded that this does vary the apparent contract; indeed, if it did not, the parties would not seek to prove the usage; but although the apparent contract is varied, the contract as modified is sensible and self-consistent. The added term consequently is not open to the objection of repugnancy. We hold accordingly that the Plaintiffs have proved the existence of a legal custom annexed to the written contract.

The result is that the decree made by Mr. Justice Buckland is affirmed and this appeal dismissed with costs.

FLETCHER, J.—I agree.

Messrs. Fox & Mandal, Solicitors for the Appellant.

Mr. B. B. Palit of (*Messrs. Pugh & Co.*), Solicitors for the Respondent.

M. N. K.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 631 OF 1919.

MOOKERJEE, C. J. **BHARAM CHAND GUIN,**
FLETCHER, J. Defendant, Appellant,

1920,
 22, July. **KANAK SARKAR,**
 Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), sec 46, suit for ejectment of non-occupancy raiyat on ground of refusal to agree to enhancement—Mode of service of the agreement on the raiyat—Civil Procedure Code (Act V of 1908), Or. 5, r. 15, service of notice on son of Defendant, whether sufficient service—Propriety of inference from the relations of father and son.

In a suit for ejectment of a non-occupancy raiyat the statutory agreement was served on his son, and the lower Courts thought that it was sufficient compliance with the requirements of Or. 5, r. 15, C. P. C., as the son was presumed to have duly brought it to the notice of the Defendant:

Held—That this clearly is a consideration which cannot be permitted to weigh with the Court when the question is whether or not the requirements of the statute have been carried out. It has to be definitely found that the Defendant could not be found after reasonable and diligent enquiries, and that the person on whom the notice was served was an adult male member residing with him. It is essential that the requirements of the statute in these matters should be strictly carried out.

This was an appeal preferred on the 11th April 1919 from a decision of A. H. Cuming, Esq., District Judge, 24-Per-ganas, dated the 14th January 1919, affirming that of Babu Upendra Chandra Ghose, Munsif, Basirhat, dated the 12th October 1919.

In a suit under sec. 46, Bengal Tenancy Act for the ejectment of an occupancy raiyat, the agreement required by the section was served upon the son of the raiyat in his absence. That was thought to be sufficient compliance with the provisions of Or. 5, r. 15 of the Civil Procedure Code by the Court of first instance and the lower Appellate Court and the suit was decreed. From that decision the tenant appealed to the High Court.

Babus Biraj Mohon Majumdar and Anilendra Nath Roy Choudhury for the Appellant.

Babus Dwarka Nath Chakravarty and Arun Kumar Ghose for the Respondent.

BHARAM CHAND GUIN v. KANAK SARKAR.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, C. J.—This is an appeal by the tenant Defendant in a suit instituted under sec. 46 of the Bengal Tenancy Act. Sub-sec. (1) of that section provides that “a suit for ejectment on the ground of refusal to agree to an enhancement of rent shall not be instituted against a non-occupancy raiyat unless the landlord has tendered to the raiyat an agreement to pay the enhanced rent, and the raiyat has within three months before the institution of the suit refused to execute the agreement.” Sub-sec. (2) then provides as follows :—“A landlord desiring to tender an agreement to a raiyat under this section may file it in the office of such Court or officer as the Local Government appoints in this behalf for service on the raiyat. The Court or officer shall forthwith cause it to be served on the raiyat in the prescribed manner, and when it has been so served it shall for the purposes of this section be deemed to have been tendered.” . . . R. 30 of the statutory rules made by the Government of Bengal provides as follows :—“The agreement under sub-sec. (2) of sec. 46 shall be filed in the Court having jurisdiction to entertain a suit for arrears of rent of the holding, and shall be served on the raiyat in the manner prescribed for the service of summons on Defendant under the Code of Civil Procedure on payment of the fee prescribed by the High Court.”

In the case before us the Plaintiff alleges that the agreement was duly served in accordance with Or. 5, r. 15 of the Code of Civil Procedure, which provides as follows :—“Where in any suit the Defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the Defendant who is residing with him.”

The first Court found in favour of the Plaintiff that the summons had been duly served. The District Judge has affirmed that conclusion. But the facts found by him are not sufficient to show that the requirements of Or. 5, r. 15 have been fulfilled. The District Judge has held that what is required is that the agreement should be properly brought to the notice of the Defendant, and that as the agreement was served upon the son, one can have little doubt but that it was duly brought to the notice of the Defendant by his son who lives in the same house with him. This clearly is a consideration which cannot be permitted to weigh with the Court when the question is whether or not the requirements of the statute have been carried out. It is not definitely found whether the first condition mentioned in r. 15 existed, namely, whether the Defendant could not be found. The District Judge says that it is very unlikely that the Defendant's son or anyone connected with the Defendant would give any real information as to the Defendant's whereabouts: and, further that “the evidence would go to show that enquiries were made from the Defendant's son as to the whereabouts of the Defendant to which apparently only vague replies were given.” The statute does not require that the enquiry should be confined to the son of the Defendant or to a person related to him. An attempt could easily have been made to find out the Defendant by an enquiry from his neighbours or other persons. The District Judge has not also found whether the son was an adult male member of the family residing with him. The findings are thus insufficient to justify the decree, for it is essential that the requirements of the statute in these matters should be strictly carried out.

The result is that this appeal is allow-

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ed, the decree of the District Judge set aside and the case remitted to him for reconsideration.

It is stated that there are other points involved in the appeal. We do not deal with them, because if the point mentioned be decided against the Plaintiff, no other question will arise. But if the point is decided in favour of the Plaintiff and against the Defendant, the other questions which arise in the case will be reconsidered by the lower Appellate Court.

Costs will abide the result.

FLETCHER, J.—I agree.

J. N. R.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 167 OF 1920.

BEPIN BEHARI BOSE

WOODBORFFE, J.

and ors, Plaintiffs,

GHOSH, J.

Appellants,

1921,

v.

Heard, 24 and

MR. K. S. BONNERJEE,

25, November.

Receiver to the Estate of

Judgment,

Kumudini Dasi, Principi-

25, November.

pal objector, Defendant,

Respondent.

Receiver, rent decree obtained by, after conditional order of discharge made by Court, but not carried out and before the decree embodying order of discharge was signed by the Judge—Receiver, if bound to disclose to Court order of discharge in such circumstances—Devolution of interest pending suit—No application for substitution—Decree passed in favour of original party, if bad.

In a rent suit instituted by the receiver of an estate as such a decree was obtained after an order discharging the receiver on certain conditions had been made by the Court. It appeared, however, that on the date the rent decree was made the order of discharge had not been in fact carried out nor was the decree embodying the said order signed by the Judge who passed it. The receiver was in possession

as before and he was subsequently continued as such by the order of the Appellate Court:

Held—That it was not established that the receiver was in fact and law discharged on the date of the rent decree nor was it proved that there was fraud such as would entitle the Plaintiff to maintain a suit to have the decree set aside.

That it was not shown that there was in fact and in law such a discharge as it was incumbent upon the receiver to disclose before the Court.

That, assuming that the receiver was discharged before the decree was passed, there was only a devolution pending the suit, and the decree made in favour of the receiver would not on that account be a bad decree but would enure for the benefit of the party on whom the interest devolved, such party not having applied for the carriage of the proceedings.

This was an appeal preferred on the 30th August 1920 against a decree of the Subordinate Judge of Howrah (Babu Banwari Lal Banerjee), dated the 6th July 1920.

The facts of the case will appear from the judgment.

Dr. Dwarka Nath Mitter and Babus Hemendra Chandra Sen and Surendra Nath Bose for the Appellants.

Babus Surendra Chandra Sen and Bhupendra Kumar Ghose for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for a declaration that a certain rent decree, dated the 13th February 1919, obtained by the Defendant as receiver against the Plaintiffs is invalid and inoperative. The Defendant was appointed receiver of the estate of Kumudini Dasi, one of the

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widows of Gopal Lal Seal, on the 7th January 1918. The Defendant instituted a rent suit as receiver. It is alleged that during the pendency of that suit, he was discharged as receiver and thus was unable to maintain and continue the suit, and that such discharge took place on the 28th January 1919. He was not, it is said, re-instated until 17th February 1919, and that the decree passed in the rent suit on the 13th of February 1919, in favour of the receiver is invalid. It is alleged that the receiver purposely withheld this information from the Court, namely, that he was discharged, and thus induced the Court to believe that he was receiver and he thus obtained a decree in his favour. It is said that the decree was secured by suppression of material facts and thus it was inoperative, entitling the Appellants to bring this suit to have it set aside. As I said, the receiver is said to have been discharged on the 28th January 1919. On that date a settlement was arrived at in the suit of Gour Mohon Mullick v. Srimati Nayan Manjari Dasi and others. In the 8th para. of that settlement it is stated "that the official receiver in this suit do forthwith make over possession of the estate in his hands to the Mullick parties with like notice as aforesaid except a pair of horses and an office jaun which he is to make over to Bahu Panna Lal Seal and that he be discharged and do pass his accounts."

This order is, it has been contended, a conditional order, because in the earlier portion of the order of the High Court discharging the receiver it appears that "the counsel for the parties other than Srimati Nayan Manjari Dasi undertaking that their respective clients shall produce to the Registrar of this Court affidavits from their respective wives stating that so long as this decree remains unreversed they will make no claim to the monthly

sums referred to in cl. 10 of the terms of settlement hereinafter referred to."

There is no evidence before us, as the learned Judge has pointed out, which shows that this undertaking was carried out. We then find that there was an appeal, and on the 17th February 1919, an order was passed by the Appellate Court directing that the receiver should retain possession of the share of Srimati Kumudini Dasi until the final determination of that appeal. The decree of the 28th January 1919 to which I have referred was not signed by the learned Judge until the 25th February. The decree was passed in the appeal in the High Court on the 4th April 1919, and after the date of the Appellate Court's decree on the 17th March 1920, an order was passed by this Court on the Original Side by which it was ordered "that the receiver of this Court and the receiver appointed in this suit under the said order dated the second day of January one thousand nine hundred and eighteen of the estate of Gopal Lal Seal deceased, which was held by Srimati Kumudini Dasi deceased, and now in his possession do continue to act as such receiver as aforesaid with all the powers conferred upon him by the said order from the said 4th day of April 1919 until further orders of this Court."

As I have mentioned, the decree in the rent suit instituted by the receiver was passed on 13th February 1919, that is, after the date of the High Court's order of discharge on the 28th January 1919, but before that decree had been signed by the learned Judge who passed it on the 25th February 1919.

It appears from the order sheet, order No. 14, dated the 13th February 1919, that the Plaintiff was ready with his witnesses. But the Defendant asked for time on the ground that his servant who looked after this case was ill. The Judge

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then recorded the following order: "I am not satisfied as to the truth of the plea. It appears from an examination of this record that the Defendant has obtained adjournments on this very plea which goes to shew that the plea is a mere pretext to delay the decision of this case. The suit is one for rent, and already more than nine months have elapsed of which seven months have elapsed after the Defendant had entered appearance. So I refuse to grant the Defendant's application." Then on the same date, the following two orders were passed. "After the disposal of the above application, the Defendant's pleader stated that he was going to make an application stating that the Plaintiff was discharged from the receivership in which capacity he sued. As there is nothing on the record to prove the correctness of this statement of the Defendant's pleader, I refuse to take cognizance of it. The Defendant's pleader then retired." The next order is "In the course of the examination of the Plaintiff's witness Tarak Chandra Mitra the Defendant's pleaders filed the application stating that the Plaintiff was discharged and asked for a week's time to prove this fact. I refuse to admit this application and to grant the time applied for."

Passing now to the law on these facts it is in the first place urged that when the suit was first instituted, there was no defect in it, on the contrary the receiver had full authority to institute the suit, the decree in which the Appellant seeks to set aside. Assuming for the moment, without deciding that the Appellant's contention is correct, namely, that the receiver ceased to be such before the date of the decree, that is on the 28th January 1919, the decree being signed on the 25th February 1919, there is in this case a devolution of interest. [See the case of *N. C.*

Macleod v. Kissan Vithal Singh (1)]. But because there was such devolution it does not follow therefrom that the suit should have been arrested, that it could no longer be maintained and that the decree which was passed in favour of the Plaintiff was, as alleged, a bad decree [see the case of *Rai Charan Mondal v. Biswanath Mondal* (2)]. If the party on whom the interest devolved did not apply, (as they did not), to carry on the proceedings, then in such a case the decree would enure for the benefit of the party. We must distinguish such a case from one in which an event subsequent to suit shows that the Plaintiff had no title to bring the suit on the date of its institution. This argument, however, as I say assumes, that the receiver was discharged before the decree, but the learned Judge holds that he was not discharged; and I am not satisfied that the learned Judge's decision on this point is erroneous. The decree of the 28th January 1919, was, it has been pointed out, conditional, on certain affidavits to which I have referred being filed; as also, it is contended, to the giving over of possession in terms of cl. 8 of the terms of settlement. There is nothing to show that these conditions were carried out and it is for the Plaintiff-Appellant, in my opinion, to show all the facts which are necessary for him to establish in order to prove his claim to have the decree set aside. Not only is there nothing to show that these conditions have been carried out but on the contrary we find that the order of the Appellate Court of the 17th February 1919 orders that the receiver do retain possession during the pendency of the appeal, thereby indicating that the receiver had been and was then in possession or in other words that the order of the 28th January 1919 had not on that

(1) I. L. R. 30 Bom. 250 (1904).

(2) 20 C. L. J. 107 (1914).

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date been carried out. Further the decree, dated the 28th January 1919, was not signed until the 25th February 1919. The decree was not complete, and was inoperative for want of signature. Then on the 17th March 1920, the receiver was continued after disposal of the appeal and it is to be observed, as the learned Judge has done, that no reference is here made to any fresh appointment, the date referred to in the order, dated the 17th March 1920, passed by Mr. Justice Greaves being the 2nd January when the receiver was first appointed. I am of opinion therefore that it has not been established that the receiver was in fact and law discharged on the date of the rent decree, that is, the 13th February 1919, nor am I satisfied that it is proved that there was fraud such as would entitle the Plaintiff to maintain the suit to have the decree set aside. Having regard to my findings on the other points it is not necessary for me to elaborate this one, but I desire to say that it is not suggested that the receiver had any intention to deceive.

It is, however, contended that it was the duty of the receiver to state to the Court that he was discharged. It has not been made clear either to us or to the Subordinate Judge that there was in fact and in law such a discharge, as, it is said, it was incumbent upon the receiver to disclose before the Court. On the question of alleged damages for such alleged fraud it is to be observed, having regard to the provisions of sec. 153 (a) of the Bengal Tenancy Act, that the Judge passed the following order. "The Defendants made an application for rehearing on the 14th March. By an order, dated the 14th March (recorded on the application) they were asked to state within three days if any rent was due from them for the period in claim. They have not answered this question. From their

application for rehearing, it does not appear that they have sustained any injury by the *ex parte* decree. So I refuse to admit their application for rehearing. It is rejected accordingly."

For the reasons stated I am of opinion that this appeal fails and must be dismissed with costs.

S. C. M.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 708 of 1919.

BROJENDRA KUMAR
ROY CHOWDHURY and
ors., Defendants,
Appellants,

CHATTERJEA, J.
PANTON, J.
1921,
3, June.

v.
ASUTOSH ROY and ors.,
Plaintiffs, Respondents.

Limitation Act (IX of 1908), Art. 138—"Date when sale becomes absolute," significance of—Arts. 137, 138 and 144, which applies when an execution purchaser obtains symbolical possession, but is kept out of actual possession—Sec. 16, if applies to a suit for possession by such an execution purchaser.

A tenure was purchased at an execution sale, which was confirmed in August 1902. Symbolical possession was delivered to the purchaser in January 1904. An application for setting aside the sale was made in June 1905 and was rejected in April 1906. Being kept out of actual possession the purchaser brought a suit for possession in July 1914 and added some Defendants in March 1916, i.e., more than 12 years from the date on which the sale became absolute, as well as from the date when symbolical possession was delivered to the execution purchaser:

Held—That the sale became absolute on the confirmation of the sale in August 1902 and not in April 1906, when the application for setting aside the sale was dismissed. The confirmation of a sale cannot be kept in abeyance (when no pro-

BROJENDRA KUMAR ROY CHOWDHURY v. ASUTOSH ROY.

ceedings are taken to set aside the sale before the confirmation) in order to enable the judgment-debtor to take such proceedings afterwards. So if Art. 138 of the Limitation Act applied, the suit would be barred, even deducting the time during which the application for setting aside the sale was pending.

Art. 137 did not apply as the judgment-debtor was in possession at the date of the sale. Art. 138 too was not the proper article applicable to the case. The purchaser obtained symbolical possession, which was as effective as actual possession against the judgment-debtor, and if the latter continued in possession, it was adverse against the purchaser from the very day on which he got symbolical possession. The purchaser therefore had a fresh cause of action for instituting the suit for possession against the judgment-debtor. In such a case Art. 138 does not apply but Art. 144 applies.

GOPAL v. KRISHNA RAO (1) referred to.

Where Art. 144 applies, no deduction of time under sec. 16 of the Limitation Act or under the general principles of equity is allowable, and the suit was therefore barred.

LAKHAN CHANDER SEN v. MADHUSUDAN SEN (2), HEMENDRA MOHAN KHASNABIS v. DHARANI NATH CHANDA ROY (3) and MUSSAMAT RANEE SUBNOMOYEE v. SHOSHI MUKHI BURMONIA (4) distinguished.

This was an appeal against the decree of M. Smither, Esq., District Judge of Zillah Dacca, dated the 23rd of January 1919, modifying the decree of Babu Sukumar Bhattacharjee, Subordinate Judge, 1st Court of that District, dated the 29th of July 1917.

(1) I. L. R. 25 Bom. 275 at p. 280 (1900).

(2) I. L. R. 35 Cal. 209, 217; s. c. 12 C. W. N. 326 (1907).

(3) 25 C. W. N. 376 (1920).

(4) 12 M. I. A. 244, 254 (1868).

The Plaintiffs purchased a tenure at an execution sale on the 12th July 1902. The sale was confirmed on the 13th August 1902. The Plaintiffs obtained symbolical possession on the 12th January 1904. The judgment-debtors made an application for setting aside the sale on 21st June 1905 and it was rejected on the 8th April 1906. The Plaintiffs, however, did not obtain actual possession and brought the present suit for possession against the judgment-debtors on the 11th July 1914, and added some Defendants on the 27th March 1916. The Court of first instance held that the suit was barred by limitation and dismissed it. On appeal the District Judge decreed the suit. The added Defendants thereupon preferred the present appeal to the High Court.

Babus D. N. Chakerbuly and Rajendra Chandra Guha for the Appellants.

Babus Ram Chandra Mazumdar, Upendra Lal Roy, Bimola Charan Das Gupta and Khemada Kinkar Roy for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for recovery of possession of the lands in dispute on the ground that they formed part of a tenure which was granted in 1837 to one Hoseinuddin Chowdhury, the predecessor-in-interest of the Defendants.

It is alleged by the Plaintiffs that a suit for rent in respect of the tenure was brought against the heirs of Hoseinuddin and in execution of that decree, the tenure was sold and purchased by the Plaintiffs on the 12th July 1902. The sale was confirmed on the 13th August 1902. The Plaintiffs obtained possession on the 12th January 1904. The Plaintiffs say that they continued in possession and were dispossessed in 1914. They then brought a suit in the Munsif's Court on the 11th July

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1914. That Court held that the suit was not cognisable by that Court, and accordingly returned the plaint. The plaint thereupon was filed in the Court of the Subordinate Judge against the original Defendants on the 15th June 1915. The Defendants Nos. 7 to 20 were added as party Defendants on the 27th March 1916.

The defence was that there was no tenancy created in 1837 in favour of the Defendant, that there was a sale of a portion of the proprietary interest, but that the transferee was to pay his share of the Government Revenue payable with respect to that portion through the transferor so long as mutation did not take place and that that being so, the Munsif's Court which held the sale in execution of the rent decree had no jurisdiction to pass the decree or hold the sale as the suit was one cognisable by the Small Cause Court.

The Court of first instance held that the suit was barred by limitation and dismissed the suit. On appeal the learned District Judge decided the question in favour of the Plaintiff and gave him a decree.

The Defendants Nos. 7 to 20 have appealed to this Court.

The main question in the case is whether the suit is barred by limitation.

As stated above, the sale was confirmed on the 13th August 1902 and symbolical possession was delivered to the Plaintiffs on the 12th January 1904. The judgment-debtors however continued in possession, and the Plaintiffs did not obtain actual possession. The Defendants Nos. 7 to 20 were added as parties on the 27th March 1916. This was more than 12 years from the date of the confirmation of the sale as well as from the date on which symbolical possession was delivered to the Plaintiffs. The learned District Judge was of opinion that the article applicable to the suit was 137 or 138 but that sec. 16 of the Limita-

tion Act applied to the case under which the Plaintiffs were entitled to deduct the time during which an application for setting aside the sale was pending in Court. That application was made on the 21st June 1905. It was rejected on the 8th April 1906.

Sec. 16 lays down that in computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a proceeding to set aside the sale shall be excluded. The only suit for possession by a purchaser at a sale in execution of a decree for which a period of limitation is prescribed is a suit under Arts. 137 and 138. Art. 137 cannot apply to the present case as the judgment-debtor was in possession at the date of the sale; and if any of these articles is applicable, it must be Art. 138. Art. 138 provides for a suit by a purchaser of land at a sale in execution of a decree for possession of the purchased land when the judgment-debtor was in possession at the date of the sale. The period of limitation (12 years) begins to run from the date when the sale becomes absolute. Now, if the sale was made absolute on the 13th August 1902 on which date it was confirmed, the suit would no doubt be barred, even if the Plaintiff was to get deduction of the period during which the application for setting aside the sale was pending, namely, from 21st June 1905 to 8th April 1906.

It is contended, however, on behalf of the Respondent that the sale did not become absolute until the 8th April 1906 when the application under secs. 204 and 311 to set aside the sale was disposed of, and if that is the proper view of the matter, there is no doubt that the suit would be in time.

The question is whether the sale was

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made absolute on the 8th April 1906 or on the 13th August 1902.

Now, sec. 314 of Act XIV of 1882 provided that no sale of the moveable property should become absolute until it had been confirmed by the Court, and sec. 316 laid down that when the sale had become absolute in the manner aforesaid the Court should grant a certificate and the property should vest in the purchaser from the date of the certificate. The sale therefore became absolute on confirmation of the sale under sec. 312 of the Code; and sec. 312 shows that the sale was to be confirmed if no application were made under sec. 311 or if any such application were made and disallowed. It appears therefore, that the confirmation of the sale followed disallowance of any application that may have been made under sec. 311, C. P. C., and evidently that was to be made before the certificate of sale was issued: and in such cases, sec. 16 of the Limitation Act would certainly be applicable. Here, the application was made several years afterwards. The sale was confirmed on the 13th August 1902, the application to set aside the sale was not made until the 21st June 1905. The confirmation of sale cannot be kept in abeyance (when no proceedings are taken to set aside the sale before the confirmation) in order to enable the judgment-debtor to take such proceedings years afterwards, as in the present case. We are unable therefore to hold that the sale became absolute on the 8th April 1906 when the application was rejected. We are of opinion that the sale became absolute on the 13th August 1902.

We think, therefore, that even if Art. 138 is applicable to the case, the suit will be barred even if the Plaintiff is allowed deduction for the period during which the application to set aside the sale was pending. We do not think, however, that Art. 138 is the proper article applicable to the case.

The Plaintiffs obtained delivery of symbolical possession on the 12th January 1904. Such symbolical possession was as effective as actual possession against the judgment-debtors; and if the judgment-debtors continued in possession their possession was adverse against the Plaintiffs from that very day. The Plaintiffs therefore had a fresh cause of action for instituting the suit for possession against the judgment-debtors; and such a suit would not be one governed by Art. 138 which evidently refers to a case where the purchaser has not obtained delivery of possession.

The cases on the point are discussed in the case of *Gopal v. Krishna Rao* (1), where it is pointed out that "Art. 137 applies to an auction-purchaser of the rights of a person not in possession, while Art. 138 applies when the auction-purchase is made of the rights of a judgment-debtor who is in possession at the date of the sale. None of these articles contemplate the case of an auction-purchaser or his assign who has obtained formal possession, and is disturbed by the judgment-debtor or his heirs who continue in actual possession, as was the case in the present dispute. In such a case all the Courts agree in holding that Art. 138 does not apply but Art. 144 applies."

If Art. 144 applies, the Plaintiff is not entitled to any deduction of time under sec. 16 of the Limitation Act. But the learned Pleader for the Respondent contends that he is entitled to deduction of the time during which the proceeding for setting aside the sale was pending, under the general principles of equity: We do not think, however, that he is so entitled.

He refers to the cases of *Lakhan Chander Sen v. Madhusudan Sen* (2) and

(1) I. L. R. 25 Bom. 275 at p. 280 (1900).

(2) I. L. R. 35 Cal. 209, 217: s. c. 12 C. W. N. 326 (1907).

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Hemendra Mohan Khasnabis v. Dharani Nath Chanda Roy (3). In the first case, there was a decree actually in favour of the *pro formâ* Defendants and so long as that decree was not set aside, a fresh suit for the same relief could not be brought by them.

In the second case, the third mortgagee was prevented by an order of the Court from applying to make the decree absolute until the second mortgage had been redeemed.

In the case of *Mussamat Ranec Surnomoyee v. Shoshi Mukhi Burmonia* (4) it was pointed out by the Judicial Committee "until the sale had been finally set aside, she was in the position of a person whose claim had been satisfied; and that her suit might have been successfully met by a plea to that effect."

In the present case the principle of those cases cannot apply; because the sale had already been confirmed, and had become absolute; a certificate of sale had been granted to the Plaintiffs and they had obtained delivery of symbolical possession. In these circumstances when the Defendants judgment-debtors withheld possession, the Plaintiffs were quite competent to maintain the suit against the judgment-debtors and the mere fact that the judgment-debtors made an unsuccessful application several years afterwards could not invalidate the confirmation of sale which had taken place, nor entitle the decree-holders to deduct the period during which the proceedings were pending.

We think therefore, that the suit is barred by limitation.

That being so, it is unnecessary to consider whether the transfer in favour of Hosseinuddin by the Plaintiffs' predecessor was a lease or a transfer of a portion of the proprietary interest; and, if it

was the latter, whether the Munsif had jurisdiction to pass a decree for rent or hold the sale in execution thereof.

The result is that the decree of the lower Appellate Court is set aside and that of the Court of first instance restored with costs here and of the Court below.

J. N. R. *Appeal decreed with costs.*

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 485 OF 1903.

BRETT, J.	}	JOGESH CHANDRA ROY,
1904,		Plaintiff, Appellant,
Heard, 7 and		v.
8, December.		ANNADA CHARAN CHOW-
Judgment,		DHURY, Defendant,
8, December.		Respondent.

Cess Act (IX of 1880, B. C.), sec. 41, cess if payable for lands held on payment of rent in kind.

In a suit for arrears of rent the claim for the tenant's share of the cess was disallowed on the ground that there was no provision for payment of cesses when rent was payable in kind:

Held—That cess is payable in respect of all lands held by a cultivating raiyat, whether the rent is payable in cash or in kind.

This was an appeal preferred on the 22nd March 1903 against the decree of the Subordinate Judge of Chittagong (Babu Jogendra Lal Choudhury), dated the 11th December 1902, modifying a decree of the Munsif of Patiya (Babu Sarat Kishore Bose), dated the 24th June 1901.

The Appellant brought a suit for arrears of rent in respect of 3 plots of land, for which rent in kind was payable for one plot, and he made a claim for the usual cesses. The Munsif decreed the whole claim, but the lower Appellate Court disallowed the claim for cesses in respect of the plot of land for which rent was claimed in kind, on the ground that there

(3) 25 C. W. N. 376 (1920).

(4) 12 M. I. A. 244, 254 (1888).

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is no provision in the law for the payment of cesses when rent is payable in kind and that there was no proof of any agreement to pay such cesses. Hence the present appeal to the High Court.

Babu Hari Bhusan Mookerjee for the Appellant.

No one for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit brought by the Plaintiff-Appellant for arrears of rent of 3 plots of land. Money rent was claimed in respect of two of the plots and rent in kind in respect of the third. There was also a claim for the usual cesses.

The Court of first instance decreed the entire claim, but on appeal the lower Appellate Court has modified the decree of the Court of first instance by disallowing the claim for cesses in respect of the plot of land for which rent was claimed in kind. The Subordinate Judge gives as his reason for disallowing that part of the claim for cesses, that there is no provisions in the law for the payment of cesses when rent is payable in kind, and there is no proof on behalf of the Plaintiff of any agreement to pay such cesses.

On behalf of the Appellant it is contended that the Subordinate Judge is in error in supposing that the law does not contemplate that cesses should be paid by the tenant in the case of lands held on rents payable in kind. The contention is in my opinion correct. Sec. 41 of the Cess Act clearly provides that the cess is payable in respect of all lands held by a cultivating raiyat; and, sub-cl. 3 of that section lays down the amount of cesses which the raiyat is bound to pay. The Subordinate Judge was possibly unaware of the rules provided for the levy of cesses in respect of rents payable in kind, and his attention is therefore invited to the

explanation given under sec. 4 of the Cess Act, B. C., of 1880, in the Edition of the Act published by the Board of Revenue with the Board's Rules attached.

In my opinion the Subordinate Judge is in error in disallowing the claim of the Plaintiff for the tenant's share of the cesses on the plot of land paying rent in kind and I therefore set aside the judgment and decree of the Subordinate Judge on this point and restore the judgment and decree of the Munsif.

As no one appears on the other side to contest the appeal I make no order as to costs.

J. N. R.

Appeal allowed.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

VISCOUNT HALDANE.

LORD ATKINSON.

SIR JOHN EDGE.

1921,

Heard, 10, May.

Judgment,

2, June.

AMBA *alias* PADMA-
VATHI, Appellant,

v.

SHRINIVASA
KAMATHI,
Respondent.

Indian Registration Act (III of 1877), secs. 3, 34—Deed of gift in favour of a married minor girl presented for registration by latter's father without authority from executant—Registration if valid—Deeds void.

Two deeds of gift executed by K in favour of his niece A who was a minor and married to his adopted son were presented for registration by A's father and registered:

Held—That upon A's marriage her father ceased to be her natural guardian and never having been appointed her legal guardian was not her assignee or representative within the meaning of sec. 3 of the Registration Act, 1877. Nor was he, within the meaning of sec. 34 of the Act, the representative assign or agent duly authorised on behalf of K. The registration of the deeds was therefore illegal, in-

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valid and void, with the consequence that the deeds themselves were void and unenforceable.

This was an appeal from a decision of the High Court of Judicature at Madras.

The facts of the case will appear from the judgment.

Mr. Kenworthy Brown for the Appellant.—The allegations are that the (1) testator was too old to know what he did; (2) testator was so old that he was easily under undue influence and was so in this case.

[LORD HALDANE referred to the Registration Act and asked whether one could not withdraw the deed once it has been presented but before registration. If it could be withdrawn then the question of undue influence does not arise.]

Sec. 32 of the Registration Act, sec. 35.

[*Mr. L. DeGruyther, K. C.*—The document could be withdrawn. This has not been challenged in the lower Courts.]

Sec. 47 of the Act. Once it is registered it dates back to date of execution.

[LORD HALDANE.—The other side challenges the validity of registration.]

[LORD HALDANE.—The Judges in the High Court take two points against you.

(1) It was not presented by any one on behalf of the executant. (2) It was no longer a proper document.]

Sec. 32 of the Act.

[LORD HALDANE.—Krishna withdrew his request for registration.]

He wanted to take back the document. Registration was effected under the decree.

[LORD ATKINSON.—The decree gave permission to Plaintiff's next friend to present the document.]

[LORD HALDANE.—The decree says: "duly presented."]

[LORD ATKINSON.—The order was that the documents should be returned to him.]

Messrs. L. DeGruyther, K. C. and K. V. L. Narasimham for the Respondent were not called on.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—The Appellant, who sues *in forma pauperis*, is a minor and the second wife of the Respondent. She was also the niece of one Krishna Kamathi, deceased, a man of considerable property, who died on the 14th April 1909. The Respondent is the adopted son of this same Krishna Kamathi. The case made by the Plaintiff was that Krishna Kamathi, being anxious that his line should be perpetuated, pressed the Respondent, who was much attached to his first wife, to marry the Appellant, then a girl only eleven years of age, that the Respondent reluctantly consented to do so, and that the marriage accordingly took place upon the 9th March 1908.

It was alleged to be the custom when these child marriages take place that the wife is not brought to reside in her husband's home till she has reached the age of puberty. However that may be, the Respondent did not bring this wife of his to his home, and in other respects was alleged to have treated her in a way of which Krishna Kamathi so strongly disapproved that he became somewhat incensed against his adopted son. He was the manager of the family property, and, although advanced in years, was admittedly an intelligent man, who managed this property well and looked after all legal matters, such as the institution of suits, etc. On the 30th April 1908, Krishna Kamathi wrote to the Respondent a letter, in which he stated that the latter had recently become disobedient to him and had disregarded him, that it appeared to him the Respondent would behave in the same manner in future, that it did not

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appear to him, Krishna, proper to live with the Respondent hereafter as a member of an undivided family, and that he had divided the movable and immovable family property into two equal parts, had prepared four lists thereof, and proposed to divide it between himself and his son, in the complicated manner set out in this letter. The Respondent, in answer to this letter, wrote to his adoptive father a letter bearing date the 30th May 1908, in which, after defending himself against the accusations made against him, he suggested that relatives for interested motives had poisoned his father's mind against him, begged of the father not to break up the joint family and divide the family property, but stated that if his father had made up his mind to do so he was ready to take as his share of it the property mentioned in List No. 2.

Krishna Kamathi, in pursuance of the resolution he had formed, employed two pleaders to draw up for him two deeds, dated respectively the 19th and 23rd May 1908. The first is a 'partition deed between him and his son, the Respondent, in which he again sets forth the charges against the latter, as he had already done in the letter already referred to, stating that he had separated and delivered to his son the property in the aforesaid List No. 2, which the latter had accepted, and provided he, the Respondent, should enjoy the immovable and movable property mentioned in that list from generation to generation, he paying the sircar terva and by the entry of kudthala in his, the Respondent's, name. The second deed is a deed of gift to the Appellant, his niece, by which, after reciting that he had effected a partition between himself and his son, of the movable and immovable property, he, Krishna, out of the part of the same which fell to his share, had made to his niece of his own free will, because of the

love he had for her, a gift of the movable and immovable property described in a schedule attached thereto and estimated to be of the value of Rs. 15,000. This deed contains the following passage :—

" Though I have given up to you just now the full right of the undermentioned property still as you are now a minor and unable to look to the management of the property, I shall look after the management of the property as your trustee till you become a major, and I shall myself take the rice and cash amount settled to be paid by you each year for my and my wife's maintenance and keep a regular account and spend the amount necessary for the due performance of the Mana Mariyado pertaining to this property and pay the remaining mesne profits to you as soon as you become a major, or I shall get a document executed in your name for such an amount on the safe security of immovable property and deliver the said document to you."

Both these deeds were executed by Krishna Kamathi alone. Neither the Appellant nor her father executed them.

On the 1st June 1908, Krishna Kamathi duly presented both these deeds at the office of the Sub-Registrar of Vittal for registration. Registration, however, did not take place owing to some question as to the amount of stamp duty leviable. This involved a reference to the Registrar of the district, which caused delay. The deeds meanwhile remained with the Sub-Registrar. The Respondent having in the meantime learned that his father had presented these deeds for registration, requested him to obtain a return of them, and the latter accordingly, on the 5th June 1908, presented a petition to the Sub-Registrar praying for a return of the two deeds without their being registered. On the 9th June 1908, Krishna and the Respondent entered into an agreement (*Tahanama*) to the effect that during their lifetime they would not partition the family property. This agreement was

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duly registered three days later, namely, on the 12th June 1908. On the 10th June 1908, Ramayya Shanbhogue, the father of the Appellant, presented on her behalf a petition to the said Sub-Registrar objecting to the return to Krishna of the two deeds aforesaid until they had been registered, and informing this official of his, the Petitioner's, intention to institute a suit to secure their compulsory registration.

In answer to this petition the Registrar, on the 19th October 1908, informed the Petitioner that the two before-mentioned deeds would be returned to the presentant, Krishna Kamathi, by the Sub-Registrar of Vittal unless the claimant under the deed of gift obtained an injunction order of a competent Court against their return within one month from the receipt of this notice. Accordingly the minor, Amba Bai, by her father as next friend, instituted a suit (No. 44 of 1908) against Krishna Kamathi and her husband to obtain the suggested relief. The first Defendant, Krishna, then filed a long written statement which is significant in its terms. After admitting that he had executed the two deeds and had presented them for registration, and after stating that his adopted son left his own house and went to reside in the house of his father-in-law at Mangalore for many days, he alleged that Ramayya Shanbhogue, taking advantage of his, Krishna's, old age, diseased and helpless condition, had represented to him that the conduct of his son, the second Defendant, amounted to deliberate disobedience and to a disregard of his, Krishna's, comforts; that his said son intended to abandon him altogether, and if necessary to marry a third girl or to himself adopt a son; that by these fraudulent misrepresentations the Plaintiff, Amba Bai's father, had prevailed upon him, Krishna, to consent to a partition of his

property and to make a provision for this girl, his niece, out of his own share; that in this way the two deeds in question were by fraud, misrepresentation and undue influence procured from him, an old man struck with disease. He further alleged that he only became aware of the effect of the two deeds after he had presented them for registration and therefore was entitled to have them returned to him unregistered. And he made the point that the Plaintiff, not being a party to the deed of partition, had no right to maintain a suit for its registration under the Registration Act. It clearly appears from these statements that Krishna Kamathi thus early clearly made the case afterwards strenuously insisted upon that the Plaintiff's father, for the purpose of procuring for his daughter the benefits conferred upon her by the two before-mentioned deeds, exercised upon Krishna undue influence by the insidious method of poisoning his mind against his adopted son. This suit was dismissed as against Shrinivasa, the Appellant's husband, but compromised as between her father on her behalf, and her uncle Krishna. The terms of the compromise were embodied in a deed, dated the 29th March 1909, styled in the proceedings the deed of rectification. By this deed it was provided that Krishna would consent and thereby did consent to the registration of the two deeds, dated 19th May 1908, and 23rd May 1908, respectively, and further that the Appellant should enjoy the partitioned property subject to certain amendments and conditions therein set out. These alterations and conditions seriously modified and diminished the provision made for Amba Bai by the deed of gift of the 29th May 1908. For instance, it burdens the property given to her by the latter instrument with a liability to pay Rs. 360 annually to Krishna's wife, Devi. Though providing

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that he, Krishna, should continue to be her trustee till her majority, it provides that owing to his ill-health her father should manage the property given to her on her behalf. It further provided that though the property given to her by the deed of gift was to be enjoyed by her from generation to generation, if she and her husband came together and lived amicably, and had children, the property was to be enjoyed on that line in succession; but that if she should have no children, and her Sayathe (co-wife) should have children, this property should be enjoyed by the latter's descendants after her, Amba's, death. Numerous provisions are, in addition, introduced in reference to adoption contingent on the many events named, and then the important provision is introduced that Amba should have no right to alienate the properties given to her in any manner while she behaved herself according to the conditions contained in the deed. This deed was executed by Krishna Kamathi in the presence of many witnesses. It was not executed by Amba Bai nor by her father, Ramayya Shanbhogue, nor by her husband, the Respondent. It is obvious that it supersedes the deed of gift of the 29th May 1908. Its aim, object and effect are substantially different. A decree by consent was accordingly made in the compromised suit on the 31st March 1909, in which, after reciting at length the effect of the compromise, it was ordered and decreed "that the partition deed of the 19th May 1908, and the gift deed of the 23rd May 1908, in dispute be returned to the Plaintiff's next friend for presentation before the Sub-Registrar of Vittal, that the Sub-Registrar do register them if they be duly presented before him for registration within thirty days from this date."

The deed of the 29th March 1909 was duly registered. The two deeds of the

19th and 23rd May 1908, were returned to the Appellant's father and on the 14th April 1909, the day upon which Krishna Kamathi died, were presented by the Appellant's father to the Sub-Registrar and registered.

The suit out of which this appeal has arisen was, on the 17th August 1914, brought by the Appellant, suing *in formâ pauperis* by her father as her next friend, to recover from her husband possession of the property given to her by the deed of gift of the 29th May 1908. On the 26th November the Defendant filed a written statement in the suit in which the main defences relied upon were (1) that the execution of these two deeds of May 1908 was procured by the misrepresentation, fraud and undue influence of the father of the Plaintiff upon Krishna Kamathi, by which the mind of the latter was poisoned against the Respondent and the said deeds were therefore inoperative and unenforceable and not binding upon him; (2) that the compromise of the suit No. 41 of 1908, and the execution of the deed of the 29th March 1909, respectively, were instituted and procured by similar means, and that the decree made in said suit was void and of no effect; (3) that the deed of gift of the 29th May 1908 was cancelled and annulled by the execution of this rectification deed; and (4) that the registration of the two deeds of May 1908 was invalid and ineffective under the provisions of the Registration Act, and was therefore void *ab initio*.

The Subordinate Judge found (1) that the two deeds of May 1908 were procured by undue influence by the Appellant's father exercised upon the Respondent's aged father, and were therefore void; (2) that the agreement of the 9th June 1908, entered into between the Respondent and his father was valid, that the deed of rectification was therefore invalid

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and void, that therefore the Appellant was not entitled to recover possession of the properties mentioned in the plaint; and (3) that the two deeds of May 1908, were validly registered. He in the result dismissed the Plaintiff's suit with costs. On the appeal from this decree to the High Court of Madras, Abdur Rahim, J., concurred with the Subordinate Judge's finding that the two last-mentioned deeds upon which the Appellant's case rested, had been obtained by the undue influence of the Appellant's father. Also that the two deeds were repudiated by Krishna Kamathi before they were registered, that they were not properly presented for registration and were not validly registered.

Oldfield, J., differed from his colleague on the question of the procurement of these deeds by the exercise of undue influence on Krishna Kamathi, but agreed with him in the view that Krishna had the right to revoke the deed of gift of the 23rd May 1908, and had revoked it, and both of these learned Judges held that under the provision of the 32nd section of the Registration Act, the two deeds of May 1908, were not validly registered. They accordingly affirmed the judgment of the Subordinate Judge.

Their Lordships do not think it necessary to pronounce any decision on the question upon which these two learned Judges differed. It was not and is not disputed that these two deeds cannot be given in evidence or enforced if they have not been duly registered. Their Lordships are clearly of opinion that as the Appellant was not only a minor but a married woman, her father had ceased to be her natural guardian, and had never been appointed her legal guardian, and was not therefore her assignee or representative within the meaning of sec. 3 of the Registration Act, 1877. He was not an executant of the said deeds or either of

them; neither was within the meaning of sec. 34 of that Act, the representative assign or agent duly authorised on the behalf of Krishna Kamathi deceased, the only executant. The presentation by him of the two deeds for registration was in direct conflict with the express provisions of this 34th section. The deeds were consequently never legally registered. The registration of them which was procured was illegal, invalid and a nullity; and if that be so, as in their Lordships' opinion it must be held to be, it is not disputed that the deeds would be void and unenforceable, and this apart altogether from the question whether they have not been impliedly revoked by the agreement dated the 9th of June 1908, entered into between Krishna Kamathi and the Respondent and duly registered by the former on the 12th of June 1908. It is therefore unnecessary for their Lordships to expressly decide this latter question. They are of opinion that owing to the invalidity of the registration of the two deeds of May 1908, the appeal fails and must be dismissed, and they will humbly advise His Majesty accordingly.

Solicitor: *Mr. Douglas Grant* for the Appellant.

Solicitor: *Mr. Henry S. L. Polak* for the Respondent.

R. M. P.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

SRI SRI SRI JAGAN-	
VISCOUNT HALDANE.	NATHA GAJAPATHI
LORD ATKINSON.	ANANGA BHEEMA DEO
SIR JOHN EDGE.	KESARI MAHARAJ-
1921,	UNGARU, Appellant,
Heard, 10, May.	v.
Judgment, 10, May.	SRI KUNJA BEHARI
	DEO, Respondent.

Registration Act (III of 1877), sec. 17 (1)—Document whether Will or an authority to adopt—Registration compulsory if latter.

ANANGA BHEEMA DEO v. KUNJA BEHARI DEO.

The operative part of a document which the writer called a "Will" stated that having, owing to severe illness, had serious misgivings and not having been blessed with an heir apparent, the writer had consented to his wife adopting a son at her pleasure and conducting the management of the estate in the best manner:

Held—That the document was not a Will but only a power to adopt and as such ought to have been registered as being an authority to adopt a son, not conferred by a Will within the meaning of sec. 17 (1) of the Registration Act of 1877.

This was an appeal against a judgment and decree of the High Court of Judicature at Madras, dated the 12th September 1918, affirming a judgment and decree of the District Court of Ganjam at Berhampur, dated the 12th March 1918.

The facts of the case will appear from the judgment.

Mr. L. DeGruyther, K. C. (with Mr. Kenworthy Brown) for the Appellant.

The Hon'ble Sir William Finlay, K. C. (with Mr. J. M. Parikh) for the Respondent said that there was a short point in the case and if their Lordships are with him on that point the other issues need not be argued.

Mr. Kenworthy Brown (who was called on to argue this short point of the construction of a Will) said:—It is clear the document was not intended to and did not operate *de presenti*. If the deed is not a will then it must be registered under sec. 17, Indian Registration Act of 1877. The lower Courts held the document was void as it was not registered.

The cases relied on are—*Bhoobun Moyce Debia v. Ram Kishore Acharj Chowdhry* (1), *Somansundara Mudaly v. Duraisami*

Mudaliar (2) and *Seshamma v. Olinnappa* (3).

I say the document is really a Will as the deceased refers to it as a "Will." It is in favour of his wife. He also speaks of "executors."

Sir William Finlay.—This is an authority to adopt. The fact that the document is a Will has to be established apart from this. I am not pressed to say that this is not a Will for other purposes.

Mr. K. Brown.—I proceeded on the assumption that the adoption was not to take place till after death.

Sir William Finlay.—That does not affect my point.

Mr. Parikh was called on to state whether an authority to adopt *de presenti* could be given and he cited Mayne's Hindu Law and the authorities referred to therein.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—This case is an important one, and but for a preliminary point on which it turns, might have been a long one. There is, however, a preliminary question which goes to the root of the appeal. Sri Sri Brojo Kishore Deo executed a document in favour of his wife on the 14th August 1906. He called it a Will, in the body of the document; but its only operative contents are to be found in the words which follow:—

"I have been laid up with severe bodily illness for about the last seven months. Consequently having had serious misgivings, and not having until now been blessed with an heir-apparent for want of divine favour, I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This Will has been executed with my consent."

(2) I. L. R. 27 Mad. 30 (1903).

(3) I. L. R. 20 Mad. 467 (1897).

(1) 10 M. I. A. 279 at p. 309 (1885).

ANANGA BHEEMA DEO v. KUNJA BEHARI DEO.

It will be observed that what is said by the writer of the document is that having had serious misgivings, and not having been until now, blessed with an heir apparent, he has consented to his wife adopting a son at her pleasure, and conducting the management of the estate in the best manner. That standing by itself appears to their Lordships to be no more than a present authority to the wife to make an adoption, and there is nothing else of substance in the document. It may be that the writer was in a position under the law applicable to give her such power, but whether he was or was not, he purports to give her nothing else; for the references to property that occur in it are no more than consequences of the guardianship of the wife, and the character of being a Will is not established independently of these. Their Lordships therefore agree with the learned Judges in the Court of Appeal in thinking that the document is not a Will, but only a power to adopt, and as such ought to have been registered as being an authority to adopt a son, not conferred by a Will within the meaning of sec. 17 (l) of the Registration Act of 1877.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor: *Mr. Douglas Grant* for the Appellant.

Solicitors: *Messrs. Chapman, Walker and Shephard* for the Respondent.

R. M. P.

[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

VISCOUNT HALDANE THIRUVENKATASAMI
LORD ATKINSON. IYENGAR and anr.,
SIR JOHN EDGE. Appellants,
1921, v.

Heard, 3, May. PAVADAI PILLAY and
Judgment, 26, May. ors., Respondents.

Civil Procedure Code (Act XIV of 1882), secs. 36, 37—Party within jurisdiction—Pleader appointed not by party but by agent acting under special power of attorney—Pleader, if must be appointed by recognised agent.

Certain decree-holders who were resident within the local limits of the jurisdiction of the Court to which the application for execution was to be made executed a special power of attorney in favour of one R authorising him on their behalf inter alia to "execute vakalat to vakils to sign execution petitions and put in affidavits and to conduct all necessary proceedings," and the application for execution was signed and filed by a pleader who was appointed by a vakalat executed by R:

Held—That the pleader was duly appointed on behalf of the decree-holders within the meaning of sec. 36 of Act XIV of 1882, sec. 37 not applying to the case.

The possessive pronoun "his" in the expression "pleader duly appointed to act on his behalf" refers to the party and not to his intermediary or agent.

This was an appeal from the judgment of the High Court of Madras, dated the 25th November 1910, which affirmed a decree of the Subordinate Judge of Kumbakonam, dated the 30th September 1907.

The facts of the case will appear from the judgment.

Mr. Kenworthy Brown for the Appellants referred to secs. 36 and 37 of the Civil Procedure Code of 1882.

The petition was duly signed. The view to the contrary is based on a wrong

[HIRUVENKATASAMI IYENGAR v. PAVADAI PILLAY.

construction of secs. 36 and 37 of the Civil Procedure Code of 1882. Again a duly appointed recognised agent can appoint a pleader although principals are within District. What was done did not purport to come within sec. 37. The parties were within jurisdiction. Therefore initial conditions in sec. 37 were not present. Recognised agent under sec. 37 is different. The position of agent is conferred by power of attorney executed on 8th September 1902, which ran thus :—

“As we have hereby fully empowered you to conduct Execution Proceedings in Tanjore Sub-Court on our behalf in E. P. No. 14 of 1891 on the file of Tanjore Sub-Court in O. S. No. 4 of 1884 on the file of Kumbakonam Sub-Court for the said temple against the Defendants in the said suit, namely, Chidambaram Pillay and others, to execute Vakalat to Vakils to sign Execution Petitions and put in affidavit and to conduct all necessary proceedings, all proceedings conducted by you orally and in writing in connection therewith shall be approved of by us though they were done by us.”

He is agent for purpose of appointing a vakil: *Badri Prasad v. Bhagabati Dhar* (1) covers this case.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—This is an appeal against the judgment and decree of the High Court of Judicature at Madras, dated the 25th November 1910, which affirmed the decree of the Subordinate Judge of Kumbakonam, dated the 30th September 1907, and made on an execution petition No. 279 of 1905.

The Appellants are the punchayetdars or trustees of a temple and as such hold a decree for mesne profits against the Respondents or their predecessors in title.

(1) 1 L. R. 15 ALI. 240 (F. B. (1894).

Their petition praying for the execution of this decree was dismissed by the Subordinate Judge, and his judgment was upheld by the High Court. From this latter decision the decree-holders have brought this appeal.

There were nine Plaintiffs originally in the suit. All but three of them have died or resigned or been removed from the trusteeship.

The Appellants, to use the words of sec. 37 of the Code of Civil Procedure, 1882, are resident within the local limits of the jurisdiction of the Court within which limits the application by petition was to be made, and the sale applied for carried out. The case of the Appellants does not come within any one of the sub-sections of sec. 37. The execution petition No. 279 of 1905 was not signed by any of the Appellants. It was signed by a pleader appointed in writing to make the application embodied in the petition, and that writing was filed in the Court.

Both the High Court of Madras and the Subordinate Judge of Kumbakonam held that this petition was not validly presented because, to use the words of the judgment of the High Court, “the person who executed the vakalat to the pleader to act on his behalf was not a recognised agent of the decree-holder as defined under sec. 37 of the Civil Procedure Code, 1882, and could not have presented the application for execution himself. Under sec. 36 of the Civil Procedure Code the pleader appointed can only do what might be done by the party on whose behalf he is appointed.” The only question for their Lordships' decision is whether the construction in this passage put upon secs. 36 and 37 of the Code of Civil Procedure is their true construction. Their Lordships do not think it is their true construction for this reason: that it confounds the intending litigant, the pleader's client,

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with the intermediary by whom, as the agent of that litigant, the pleader is appointed to act on the litigant's behalf. The pleader is not appointed, on behalf of the intermediary or agent, to act on the agent's behalf, but by the agent on behalf of his principal, the litigant, to act on the litigant's behalf. The litigant is at once the principal of the agent and the client of the pleader. The lines of sec. 36 of the Code of Civil Procedure immediately preceding the proviso run thus : "be made or done by the party in person or by his recognised agent or by a pleader duly appointed to act on his behalf." The possessive pronoun *his* all through this sentence refers to the "*party*," i.e., *the litigant*, not the intermediary or agent.

This construction gives a reasonable and natural meaning to the provisions of sec. 36. The application is to be made or done by the party in person or by the recognised agent of the party in person, or by the duly appointed pleader of the party in person, while the other construction would leave entirely uncovered the case where the party himself in person without the intervention of any agent duly appoints his own pleader to act on his own behalf.

In the present case, the Appellants on the 8th September 1902, executed, not a general power of attorney, but a special power of attorney in favour of one Raghava Naicken, authorising him on their behalf to, amongst other things :—

"execute vakalat to vakils to sign execution petitions, and put in affidavits and to conduct all necessary proceedings" in this suit. On the same day this same Raghava Naicken, the Appellants' agent, authorised the pleader to appear in the Tanjore Court to present the execution petition verified by him, the agent, to examine witnesses, argue, etc. No doubt the words run : "to appear on my behalf

in the Tanjore Court," and he describes himself as general agent of the Appellants under a general power of attorney, but that was a misrecital. The power of attorney was not a general power of attorney, but a special one, and the words, "on my behalf" are misleading. The execution petition was to be presented on behalf of the Appellants, they were the only persons who had the right to put the decree into execution and have the property of the debtors attached and sold.

Their Lordships are therefore of opinion that the judgment appealed from as well as that of the Subordinate Judge which it affirmed were erroneous, and should be reversed, and a declaration made that the Appellants' decree should be put into execution. They will humbly advise His Majesty accordingly.

The Respondents will pay the costs of the appeal.

Solicitors : Messrs. T. L. Wilson & Co. for the Appellants

R. M. P. *

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 84 of 1920.

MOOKERJEE, J.	}	RAJENDRA LAL GHOSE,
BUCKLAND, J.		Plaintiff, Appellant,
1921,		v.
22, March		SRIMATI MRINALINI DASI and ors., Defend- ants, Respondents.

Will, construction of—Legacy on a condition precedent, if takes effect when the condition by reason of subsequent events becomes impossible of performance—Intention of the testator, to be the guiding principle.

A testator bequeathed a sum of money to some of his relatives asking them to re-excavate a tank with the money and take the surplus. But the testator himself re-excavated the tank before his death :

RAJENDRA LAL GHOSE v. SRIMATI MRINALINI DAS.

Held—That the re-excavation of the tank was a condition precedent, i.e., there was no gift intended unless the condition was fulfilled. The ascertainment of the testator's intention shown by the Will cannot be varied by events which occur afterwards. That intention must be determined from the terms of the bequest, and where the performance of the condition appears to be the motive of the bequest the impracticability of the performance will be a bar to the claims of the legatee. In such a case the bequest does not take effect, discharged of the condition.

DARLEY v. LANGWORTHY (1), GATH v. BURTON (2), WEDGWOOD v. DENTON (3) and LOWTHER v. CAVENDISH (7) and other cases referred to.

This was an appeal against the decree of Babu Lal Behary Chatterji, Subordinate Judge, 2nd Court, of Zillah Hooghly, dated the 6th April 1920.

The facts of the case will appear from the judgment.

Babus Sarat Chandra Ray Choudhury and Rishindra Nath Sarkar for the Appellant.

Babus Ram Chandra Majumdar and Narendra Nath Choudhury for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the Plaintiff in a suit for construction of a Will executed by his step-brother Nataraj Ghose. The substantial controversy between the parties relates to the construction of cl. (5) of the Will which is in the following terms : "That I have some *tezarati karbar* in my own name and in the *benami* of my son Girish Chan-

dra Ghose. After my death my said step-brother Sriman Rajendra Lal Ghose and his sons, etc., in succession shall realise either amicably or by suits, the amounts that may remain due from my debtors and with the said money and with the Government Promissory Notes that may be left by me, they shall re-excavate in my name, the tank known as Panja tank belonging to us in village Khorda Cawnpore and remove thereby the water difficulty of the public. Whatever will remain surplus, after defraying the said expenses, shall be obtained by my said brother and his sons, etc. If he does not re-excavate the said tank in my name, then my three married daughters Srimati Mrinalini Dasi, Srimati Bibhabati Dasi and Srimati Rashmani Dasi, and after them my daughters' sons, shall realise the money of the *tezarati karbar* and with the said money and with the Government Promissory Notes that may be left by me, they shall re-excavate the said tank in my name; and if any surplus be left, it will be obtained by the married daughters and widowed daughter Srimati Nikunja Dasi and daughter-in-law Srimati Subhasini Dasi in equal shares."

It appears that after the execution of the Will and before his death the testator re-excavated the tank. Consequently it is no longer possible for the legatee to fulfil the condition imposed in the Will. There can be no question that according to the true construction of this clause this is a condition precedent, that is to say, there is no gift intended at all unless and until the condition is fulfilled. At the time when the Will was executed the condition was not impossible of performance but by reason of event subsequent, the condition has now become impossible; for, the testator himself re-excavated the tank after he had executed the Will and before his death. Consequently at the

(1) 3 Brown P. C. 350 (1774).

(2) 1 Beav. 479 (1859).

(3) L. R. 12 Eq. 290 (1871).

(7) 1 Eden 99, 116 (1758).

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time of his death, when the testamentary disposition came into operation, the legatee could not re-excavate the tank. The contention of the legatee is that the condition has been discharged by the act of the testator himself and he can accordingly claim the legacy as if the condition had never been imposed. He invokes in substance the aid of the doctrine that the donee may not be bound by a condition imposed by the Will, where on account of the acts of the testator or other events subsequent to the date of the Will the effect is that substantially the condition is performed or nullified in the testator's life-time or that substantially the testator has dispensed with the condition or has put performance out of the power of the donee. As an illustration of the application of this principle, reference has been made to the decision of the House of Lords in *Darley v. Langworthy* (1), where there was a bequest of chattels at a mansion house conditional on residence there. The testator afterwards suffered recovery of the estate; it was ruled that the wife was entitled to the use of the furniture discharged of the condition which the recovery had put out of her power to perform. Reference has also been made to other cases of the same type such as *Gath v. Burton* (2), (condition requiring payment of debt held satisfied by testator accepting composition); *Wedgwood v. Denton* (3), (surrender of term followed by acceptance of new term); *Walker v. Walker* (4), (condition requiring conveyance by donee fulfilled by purchase by testator of donee's interest) and *Re Park* (5), (marriage with testator's consent). There are remarks in some of these cases

suggesting that the true principle is not that of considering that the condition has been fulfilled but that the donees are exempt from the condition altogether so that the Will must be read as if there were no condition. But this view may militate against the principle that the ascertainment of the testator's intention shown by the Will cannot be varied by events which occur afterwards; see the observations of Wood V. C. in *Re Clarke's Trusts* (6). That intention must be determined from the terms of the bequest, and where the performance of the condition appears to be the motive of the bequest the impracticability of the performance will be a bar to the claim of the legatee. In such a case the bequest does not take effect, discharged of the condition. Reference may in this connection be made to *Lowther v. Cavendish* (7) and *Priestly v. Holgate* (8), which afford illustrations of the principle that where a condition precedent becomes impossible to be performed even though there be no fault or laches on the part of the devisee himself, the devise fails. The case before us is clearly of this description. The motive of the testator was that the water difficulty felt by the people of the locality should be removed and that this should be effected by the re-excavation of the tank in his name, to be accomplished by means of the funds placed by him at the disposal of the legatee. The essence of the intention consequently was that the legacy should be applied in the re-excavation of the tank; and as an inducement to the legatee to carry out this injunction, the testator provided that the surplus should belong to the legatee or his representative in interest. By reason of events over which the legatee had no con-

* (1) 3 Brown P. C. 359 (1774).

(2) 1 Beav. 479 (1859).

(3) L. R. 12 Eq. 290 (1871).

(4) 2 DeG. F. & J. 255 (1855).

(5) [1910] 2 Ch. 322.

(6) 32 L. J. Ch. 525, 529 (1875).

(7) 1 Eden 99, 119 (1758).

(8) 3 K. & J. 286 (1857).

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trol, the re-excavation of the tank has become impossible and unnecessary, in other words, the motive of the bequest had ceased to exist at the date of the death of the testator, whence the Will takes effect. If we test the matter from a plain common sense point of view, we may put the question whether, if the Will had been made at the time of the death of the testator, he would have inserted this particular provision therein. The answer must obviously be in the negative. As the tank had already been re-excavated by him, he could not very well impose the obligation either upon the Plaintiff or upon his daughters to re-excavate it. The substance of the matter is that the purpose which he had in view was not then in existence; it is consequently impossible for us to hold that the Will intended that even in such circumstances the bequest should take effect. We are of opinion accordingly that the clause has been correctly construed by the Court below and that this appeal must be dismissed with costs.

BUCKLAND, J.—I agree.

J. N. R. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 180 OF 1917.

MOOKERJEE, J.	}	YASIN ALI MIRDHA
PANTON, J.		and ors., Plaintiffs,
1919,		Appellants,
Heard, 12 and		v.
13, August.		RADHAGOBINDA CHOW-
Judgment,		DHURI and ors., Defend-
2 ^d , August.		ants, Respondents.

Assam Land and Revenue Regulation (I of 1886), sec. 97, partition of an estate, the lands of which, in whole or in part, are joint with those of other estates—Jurisdiction of Revenue Courts—Sec. 96, imperfect partition—Mode in which lands of an estate are held, if material to the jurisdiction of Court to effect partition—Modus operandi of parti-

tion—Interpretation of statutes—Sec. 154, jurisdiction of Civil Courts.

Plaintiffs brought a suit for declaration that an order for partition of an estate made by the revenue authorities was without jurisdiction and was consequently inoperative in law on the ground that some of the lands of the estate sought to be partitioned were joint with the lands of other estates, and the revenue authorities were not competent under the Assam Land and Revenue Regulation, 1886, to effect a partition of lands included in several estates:

Held—That sec. 97 of the Regulation confers upon every recorded proprietor of a permanently settled estate, subject to the qualifications specified therein, the right to claim a partition of the estate. It makes no reference directly or by implication, to the mode in which the lands of the estate are held. The duty is imposed upon the Revenue Court to effect a partition of an estate on an application by a person competent to claim partition under sec. 97. The first step in the performance of that duty is to ascertain the lands which constitute that estate. To carry out this preliminary step, it may conceivably be necessary to have recourse to an ancillary measure, namely, to effect a partition of the joint lands of the several estates and thereby to ascertain the lands which belongs to the estate under partition. It is a well-known rule of interpretation of statutes that where a statute confers jurisdiction, it *impliedly* grants also the power to do such acts, adopt such measures, and employ such means as are essentially necessary to its execution.

ABDUL KHALEK v. ABDUL KHALEK (3),
SARAT CHANDRA v. PROKASH CHANDRA (4)

(3) I. L. R. 23 Cal. 514 (1896).

(4) I. L. R. 24 Cal. 751 (1897).

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and BRAJENDRA KISHORE v. KALIKUMAR (6) referred to.

It cannot be maintained that the joint lands should first be divided by a Civil Court, as then the result would follow that the Civil Court would in essence be called upon to constitute an estate for the purpose of partition under sec. 97 and consequently to deal with a matter which affects the Government revenue and is excluded from its jurisdiction by sec. 154 (1) (f) of the Regulation.

GOURI KRISHNA v. SABANANDA (5) *dislinguished*.

This was an appeal from a decision of Babu Upendra Chandra Mukherjee, Subordinate Judge, Sylhet, dated the 24th April 1917.

The facts will fully appear from the judgment.

Babus Dwarkanath Chakravarty, Debendra Narayan Bhattacharyee and Promotho-nath Banerjee for the Appellants.

Dr. Sarat Chandra Basak and Babus Rajendar Chandra Guha and Hemendra Kumar Das for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Plaintiffs in a suit for declaration that an order for partition of an estate made by the Sub-Divisional Officer of Sunamgunj on the 15th April 1913 and confirmed successively by the Deputy Commissioner of Sylhet on the 14th July 1913, by the Commissioner on the 9th December 1913 and by the Chief Commissioner on the 22nd November 1914, was without jurisdiction and was consequently inoperative in law. The case for the Plaintiffs is that they objected to the applications for partition presented by the Defendants to the revenue authorities on the ground that some

of the lands of the estates sought to be partitioned were joint with the lands of other estates and the revenue authorities were not competent, under the Assam Land and Revenue Regulation, 1886, to effect a partition of lands included in several estates. This objection was overruled as untenable. The substantial matter in controversy in the present litigation, is the question of the legality of the order made by the revenue authorities. The Subordinate Judge has held that the decision of the Revenue Court was not *ultra vires* and that the Plaintiffs were not entitled to the declaration and injunction asked for in the plaint.

To appreciate the true position reference may be made to the application for imperfect partition, which was presented on the 31st October 1911 by the first two Defendants, and may be regarded as typical, as the applications presented by the third Defendant on the 21st February 1912 and by the fourth Defendant on the 22nd March 1912 respectively may be treated, for the solution of the question raised before us, as similar in scope and purpose. The application of the first two Defendants describes the estate to be divided as Taluk Krishnamani (No. 24,202/12) appertaining to Perganah Pagla, total revenue Rs. 6-3 as. Then follows the statement that Account No. 1 of that Mehal stands in the names of the Petitioners and bears the total revenue Rs. 4-2 as. This indicates that the applicant's own two-thirds share in the Taluk. The next column specifies the Mouzas included in the estate, namely, Dekharhant, Dhamdharpur, and Kastachpur. The fourth column states that the applicants have a two-thirds share of the original Mehal. Then follow in the sixth column the names of the other sharers with their respective shares. In the seventh column it is prayed that the lands of the original

(5) I. L. R. 32 Cal. 1036 (1905).

(6) I. L. R. 46 Cal. 236 (1918).

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Mehal, the subject-matter of the application, may be imperfectly partitioned and an allotment in respect of two-thirds share may be made in favour of the applicants. The eighth column contains the important statement that the lands of the original Mehal in respect of which the application is made are joint with six Mehals (names and numbers specified). The applicants pray that the lands of the original Mehal in respect of which this prayer is made may be separated from those of the other Mehals and the same may be partitioned, and, treating it as 16 annas, the applicants may be given an allotment representing two-thirds of 16 annas. Then follows the statement that the proprietors of the joint Mehals have all been made parties to the proceeding. The question thus arises, whether the Revenue Court has jurisdiction to effect a partition of an estate when the lands of that estate, in whole or in part, are joint with the lands of other estates.

The answer to the question in controversy must depend primarily upon the true construction of the provisions of the Assam Land and Revenue Regulation. Sec. 3, cl. (b) furnishes a definition of an estate; it includes, amongst other things, any land subject, either immediately or prospectively, to the payment of land revenue, for the discharge of which a separate engagement has been entered into. Sec. 96 which finds a place in the sixth Chapter devoted to partition and union of revenue-paying estates, classifies partition as either perfect or imperfect. Perfect partition means the division of a revenue-paying estate into two or more such estates, each separately liable for the revenue assessed thereon. Imperfect partition means the division of a revenue-paying estate into two or more portions jointly liable for the revenue assessed on the entire estate. Sec. 97 defines the

persons entitled to partition and is in these terms:—

Every recorded proprietor of a permanently settled estate and every recorded land-holder of a temporarily settled estate, may, if he is in actual possession of the interest, in respect of which he desires partition, claim perfect or imperfect partition of the estate:

Provided that (a) no person shall be entitled to apply for perfect partition if the result of such partition would be to form a separate estate, liable for an annual amount of revenue less than five rupees;

(b) no person shall be entitled to apply for imperfect partition of an estate unless with the consent of recorded co-sharers holding in the aggregate more than one-half of the estate;

(c) a person may claim partition, only in so far as the partition can be effected in accordance with the provisions of this Chapter.

(2) When two or more proprietors or land-holders would be entitled under sub-sec. (1) to partition in respect of their respective interests in the estate, they may jointly claim partition in respect of the aggregate of their interests."

It is plain that, subject to the restrictions specified in the proviso, every recorded proprietor of a permanently settled estate and every recorded land-holder of a temporarily settled estate may, if he is in actual possession of the interest in respect of which he desires partition, claim perfect or imperfect partition of the estate. The Plaintiffs contend that in order to entitle the revenue Court to effect a partition under sec. 97, the land comprised in the estate must be land which exclusively belongs to that estate; in other words, if any portion of the lands of an estate is joint land of that and other estates, sec. 97 ceases to be applicable.

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The Defendants contend, on the other hand, that the construction put forward by the Plaintiffs narrows the operation of the section in a manner not justified by its language. After a careful consideration of the language of the section, we have arrived at the conclusion that the contention of the Plaintiffs should not prevail. The section confers upon every recorded proprietor of a permanently settled estate, subject to the qualifications specified therein, the right to claim a partition of the estate. It makes no reference, directly or by implication, to the mode in which the lands of the estate are held. If all the lands included in the estate belong exclusively to that estate, no difficulty admittedly arises. But if some or all of the lands included in the estate are the joint lands of several estates, there is no reason in principle why the right to claim partition should be negatived. The duty is imposed upon the Revenue Court to effect a partition of an estate on an application by a person competent to claim partition under sec. 97. It is plain that the first step in the performance of that duty is to ascertain the lands which constitute that estate. To carry out this preliminary step, it may conceivably be necessary to have recourse to an ancillary measure, namely, to effect a partition of the joint lands of the several estates and thereby to ascertain the lands which belong to the estate under partition. The Plaintiffs had contended that this view is open to the objection that it may enable the parties to do that indirectly which cannot be done directly. If a partition were claimed of the portion which constitutes the joint lands of several estates, the application would be forthwith refused, because those joint lands do not constitute an estate within the meaning of the *Assam Land and Revenue Regulation*. This may be conceded; but no

valid objection in principle can be taken to the procedure indicated. It is a well-known rule of interpretation of statutes that where a statute confers jurisdiction, it impliedly grants also the power to do such acts, adopt such measures, and employ such means as are essentially necessary to its execution. If the legislature had intended that the Revenue Court should have authority to effect a partition of such estates alone as do not include lands joint with other estates, a suitably restricted phraseology might easily have been framed to indicate that view. On the other hand, there is a serious objection to the contention put forward by the Plaintiffs. If it be maintained that the joint land should first be divided by a Civil Court, the result would follow that the Civil Court would in essence be called upon to constitute an estate for the purpose of partition under sec. 97 and consequently to deal with a matter which affects the Government revenue and is excluded from its jurisdiction by sec. 154 (J) (f) of the Regulation. But, in this Regulation as in other legislative enactments of this description, the policy is consistently followed that the partition of an estate which affects the distribution of the revenue should be effected not by a Civil Court but by the appropriate Revenue Court. To take another illustration—Suppose a partition has been effected of an estate and four new estates A, B, C, D have thereby been created in such a way that some lands of the estates are joint, though each estate constitutes a separate entity in the revenue records. If, in course of time, estate A passes into the hands of several persons who find it necessary to seek a partition, perfect or imperfect, no partition can according to the Plaintiffs be effected, because a partition is not permissible when the lands of an estate (e.g., A) are joint with the lands

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of other estates (e.g., B, C, D). If the argument of the Appellants were to prevail, no partition, perfect or imperfect, could be made of lands included at one time in an estate which has later formed the subject-matter of partition keeping some of the lands joint. The Court would be slow to place so narrow a construction upon the Regulation and thereby largely restrict the application of its provisions, unless the language used by the legislature left no escape from such a position.

In view of all this, the Appellants have been indeed driven to suggest that neither the Civil Court nor the Revenue Court is competent to effect a partition under these circumstances. Reference has been made to the provisions of sec. 13 of the Reg. VIII of 1800 and sec. 4 of Reg. XIX of 1814 to show that no partition by revenue authorities was possible in respect of lands common to several estates, and our attention has been invited to the cases of *Durgakanta v. Radha Mohun* (1) and *Omashchandra v. Manikchandra* (2), which affirmed the proposition that when land was held in joint possession, each proprietor receiving his portion of the rent according to his interest in the land, it could not, under the partition Regulation of 1814, be divided either by the Civil Courts or by the revenue authorities—not by the former, because such partition might endanger the Government revenue, nor by the latter because such a partition was not contemplated by the Partition Regulation. It has also been suggested that with a view to remove this difficulty, Act VIII of 1876, B. C., included a provision in sec. 112 for partition of lands common to two or more estates, which has been subsequently reproduced in sec. 84 of Act V of 1897, B. C. The Plaintiffs have contended that, by an oversight, the framers

of the Assam Land and Revenue Regulation did not embody a similar provision therein. We are of opinion that, this assumption, even if well-founded, is of no real assistance in the solution of the question before us, because neither sec. 112 of Act VIII of 1876 nor sec. 84 of Act V of 1897 would have covered the contingency which has arisen here. We prefer accordingly to base our judgment upon an examination of the provisions of the Assam Land and Revenue Regulation.

We may observe that our conclusion is in harmony with what has been recognised as settled law for nearly a quarter of a century. In *Abdul Khalek Ahmed v. Abdul Khalek Choudhry* (3), Banerjee and Gordon, JJ., ruled that in a suit for partition, without division of revenue, of lands held jointly by the parties in four different estates, governed by the Assam Land and Revenue Regulation, although the division asked for might not include all the lands of each of the four estates, the suit was in reality one for an imperfect partition, because such division would result in a division of each of those estates, the lands left out forming one portion and the lands sought to be divided forming another. The suit was accordingly deemed barred under sec. 154, cl. (e) of the Assam Land and Revenue Regulation, which provides that no Civil Court shall exercise jurisdiction in the matter of claims of persons to imperfect partition, except in cases in which a perfect partition could not be claimed from and has been refused by the revenue authorities on the ground that the result of such partition would be to form a separate estate liable for an annual amount of revenue less than Rs. 5. The Plaintiffs have contended that the expression of opinion contained in this judgment is in the nature of an *obiter dictum*. We are not

(1) 7 W. R. 51 (1867).

(2) 3 W. R. 128 (1867).

(3) I. L. R. 23 Cal. 514 (1896).

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prepared to adopt that view, because the reason assigned was essential to justify the conclusion. A similar view was taken by Macpherson and Ameer Ali, JJ., in *Sarat Chandra v. Prokash Chandra* (4), where it was ruled that an estate does not cease to be an entire estate within the meaning of the Assam Land and Revenue Regulation, because a few plots of land are common to it and some other estate or because they are held in some undefined way jointly with other persons. The result followed that where a suit was brought for the partition of an estate, excluding certain portions as being held jointly by third persons, the jurisdiction of the Civil Court was still barred by sec. 154 of the Regulation. These decisions have, so far as we can discover, never been questioned, and we are not prepared at this distance of time, to treat the matter as if it were *res integra*. Reference has also been made to the decision in *Gouri Krishna v. Sabanunda Sarma* (5), which, however, is clearly distinguishable. It was there ruled that a suit for the partition of certain specific plots of land situated within a revenue-paying estate in Assam, the Plaintiff having no joint interest in the other lands of the estate, is not covered by sec. 154 of the Assam Land and Revenue Regulation and is cognizable by the Civil Court, as the revenue authorities have no jurisdiction to make such a partition. We need not pause to consider, whether this may be reconciled with the principle involved in the two decisions previously mentioned. But it is plain that the view taken by the majority does not militate against the conclusion that an estate does not cease to be an estate within the meaning of the Assam Land and Revenue Regulation, merely because its lands are held jointly with the lands of other estates,

provided it fulfils the requirements of the definition given in sec. 3. The proposition adopted by us is identical with that formulated in *Brajendra Kishore v. Kalikumar* (6). But we have not placed reliance upon that case as one of the arguments assigned in support of the decision appears on examination to be incorrect. It was assumed in that case that the Assam Land and Revenue Regulation repealed the Bengal Partition Act, VIII of 1876, which in reality was not repealed by the Regulation, for the simple reason that it was never in force in Assam; indeed, it could not be, as it was passed by the Bengal Legislative Council after the separation of Assam in 1874. The Partition Law in force when the Assam Regulation came into operation was Reg. XIX of 1814, which was repealed by sec. 2. But although we cannot thus adopt the reasoning in the case of *Brajendra Kishore v. Kalikumar* (6), we have reached the same conclusion on other grounds.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

J. N. R.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1952 of 1919.

CHATTERJEA, J.

PANTON, J.

1921,

Heard, 15 and

19, December.

Judgment,

19, December.

NAGENDRA NATH PAL,
Defendant, Appellant,

v.

SARAT KAMINI DAS
and ors., Plaintiffs,
Respondents.

Limitation Act (IX of 1908), Sch. I, Arts. 109, 112, 120—Suit on mortgage—Profits received by transferee pendenti lite—Suit by purchaser at mortgage sale to recover same—Profits if “wrongfully received.”

The words “wrongfully received” in

(4) I. L. R. 24 Cal. 751 (1897).

(5) I. L. R. 32 Cal. 1036 (1905).

(6) I. L. R. 46 Cal. 236 (1918).

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Art. 109 of the Limitation Act, include receipts of profits that cannot be legally substantiated.

It was held in a suit between the purchaser at a mortgage sale and the holder of a usufructuary mortgage granted by the mortgagor after the passing of the mortgage decree that the usufructuary mortgage was void as against the purchaser owing to the application of the doctrine of lis pendens. The purchaser having sued the usufructuary mortgagee to recover rents realised by the latter from certain tenants of the property before the Plaintiff obtained possession under his purchase :

Held—That Art. 109 of the Limitation Act applied to the case.

This was an appeal preferred on the 8th November 1919 against a decree of the District Judge of Zilla Bankura (S. C. Mallik, Esq.), dated the 3rd July 1919, affirming a decree of the Subordinate Judge of that District (Babu Sarat Kishore Bose), dated the 11th October 1917.

The facts of the case will appear from the judgment.

Babu Nagendranath Ghose for the Appellant.

Babus Kalikinkar Chakravartty, Panchanon Ghose and Monindra K. Bose for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for recovery of rents realised by the Defendant from certain tenants in respect of certain lands purchased by the Plaintiff at a sale held in execution of a mortgage decree obtained by two persons, Digambar Pal and Gopinath Daripa.

It appears that subsequent to the decree obtained by the mortgagee, the mortgagor granted a usufructuary mortgage in

favour of the Defendant. The Defendant entered into possession of the property under it and realised rent from certain tenants of the property. The Plaintiff, after his purchase at the sale held in execution of the mortgage decree, obtained possession of the property through the Court from the Defendant, and then brought the suit out of which this appeal arises for recovery of monies realised by the Defendant from the tenants for certain *kists* of Jaist and Bhadro 1320, Fusli.

It is found that the Defendant's usufructuary mortgage was *pendente lite* and, as such, invalid as against the Plaintiff. The Plaintiff describes the Defendant in the plaint as a trespasser.

One of the questions raised in the case was whether the suit was barred by limitation; and, if so, which article of the Limitation Act was applicable to the case?

The Plaintiff contended that Art. 120 was the proper article; while the Defendant contended that it was Art. 62.

The Court of Appeal below held that Art. 62 did not apply and that Art. 120 was the proper article applicable to the case.

The Defendant has appealed to this Court and has contended that the proper article applicable to the suit is Art. 109 but even if that is not applicable, Art. 62 should be held to apply and in any case Art. 120 is not applicable to the suit.

We are of opinion that the first contention is correct, and that Art. 109 is the proper article applicable to the suit.

That article provides a period of three years' limitation for a suit for recovery of profits of immoveable property belonging to the Plaintiff which have been wrongfully received by the Defendant.

There is no doubt that the monies received by the Defendant are profits of immoveable property and, upon the finding, those profits belong to the Plaintiff.

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It is contended, however, on behalf of the Respondent that those profits cannot be said to have been wrongfully received by the Defendant at the time they were received; because at that time, the Defendant claimed to realise them as usufructuary mortgagee. But as stated above, that mortgage was invalid as against the Plaintiff; the words "wrongfully received" in Art. 109 include receipt of profits that cannot legally be substantiated.

In the case of *Peary Mohon Roy v. Khelaram Sarkar* (1), a suit was instituted by the owner of a *putni* for recovery of mesne profits against the Defendant who had purchased the *putni* at a sale under Reg. VIII of 1819 and had been in possession under the purchase which was subsequently set aside. It was held that the Defendant wrongfully received the profits which were receivable by the Plaintiff and that Art. 109 and not Art. 120 governed the case.

Our attention has been drawn on behalf of the Respondent to the case of *Bhubaneswar Bhattacharjee v. Darkeswar Bhattacharjee* (2). But that was a case in which a suit was brought by a co-sharer landlord against another for a share of the paddy rent collected by the latter the paddy rent being due in respect of lands held by the co-sharers not separately but jointly, and different considerations would arise in a case of this kind as the receipt of rent by the co-sharer was not wrongful.

We are accordingly of opinion that Art. 109 is applicable to the suit. That article lays down that the period of three years is to be counted from the time when the profits are received.

In this case there is no finding when the profits were received.

The case must accordingly be sent back to the lower Appellate Court in order that that matter may be inquired into.

If the profits were received within three years, the question of limitation must be decided in favour of the Plaintiff.

The learned Pleader for the Respondent has contended that even if the profits were received beyond the three years before the date of the institution of the suit, the Court should consider whether limitation was suspended or not; because the sale at which the Plaintiff purchased was on a later date, i.e., on some date within three years of the suit. This question, however, was not raised in the Courts below, and all the materials for deciding the question whether there should or should not be any suspension of limitation in the case are not before us. We, therefore, think that if the Court below finds that the profits were received more than three years before the date of the suit, this question will be gone into by that Court.

It is contended on behalf of the Appellant that even if the suit is not barred by limitation, the rent ought to be apportioned between the Defendant and the Plaintiff, having regard to the principle embodied in sec. 36 of the Transfer of Property Act. This question will also be considered by the Court below.

The case is accordingly sent back to the lower Appellate Court for disposal according to law, having regard to the observations made above.

Costs to abide the result.

N. G.

(1) I. L. R. 35 Cal. 993; a. c. 13 C. W. N. 15 (1908).

(2) 34 C. L. J. 508 (1921).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1088 of 1919.

<p>TEUNON, J. ABDUL MAJID, J. 1920, 30, August.</p>	}	<p>HARENDRA KUMAR ROY CHOWDHURY and ors., Plaintiffs, Appellants, v. HARA KISHORE PAL, Defendant, Respondent.</p>
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Suit in ejectment—Homestead within Municipal limits forming part of non-transferable occupancy holding sold to a pleader for residential and professional purposes—Recognition by landlord on receipt of salami, rent previously paid being quadrupled—Settlement whether fresh or in continuation of the old tenancy—Transfer of Property Act (IV of 1882) or Bengal Tenancy Act (VIII of 1885), which applicable.

Where a raiyat occupying his homestead within the residential suburb of the Naraingunj Municipality as part of his non-transferable occupancy holding first sold the rest of the holding to a certain person, and next sold his homestead to the Defendant a pleader who purchased it for the purpose of residence and for carrying on his profession as a pleader in the local Civil Courts, was recognized by the Plaintiffs, landlords, on payment of salami and was granted rent receipts in the forms prescribed in the Bengal Tenancy Act as for a *karsha* holding, while the rent previously paid was now quadrupled:

Held, in a suit brought by the Plaintiffs for ejectment of the Defendant after service of six months' notice to quit terminating with the end of a year of the tenancy—That the Defendant's contention that his tenancy was in continuation of the old tenancy of the outgoing raiyat was not maintainable, that the tenancy originated in a fresh settlement with the Plaintiffs and that in view of the purpose for which the new tenancy was created it was governed by the provisions of the Transfer of Property Act.

RAKHAL DAS ADDY v. DINOMOYI DEBI (1), RANIGANJ COAL ASSOCIATION v. JADOO NATH GHOSH (2) and UMRAO BIBI v. MAHOMED ROJABI (3) referred to.

This was an appeal against the decree of Babu Ashutosh Pal, Officiating Subordinate Judge, 2nd Court of Zillah Dacca, dated the 26th of February 1919, affirming the decree of Babu Bama Charan Chakravarty, Munsif, 4th Court at Naraingunj, dated the 20th of June 1917.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chakravarty and Kali Kinkar Chakravarty for the Appellants.

Dr. Sarat Chandra Basak and Babu Prakash Chandra Palcrasi for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit in ejectment.

It has been found that the land in question was originally the homestead of one Lobai Chang a cultivating raiyat who held the same as part of his non-transferable occupancy holding.

Having sold the other portions of his holding he next proceeded to sell his homestead to the Defendant on the 23rd Kartik 1304 (8th November 1897). The land in question is situated in Chashara, a Mauza lying within and now forming what may be described as a residential suburb of the Municipality of Naraingunge. The Defendant is a pleader practising in the Civil Courts established in that Sub-divisional head-quarter.

It has been held by the Courts below that having purchased from Lobai, the Defendant next secured from the landlords their recognition of his purchase,

(1) I. L. R. 16 Cal. 552 (1889).

(2) I. L. R. 19 Cal. 459 (1892).

(3) I. L. R. 27 Cal. 205: s. c. 4 C. W. N. 76 (1899).

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and have thus acquired in the land the rights of an occupancy raiyat.

On behalf of the landlord Appellant it has been contended before us that the arrangement between the landlord and the Defendant should have been and should be regarded not as a recognition and an admission into an existing tenancy but as a new settlement, that the tenancy thus created is one governed by the provisions of the Transfer of Property Act, and not being of a permanent nature terminated on the expiry of the six months' notice to quit served upon the Defendant, that is, at the close of the year 1922.

The facts upon which the Courts below have relied are as follows :—

Lobai was a cultivator and had the rights of an occupancy raiyat in his holding and in the homestead (1½ bighas house and garden forming part thereof). The purchase by Plaintiff from Lobai has been proved : *nazar* or *salami* was paid to and accepted by the landlord. The arrears of rent due from Lobai were also paid by the Defendant. His name was mutated or substituted in the landlord's papers in place of Lobai's name. Plaintiffs' witness No. 2 whom both Courts have believed deposed that at the time of the recognition or settlement what right the Defendant should obtain thereby was not specified, he should have such rights as under the circumstances the law might give him. The *dakhilas* granted to the Plaintiff since 1897 are in the form prescribed by the Bengal Tenancy Act, and the tenancy is described therein or in most of them as a *karsa*, a term usually applied to an agricultural holding.

On behalf of the landlord Appellant it is contended that the Courts below should have had regard to or laid more stress upon other facts in the case such as the following : the homestead was the last remaining portion of his holding, and on

its transfer the landlords were entitled to re-enter. It was known that the Defendant was a pleader, and was taking this homestead for purpose of residence and of carrying on, not any form of agriculture or horticulture, but the practice of his profession as a pleader in the local Courts. The rent previously payable was quadrupled : Entries in the landlord's papers are for his information, and for the purpose of preserving a record of the history of the holding, and are not of importance for the purpose of showing the right acquired by the new tenant. The arrears due from Lobai when paid by the Defendant should be regarded as part of the *salami* or premium. The deposition of Plaintiffs' witness No. 2 believed by both Courts shows that the incoming tenant was not admitted into the rights of Lobai and so far from supporting the case of recognition negatives that case and shows that the arrangement was a new settlement.

Having given to the case our careful consideration we are of opinion that the inference legally deducible from the facts found or not disputed in the present case is that the Defendant having bought out Lobai was not admitted by the landlord into the tenancy and the rights previously held by Lobai but obtained from the landlord a fresh settlement or a new tenancy. We are of opinion that the Courts below have been misled by the use of the terms "tenant-at-will" or "tenancy-at-will" and by the attempt made at one time by the landlords or their agent to introduce the words "*sweccadhin* or tenant-at-will," into one of the *dakhilas* granted to the tenant. These words have been wrongly used for a tenancy terminable on a proper notice to quit, for instance, the six months' notice terminating with the close of a year of the tenancy actually served upon the tenant in this case.

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The Courts have further overlooked the significance to be attached to the fact that on the settlement with the Defendant the rent previously payable was quadrupled. The Court of First Appeal makes no reference to this fact and the Court of first instance but casually alludes to it. Yet by itself and certainly taken with the other facts this is inconsistent with any admission of the Defendant into the occupancy rights previously held by Lobai.

We therefore hold that the Defendants' tenancy is not a continuation of Lobai's tenancy but originated in a new settlement with the landlord in the year 1304. It has been found by both Courts below that the lease since taken by the Defendant was taken not for purpose of agriculture or horticulture but for residential purposes and in order to the practice of the Defendant's profession as a pleader in the local Courts.

The tenancy is therefore governed by the provisions of the Transfer of Property Act and has been terminated by the notice to quit, duly served as is not disputed before us, on the Defendant. In support of our view as to the nature of the Defendant's tenancy we may refer to the cases of *Rakhal Das Addy v. Dinomoyi Debi* (1), *'Raniganj Coal Association v. Jadoo Nath Ghosh* (2) and *Umrao Bibi v. Mahomed Rojabi* (3). It was suggested on behalf of the Defendant that if the Plaintiffs' contention succeeded there should be a remand to the Court of First Appeal in order that the Defendant's claim to compensation for improvements should be determined. This question was not raised in the Court of First Appeal and was decided against the Defendant in the Court of first in-

stance. A remand is not necessary. The Defendant may remove his structures and for this purpose a period of four months will be allowed to him from this date. In these terms this appeal and the Plaintiffs' suit are decreed. Parties will bear their own costs throughout this litigation.

S. C. C.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 701 of 1920.

NEWBOULD, J.
1921,
4, March.

SURENDRA PRASAD
LAHIRI CHOUDHRY,
Defendant, Petitioner,
v.
ATTABUDDIN AHMED,
Plaintiff, Opposite
Party.

Civil Procedure Code (Act V of 1908), sec. 27, "suit duly instituted," meaning of—Dismissal of a suit for not putting in deficit court fees—Or. 47, r. 4, cl. (a), reversing of that order without notice to the Defendant, legality of—Secs. 148 and 149, Court's power to extend time for putting in deficit court fees after expiry of the period of limitation.

A suit was instituted on the last day for filing the suit under the Limitation Act. The plaint was insufficiently stamped and the deficit Court fees not having been put in within the time fixed by the Court, the suit was dismissed. Thereafter on an application for review, the order of dismissal was set aside without any notice to the Defendant and time was granted for putting in the deficit Court fee:

Held—That at the time the order of dismissal was set aside, there was no Opposite Party on whom the notice could be served, as the summons in the suit had not yet been issued on the Defendant and as, until the suit was registered, the suit could not be said to have been duly instituted. The order of dismissal passed at that stage of the case can be reviewed without notice to the Defendant.

(1) I. L. R. 16 Cal. 652 (1889).

(2) I. L. R. 19 Cal. 489 (1892).

(3) I. L. R. 27 Cal. 205: S. C. 4 C. W. N. 76 (1899).

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MUSSTI. GULABOO v. RAMDYAL SINGH (1) and SAHEBZADA MD. ZAHURUDDIN v. NURUDDIN (2) referred to.

The principle of JOY RAMA v. ESHAREK NAND (3) and JANAKINATH v. PRABHASINI (4) applied.

Once the order rejecting the plaint is set aside in review, the Court has full power, under secs. 148, 149 of the Civil Procedure Code, to extend the time for payment of the deficit Court fee, and the plaint having been originally filed within the period of limitation, the suit was not barred.

This was a Rule granted on the 2nd September 1920 against the order of the Small Cause Court Judge of Dinajpur (S. K. Ghosh, Esq.), dated the 7th June 1920.

The facts will fully appear from the judgment.

Babu Atul Chandra Gupta for the Petitioner.

Babu Girija Prosanna Sanyal for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

This Rule was directed against an order of the Small Cause Court Judge decreeing a suit against the Petitioner. The plaint in the suit was presented on the 16th January 1919, the last day for filing the suit under the Limitation Act. That plaint was insufficiently stamped and the Court required the Plaintiff to supply the deficit Court fee within four days. This was not done and the plaint was rejected on the 28th May 1919. On the 5th June 1919, the Plaintiff applied for a review of the order rejecting the plaint and the review was granted without any notice of

the application to the Defendant. The order of rejection of the plaint was set aside and the Plaintiff was allowed 15 days' time from the date of that order, the 20th December 1919, for putting in the deficit Court fee. The Court fee was duly paid by the Plaintiff and the plaint was registered in the due course. The suit was tried and at the hearing of the suit, the pleader for the Defendant stated that he would not press any other objection than that of limitation taken in the written statement, and he did not adduce any evidence, nor cross-examine the Plaintiff who deposed in support of his claim. The point of limitation was decided against the Defendant and the suit decreed.

Under the present Civil Procedure Code, it is clear under secs. 148 and 149 that a Court has power to extend the time for filing deficit Court fee and can extend that time, even though the period which had been fixed may have expired.

The question to be decided in this appeal is whether the order of the 20th December reviewing the order rejecting the plaint was bad, because it was made without notice to the Defendant. On behalf of the Petitioner reliance is placed on the wording of Or. 47, r. 4, cl. (a) which provides that no application for review shall be granted without previous notice to the Opposite Party. So far as they go, the words of the rule are perfectly clear. In support of the contention reliance was placed on rulings in *Mussti. Gulaboo v. Ramdyal Singh* (1) and *Sahebzada Md. Zahuruddin v. Nuruddin* (2).

There is a further point to be considered and that is whether at the time the review was granted there was any Opposite Party on whom notice could have been served. When the order rejecting the plaint was made, no summons had issued on the De-

(1) 8 W. R. 304 (1867).

(2) 14 Mad. L. J. 7 (1903).

(3) 12 W. R. 475 (1898).

(4) I. L. R. 43 Cal. 178; s. c. 19 C. W. N. 1077 (1915).

(1) 8 W. R. 304 (1867).

(2) 14 Mad. L. J. 7 (1903).

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pendant, nor could any summons be issued, since sec. 27, C. P. C., only provides summons to issue where suits have been duly instituted, and until the plaint is registered, the suit has not been duly instituted. In the case of *Joy Rama v. Esharee Nand* (3), which was followed in *Janakinath v. Prabhasini* (4), it was held that when an appeal is summarily dismissed by a Division Bench of this Court, that order can be set aside on review on an *ex parte* application without notice to the Respondent. In the former of those cases, it was contended on behalf of the Respondent that no review of judgment could be granted without a previous notice to the Opposite Party and it was held that there would be no Opposite Party, as the first application for admission of the special appeal was necessarily *ex parte*. It seems to me that these remarks are equally applicable to the case of the proceedings in Court in a suit before it reached the stage of the plaint being registered. They are necessarily *ex parte*; and following the principle of these rulings I hold that the order passed at that stage of the case can be reviewed without notice to the Defendant, who could not have appeared before Court when the order was made. Once the order rejecting the plaint is set aside on review, the Court has full power to extend the time for payment of the deficit Court fee, and the plaint having been originally filed within the period of limitation, the suit was not barred.

In this view I discharge the Rule with costs, one gold mohur.

J. N. R.

Rule discharged.

(3) 18 W. R. 476 (1872).

(4) I. L. R. 43 Cal. 178; s. c. 19 C. W. N. 1077 (1916).

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER,
CENTRAL PROVINCES.]

VISCOUNT HALDANE.

LORD ATKINSON.

SIR JOHN EDGE.

1921,

Heard, 5 and

6, May.

Judgment,

3, June.

YADAO, Appellant,

v.

NAMDEO, Respondent.

Hindu law—Marhatta School—Widow's power to adopt without husband's authority and without consent of kindred—Authority by husband—Particular boy named—Direction if operates as prohibition to adopt another boy on his death.

The rule laid down in *RAKHMABAI v. RADHABAI* (7) that in the Marhatta Country, a Hindu widow may, without the permission of her husband and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and bona fide performance of a religious duty and neither capriciously nor from a corrupt motive, is equally applicable whether her husband at the time of his death was joint or separate and whether his property was or was not vested in her as his heir at the time when she made the adoption.

RAMJI v. GHAMAU (4) and *DINKAR SITARAM v. GANESH SHIVRAM* (5) overruled.

Report of *RAYABAI v. BALA VENKAT* (6) commented on.

Where the most that could be said was that the husband directed his wife to adopt a particular boy, but said nothing as to what should be done if the boy named should be unavailable or should die after he was adopted, and the boy who was adopted after the husband's death died in childhood and unmarried;

(4) I. L. R. 6 Bom. 498 at p. 503 (1879).

(5) I. L. R. 6 Bom. 505 (1879).

(6) 7 Bom. H. C. R. App. I (1886).

(7) 5 Bom. H. C. R. A. C. J. 181 (1868).

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Held—That there was no explicit or clearly expressed intention to prohibit the widow against adopting any boy other than the boy named, and a second adoption by the widow to her husband subsequently to his death was validly made.

This was an appeal from a decree of the Judicial Commissioner of the Central Provinces, dated the 27th April 1918, reversing a decree of the Additional District Judge, West Berar, Akola, dated the 15th December 1916.

The facts of the case will appear from their Lordships' judgment.

Sir G. Lowndes, K. C. (with *Mr. E. B. Raikes*) for the Appellant.—If property was separate, widow required no consent. We say it was separate on a construction of the deed of Namdeo. This deed amounts to an actual partition by metes and bounds. On the first adoption (in 1905) the property ceased to be joint property. In 1907 the adoption in question took place.

[*Mr. Dubé* for the Respondent.—This point does not arise if there was a prohibition to adopt on which there are concurrent findings.]

Sitabai v. Bapu Anna Patil (3). The words used there are "mandatory power" which the husband might give. There is no issue as to "prohibition."

[*LORD ATKINSON* refers to p. 307 of the records, where *Lakshmibai v. Rajaji* (12) is referred to and reference therein to West and Bühler, Vol. II, p. 965.]

I set up a general authority and both the Courts have found against me.

[*LORD HALDANE*.—We will hear the Respondent on this point and if he fails to establish his point we will hear you on the larger question you wish to put before us.]

Mr. B. Dubé (with *Mr. L. DeGruyther*,

(3) *L. R. 47 I. A. 202*; s. c. 25 C. W. N. 97 (1920).

(12) *L. L. B. 32 Bom. 996* (1897).

K. C.) for the Respondent.—Both the Courts have taken the view and it was no casual expression of opinion.

[*SIR JOHN EDGE*.—Would you go to the extent of saying that whether the widow is told her husband's wishes or not, she is still bound by them?]

Yes. Whether it is communicated to her or not. All that is necessary is that those are the husband's wishes.

The deed referred to is one of adoption and not of separation. When the first adoption was made, the boy ceased to belong to his original family.

[*SIR JOHN EDGE*.—If there had been no separation he could not have got half.]

[*LORD ATKINSON*.—Deed shows partition.]

Mere statement that one is owner of "half" does not mean a partition by metes and bounds.

Mr. L. DeGruyther, K. C. (following):—There need not be express prohibition. Any indication that a particular person should be adopted operates as a prohibition as regards any others.

The object of the "adoption" deed was to enable Champabai and Annapurnabai to manage the entire property. *Girja Bai v. Sadashiv Dhundiraj* (1), *Suraj Narain v. Ikbal Narain* (13) and *Kawal Nain v. Budh Singh* (2).

These cases lay down that once there is an unequivocal intimation of a co-sharer's desire for partition there is separation from the joint family.

Sitabai v. Bapu Anna Patil (3) lays down that widow must have express or implied authority.

(1) *L. R. 43 I. A. 151*; s. c. *I. L. R. 43 Cal. 1081*; 20 C. W. N. 1085 (1916).

(2) *L. R. 44 I. A. 159*; s. c. *I. L. R. 39 All. 496*; 21 C. W. N. 986 (1917).

(3) *L. R. 47 I. A. 202*; s. c. 25 C. W. N. 97 (1920).

(13) *L. R. 40 I. A. 40*; s. c. 17 C. W. N. 333 (1912).

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Bayabai v. Bala Venkatish (6) states the law clearly.

Rakhmabai v. Radhabai (7) is really later than the case of *Bayabai v. Bala Venkatish* (6), although reported in an earlier volume.

In a separate family a wife has power to adopt unless expressly prohibited. Here the separation was after the death of husband and so the wife had no power to adopt.

[LORD HALDANE.—What is the test as to whether she has power?]

The only case where the wife has power to adopt is where the husband dies separate and she is his heir. There is no implied authority where the husband dies leaving a son.

The statements of Pandlik do not imply any authority to adopt anyone except Pandurang. Both Courts find this.

[LORD HALDANE.—This is purely a matter of construction.]

Can you say that the widow acquires an authority to adopt if the son separates and then dies say 40 years hence?

Ramji v. Ghamau (4).

[LORD HALDANE.—On the words used we all take the view there was separation.]

Sir George Lowndes.—My point is that the widow has a general power and so it must be prohibited and it does not depend on the fact whether she was heir to her husband or not. And she has implied authority even if it is a joint family. Under Mitakshara law in Bombay, she has a "co-extensive power" with her husband and that is not cut down unless there is an express prohibition. Even then it depends on wifely duty.

Pratapsing Shivsing v. Agarsingji Raisingji (10).

(4) I. L. R. 6 Bom. 498 (1879).

(6) 7 Bom. H. C. R. App. 1 (1866).

(7) 5 Bom. H. C. R. A. O. J. 181 (1868).

(10) L. R. 46 I. A. 97 at p. 104; s. c. 24 C. W. N. 57 (1918).

An adopted son is exactly in the same position as the son of the body. An adoption is a continuation of line and refers back to the death of the deceased. She can exercise the power whether any property is vested in her or not.

Lakshmibai v. Sarasvatibai (9) (Sir Lawrence Jenkin's judgment).

Sitabai v. Bapu Anna Patil (3) (per Lord Buckmaster).

In *Bayabai v. Bala Venkatish* (6), there was a minority differing judgment.

Rakhmabai v. Radhabai (7).

[*Mr. DeGruyther*.—*Lakshmibai v. Sarasvatibai* (9) rejects this case.]

Sir Michael Westropp was the first to introduce this distinction between joint and separate property.

The Board says the widow has the authority in her and the consent is merely a test whether it is properly exercised in *Balusu Gurulinga Sami v. Balusu Rama Lakschamma* (14).

[*Mr. DeGruyther*.—I have never seen *Ramji v. Ghamau* (4) differed from anywhere.]

Rakhmabai v. Radhabai (7). There is no distinction between joint and separate property. If there is a prohibition then of course I have no case.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by the Plaintiff, a minor, through his guardian, from a decree, dated the 27th April 1918, of the Court of the Judicial Commissioner of the Central Provinces, which reversed a preliminary decree of

(3) L. R. 47 I. A. 202; s. c. 25 C. W. N. 97 (1920).

(4) I. L. R. 6 Bom. 498 (1879).

(6) 7 Bom. H. C. R. App. 1 at p. 23 (1866).

(7) 5 Bom. H. C. R. A. O. J. 181 (1868).

(9) I. L. R. 23 Bom. 789 at p. 794 (1899).

(14) L. R. 26 I. A. 118; s. c. I. L. R. 22 Mad. 398; 8 C. W. N. 427 (1899).

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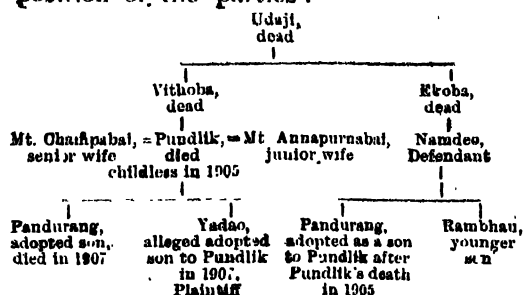
partition, of the 15th December 1916 of the Additional District Judge of Akola, in Berar, and dismissed the suit. By the preliminary decree it was declared that the parties to the suit were entitled to separate possession of the property mentioned in the schedule to that decree, and that :—

“The Plaintiff, as a legally adopted son of the deceased Pundlik Patil, is entitled to a half share in the property immoveable and moveable, including the shop assets, and that he is entitled to the possession of that half share after a partition of it all by metes and bounds as against the Defendant. If any other property besides that in the hands of the receiver available for partition is brought to the notice of the Court, till the passing of a final decree of partition, it shall be put into the schedule.”

and a Commissioner was appointed to make partition of the said property.

The plaint in the suit was not in the form of a plaint for partition, but in the Courts below the suit was treated as a suit for partition, and as a suit for partition their Lordships will consequently regard it.

The following short pedigree shows the position of the parties :—



At the time of his death Pundlik was a member of a joint Hindu family, which consisted of himself, his cousin Namdeo, and Namdeo's two sons Pandurang and Rambhau. The property mentioned in the schedule to the decree of the trial Judge was the property of that joint family. The parties to the suit are Hindus to whom the Hindu law appli-

cable to Hindus of the Mahratta country of the Presidency of Bombay applies, and the question upon which the result of this appeal depends, is whether Mussamat Champabai had, under circumstances which later will be mentioned in some detail, power validly to adopt the Plaintiff as a son to her deceased husband Pundlik.

Pundlik died childless in January 1905, leaving his two wives, Mussamat Champabai and Mussamat Annapurnabai surviving him. Mussamat Champabai was the senior wife, and she, with the concurrence of Mussamat Annapurnabai, adopted in 1905 as a son to her deceased husband, Pandurang, who was one of the two sons of Namdeo, the Defendant. The validity of that adoption is not disputed. Pandurang, whose adopted name was Vithal Rao, died in childhood and unmarried in 1907; and Mussamat Champabai in December 1908 in fact adopted to her deceased husband the Plaintiff without having obtained the consent of anyone, except the consent of the Plaintiff's natural father, who had given him to her to be adopted by her to her deceased husband. Namdeo had refused to give his consent to the adoption, and his contention was and is that Mussamat Champabai had, under the Hindu law which was applicable to their family, no power as a widow to make the adoption, and also that any such adoption by her had been prohibited by Pundlik. The trial Judge came to the conclusion that after the adoption of Pandurang the joint family had separated, and that afterwards, when the contingency for a second adoption arose by reason of Pandurang's death, Mussamat Champabai could validly adopt the Plaintiff without the consent of Namdeo who was then separate, and made the preliminary decree for partition. The learned Judges of the Court of the Judicial Commissioner came

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to the conclusion that there had been no separation of the joint Hindu family; that Pundlik intended that Pandurang only should be adopted, and had given no general permission as regards the adoption of a son; that on Pandurang's death Namdeo and his son Rambhau became by survivorship sole owners of the joint family estate; and that Mussamat Champabai could not under such circumstances make a valid adoption of the Plaintiff without having obtained the sanction of Namdeo; and, holding that the adoption was invalid, they, by their decree, dismissed the suit. From that decree of the Court of the Judicial Commissioner this appeal has been brought.

Except that their Lordships agree with the Court of the Judicial Commissioner that Pundlik had not given an authority for the adoption of the Plaintiff, they do not agree with the Court of the Judicial Commissioner as to what the facts were. Pundlik, until he died in January 1905, had managed the joint property. On the 31st March 1905, Mussamat Champabai, with the concurrence of Mussamat Annapurnabai, adopted as a son to their deceased husband Pandurang, and on the 23rd April 1905, Namdeo executed the following deed:—

“Deed of adoption.

“In favour of both Mt. Champabai and Mt. Annapurnabai, widow (widows) of Pundlik Vithoba Patil, resident of Warwat Bakal, Taluq Jalgaon, District Akola. I, Namdeo Yekoba Patil, Warwatkar, execute this writing to the effect that in accordance with the wishes of the deceased Pundlik Vithoba Patil, who was my real cousin (uncle's son) at the time of his death, I have placed upon your lap my own son Pandurang.

“The adoption ceremony in accordance with the popular usage in regard to it was settled with the consent of us three to be performed at an auspicious time on Friday Falgun Vadya 11, corresponding to 31st

March 1905, and the ceremony has been done. In his capacity as an adopted son, Pandurang would hereafter be called by the name of Vithal Rao, son of Pundlik Patil. He has become the sole owner of the entire moveable and immoveable property of the deceased Pundlik Vithoba Patil, and even in all sorts of papers the management should hereafter be conducted as “Pundlik Vithoba Patil shop at Warwat” Firm through managing proprietor Vithal Rao, son of Pundlik Patil, minor, through guardian mothers Mt. Champabai and Mt. Annapurnabai. Deceased Pundlik Patil and I formed a joint family. Immoveable and moveable property belongs to the joint family. Vithal Rao is the sole heir to half of the entire property on the authority of the deed of adoption and half of the property belongs to me. The following are the conditions on which the adoption business was settled amongst us.

“1. My half share in the moveable and immoveable property may be kept as joint if both Champabai and Annapurnabai would approve, but if you do not approve of it you may separate it and give it at any time you like.

“2. A list of the entire property should be made and signed by us three. After preparing such list it should be kept with Jairam Govind Patil of Sowghad and Govind Hari Sawarkar as Panchas. It is true that Vithal Rao, son of Pundlik Patil by virtue of his adoption, is the owner of all the property of the deceased Pundlik, son of Vithoba. But for the protection of the property and for the future welfare of the real owner Vithal Rao, you both should do the management of the entire property till the adopted son completes his 25 (twenty-fifth) year. After Vithal Rao attains majority he should do the management according to the orders of both of you. This is the original desire in making the adoption. But the above condition is specially mentioned to-day for the good conduct, for excellent dwelling in the world and for the growth of the family tree of Vithal Rao. If there arise any difference between Vithal Rao and both of you then on the authority of this writing Vithal Rao will have no right at all during the lifetime of both of

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you and the entire property should be managed by Champabai.

"4. After Vithal Rao completes his 25 (twenty-fifth) year, Champabai has got power to make over the entire property to his charge. If after the transfer of the power you and Vithal Rao do not pull on amicably a separate yearly allowance of Rs. 200 to Champabai and a separate yearly allowance of Rs. 200 to Annapurnabai may be apportioned. This allowance would be a charge on the entire moveable and immoveable property.

"5. If Annapurnabai desires to live separate on account of household affairs before Vithal Rao completes his 25th year, Champabai has power to give an allowance of Rs. 5 per mensem to her, and Vithal Rao would never acquire the right to interfere in this decision. On the conditions as mentioned above I have placed my son on the lap of you both. He should secure for the deceased Pundlik Patil and his ancestors spiritual, final and eternal happiness, and by the grace of God he may propagate the family and give you all the pleasure, and with this object I have completed this writing of the deed of adoption with my free will, and I have made my signature to-day in order to make it over to the charge of you both. Dated 23rd April 1905. Written by Bhao Sheoram Patil, Keli.

"Namdeo Yekoba Patil."

As their Lordships construe that deed of the 23rd April 1905, Namdeo by it declared that he had separated from Pandurang, whom he had given in adoption. It was not merely an expression of an intention to separate, although an unequivocal intimation of an intention to separate by a member of a joint Hindu family governed by the Mitakshara would operate as a severance of the joint status [see *Girja Bai v. Sadashiv Dhundiraj* (1) and *Kawal Nain v. Budh Singh* (2)]. Their Lordships find as a fact and hold in law that on the date of that deed

Namdeo and his son Rambhau had separated from Pandurang, and had ceased to be members with Pandurang of the joint family, although no partition of the family property had been effected.

It is common ground that the adoption of Pandurang was a valid adoption. Pandurang died unmarried in 1907. After the death of Pandurang, Mussamat Champabai tried to obtain the consent of Namdeo to her adopting to her deceased husband Rambhau, but Namdeo refused to give him in adoption, and on the 11th December 1908, she adopted to her deceased husband the Plaintiff, who was by birth a son of Raoji Patil.

It has not been and cannot be disputed that Mussamat Champabai had the authority of her husband Pundlik, if she chose to exercise it, to adopt to him Pandurang. That authority she acted upon in adopting Pandurang in 1905, but on behalf of Namdeo it is contended that Pundlik's authority to his wife to adopt a son to him was limited to an adoption of his son Pandurang, and that Pundlik's expressed wish in his last illness was that no boy except Pandurang should be adopted to him. If it had been proved that Pundlik had in fact expressed as a direction to be followed by his wife his wish that no boy except Pandurang should at any time be adopted to him, their Lordships would hold that the direction prohibited Champabai from adopting the Plaintiff, and consequently that the Plaintiff's adoption was invalid. But such a direction to operate as a prohibition against his widow adopting any boy to him as a son except the boy named by him must be explicitly made and clearly intended by the husband to limit the discretion of his widow for all time, and on every occasion on which otherwise after his death his widow might validly make an adoption to him. Such a direction may

(1) L. R. 43 I. A. 151; s. c. I. L. R. 43 Cal. 1031; 20 C. W. N. 1085 (1916).

(2) L. R. 44 I. A. 159; s. c. I. L. R. 39 All. 496; 21 C. W. N. 986 (1917).

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be given by the husband orally or in writing, as for instance by a Will. The duty of a Hindu widow is to obey such directions as her husband may have given as to the way in which she should exercise a power of adoption to him. That is a general principle of Hindu law as to adoptions, and is not applicable only in cases in which the husband and wife were subject to the Bombay School of Hindu law. In *Sitabai v. Bapu Anna Patil* (3) in which a husband had given in his Will a direction as to how his wife should exercise a power of adoption to him, the Board held:—

“That according to the Bombay School of Law the duty of a Hindu widow to obey her husband's command compels her to act upon any mandatory direction that he may give by Will as to the way in which her power of adoption may be exercised.”

In the present case the strongest evidence suggestive of a prohibition by Pundlik, of any kind as to the making of an adoption to him by Mussamat Champabai was that given by Balkrishna, who had been Pundlik's gumashta. Balkrishna said:—

“He (Pundlik) told us that he was very ill and that we should manage the property well. We opened the talk about the arrangement of inheritance. He told us that his cousin's (Namdeo's) sons were his heirs, and if at all an adoption was wanted Namdeo's son Pandurang should be the only boy for adoption, otherwise he had no wish to adopt anybody else or to make any other arrangement. Namdeo's younger son (Rambhau) was then four or five months old.”

To a similar effect as to Pundlik's intention as to the boy who might be taken in adoption to him was the evidence of Raibhan, a Tahsildar and Magistrate, the evidence of Ranchandra, a pensioner, and the evidence of Jayram, who had married

a sister of Pundlik. According to Jayram, some persons who were present during Pundlik's last illness were pressing him to adopt a son as he was sonless, and Pundlik “said then that he did not want to adopt . . . Pundlik Patil told them that he was not obstinate, and that if a son was to be adopted he would adopt Namdeo's son, Pandurang, and none else.”

The conclusion which their Lordships draw from the evidence is that Pundlik intended if he adopted any boy as his son, to adopt Pandurang, and if his statements can be construed as a direction to his wife, that direction was that she should adopt Pandurang, and that he gave no direction as to what should be done if Pandurang should be unavailable or should die after he was adopted.

Under these circumstances and Pandurang having died in childhood and unmarried, it is necessary to consider what power, if any, Mussamat Champabai had under the Hindu law applicable in the Mahratta country of the Presidency of Bombay to adopt the Plaintiff as a son to her deceased husband.

It has been decided by the High Court at Bombay that in the Mahratta country of the Presidency of Bombay and in Gujarat a Hindu widow, who is sole or joint heir to her husband's estate, may adopt a son to her deceased husband, without authority from her husband, and without the consent of his kindred, or of the caste or of the ruling authority, but that she cannot adopt where her husband has expressly forbidden an adoption. That is not now disputed; it is undoubtedly the law. But it has been held by that High Court in *Ramji v. Ghamau* (4), and by the same bench in *Dinkar Sitaram v. Ganesh Shivaram* (5), that a Hindu widow in the Mahratta country of that Presi-

(3) L. R. 47 I. A. 202; s. c. 25 C. W. N. 97 (1920).

(4) I. L. R. 6 Bom. 498 (1879).

(5) I. L. R. 6 Bom. 505 (1879).

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dency or in Gujarat, who has not her husband's estate vested in her, and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority, or the consent of her father-in-law, or of her husband's undivided coparceners. See paragraph 130 of Mayne's Hindu Law, where the two authorities above-mentioned are cited, as the authorities for the last-mentioned proposition. They were decisions of the 8th July 1879 of a Full Bench consisting of Sir Michael Westropp, C. J., Melvill and Kemball, JJ. The decision in *Dinkar Sitaram v. Ganesh Shivram* (5) merely followed the decision in *Ramji v. Ghamau* (4). It is contended in this appeal that these decisions were wrong in law. It may be mentioned that in *Dinkar Sitaram v. Ganesh Shivram* (5), the District Judge had held that the consent of relations was unnecessary in the Presidency of Bombay.

In the present case Pundlik had not separated; he had died a member of a joint Hindu family, and the estate which was vested in Mussamat Champabai at the time when she adopted the Plaintiff as a son to her husband was not the interest which Pundlik had in the joint family property, but was the estate which had vested in Pandurang on the separation of the joint family.

In *Ramji v. Ghamau* (4) the parties were members of a Hindu joint family, and it may be assumed from the report of the case that the parties were subject to the Hindu law applicable to Hindus of the Mahratta country of the Presidency of Bombay. In that case it was held that a Hindu widow, who has not the family estate vested in her and whose husband was not separated at the time of his death, is not competent to adopt a son to

her husband without his authority or the consent of his undivided coparceners. That was the question which had to be decided in that case. So far as their Lordships are aware that decision in *Ramji v. Ghamau* (4) was the first decision of the High Court at Bombay on that question in any case in which the Hindu law applicable to Hindus in the Mahratta country of the Presidency of Bombay or in Gujarat had to be considered, and the attention of their Lordships has not been drawn to any earlier decision of the Supreme Court of Bombay on that question. In *Ramji v. Ghamau* (4), the learned Judges stated:—

"There has not been any text quoted to us from the books to the effect that the widow of a parcener in a Hindu undivided family may adopt without the authority of her husband or the assent of her coparceners. The authorities in relation to the taking in adoption by a Hindu widow in this Presidency are so fully collected and discussed in *Bayubai v. Bala Venkatish* (6), *Rakhmabai v. Radhakai* (7) and *Narayan Babaji v. Nana Munohar* (8), that it is unnecessary to set them forth here."

After referring to some ancient texts and to some statements of Sir Thomas Strange and Mr. Colebrooke, the learned Judges said:—

"Accepting, however, the view which the cases seem to establish, viz., that the widow, where the husband dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, may adopt without the sanction of the husband (if he have not expressly or by implication indicated his desire that she shall not do so) and without the sanction of his kindred, we are not (as has been previously said in this Court) disposed to carry the deviation from ordinary Hindu law further than it has been already established by precedents."

(4) I. L. R. 6 Bom. 498 (1879).

(6) 7 Bom. H. C. R. App. 1 (1866).

(7) 5 Bom. H. C. R. A. C. J. 181 (1868).

(8) 7 Bom. H. C. R. A. C. J. 152 (1870).

(4) I. L. R. 6 Bom. 498 (1879).

(5) I. L. R. 6 Bom. 505 (1879).

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The allusion to what had "been previously said" in the High Court was an allusion to a judgment of Sir Michael Westropp, then Mr. Justice Westropp, reported in *Bayabai v. Bala Venkatish* (6), which it will be necessary to refer to later.

The Hindu law in the Mahratta country of the Presidency of Bombay and in Gujarat as to the power of widows to adopt to their deceased husbands differs widely from the Hindu law as it has been variously interpreted in other parts of India, but whether it is the original Hindu law on that subject, or, as the learned Judges in *Ramji v. Ghamau* (4) assumed, a deviation from it is not now an easy question to decide with certainty; probably it is a deviation.

In *Lakshmibai v. Sarasvatibai* (9), Sir Lawrence Jenkins, C. J., said:—

"It has been argued before us on the part of the Appellant that a widow's power to adopt does not rest on any delegation from her husband, but is her own inherent right, and it is obvious that the distinction may have more than an academic value. The commentaries, which prevail in this Presidency, seem to me strongly to favour the view thus contended for, but some at any rate of the more recent decisions in this Court contain expressions that point in the other direction. In the view I take of the present case, it is not necessary to decide the point, but the inclination of my opinion (though I reserve to myself the right to reconsider the matter hereafter, if necessary) is that in this Presidency the widow's right is inherent and not merely delegated."

There does not appear to their Lordships to be any sound reason why in the Mahratta country of the Presidency of Bombay the Hindu law as to the power of a Hindu widow who has not the authority of her deceased husband to adopt a son to him, should depend on the question

as to whether her husband had died as a separated Hindu or as an unseparated Hindu, or on the question as to whether the property which was vested in her when she made the adoption was or was not vested in her as his heir. If it was her religious duty to adopt a son to her husband, that duty would be the same in either case, although possibly the right of the adopted son to the property vested in the widow might be different. It has, however, been held by the Board in *Pratapsing Shivsing v. Agarsingji Raisingji* (10), which was a case from the Ahmedabad District of the Presidency of Bombay, that:—

"The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her."

The Board was not then dealing with a case in which the deceased husband had expressly or implicitly prohibited his wife from making any adoption.

In *Shri Ragunada v. Shri Brozo Kishoro* (11), the Board said:—

"It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It

(4) I. L. R. 6 Bom. 498 (1879).

(6) 7 Bom. H. C. R. App. 1 (1866).

(9) I. L. R. 23 Bom. 792 at p. 794 (1899).

(10) L. R. 46 I. A. 67: s. c. 24 O. W. N. 57 (1918).

(11) L. R. 3 I. A. 154 at p. 193 (1878).

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seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

That case came from Travancore, where the Hindu law as interpreted in the Province of Madras as to the power of Hindu widows to adopt, who have not had the authority of their husbands to adopt a son to him, is much more restricted than it is in the Mahrattā country of the Presidency of Bombay and in Gujarat, where it is the law that the widow of a separated husband, who has not prohibited her from making an adoption to him, can validly adopt a son to him without the consent of anyone except that of the parent of the boy. In the present case, owing to the family having separated, the rights of Namdeo and his son Rambhau were merely the rights of collaterals in unpartitioned property.

In *Narayan Babaji v. Nana Manohar* (8), where the question for decision was whether a Hindu wife could in the lifetime of her husband make a valid adoption to him, a widely different point from that to be decided in this appeal, and a widely different point from that which had to be decided in *Ramji v. Ghamau* (4), Westropp, C. J., delivered a long judgment of value when the respective authority of various ancient texts and commentaries on Hindu law has to be considered on questions of a woman giving or taking a boy in adoption or on the difference between the power of a widow and that of a wife to take a boy in adoption, and on other questions which their Lordships have not to consider in this appeal. In the course of the judgment, the learned Judge stated that he adhered to an opinion expressed by him

in 1866 in *Bayabai v. Bala Venkatish* (6) as to the construction of some passages in the *Dattaka Chandrika*. As will later appear, it is not at all clear what was the judgment which Mr. Justice Westropp actually did deliver in *Bayabai v. Bala Venkatish* (6).

In *Rakhmabai v. Radhabai* (7), which was decided in the High Court on the 26th August 1868, the suit was between the two widows of Murarav Desai, of Nipani, in the Mahratta country of the Presidency of Bombay, who had died childless and apparently separate. The suit was brought by Radhabai who was the junior widow; she claimed to be jointly entitled with the Defendant Rakhmabai to the estate of their deceased husband.

The defence was that Rakhmabai had authority to adopt a son to her late husband, and had adopted Rav Saheb, who therefore became the lawful heir to the entire estate. The District Judge who tried the suit found that the adoption was not authorised by the husband, but he had no doubt that the adoption was in fact made, and for some reason which was not apparent to the Court of Appeal, he decreed that the Plaintiff was entitled to the half share which she claimed. The Defendant appealed to the High Court at Bombay and the appeal came before Sir Richard Couch, C. J., and Newton and Warden, JJ., who having found that the adoption had in fact been made, proceeded "to consider whether it was valid, either by reason of its having been made by the authority of the deceased Murarav (the husband), or by virtue of the power which Rakhmabai had by the Hindu law, by which the parties were governed." The High Court found that the husband had given no direction to adopt, and then considered whether the adoption without

(4) 1, L. R. 5 Bom. 498 (1879).

(8) 7 Bom. H. C. R. A. C. J. 153 (1870).

(6) 7 Bom. H. C. R. App. 1 (1866).

(7) 5 Bom. H. C. R. A. C. J. 181 (1868).

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authority having been given by the husband was valid. The learned Judges of the High Court then referred to the Mitakshara, the Vyavahara Mayukha, an opinion expressed by Sir W. H. Macnaghten in a note at page 68 of the second edition of his Principles of Hindu Law, several cases reported, some reported in Borradaile's Reports and some in Morris' Sudder Dewany Reports, and to the opinions which had been given in some of those cases by Shastris and by Pundits, and expressed their decision thus:—

“Upon the review which we have made of the authorities applicable in this part of India, we are of opinion that in the Maratha country, wherein the property in question in this suit is situate, a Hindu widow may, without the permission of her husband, and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive.”

That decision was not based upon the fact that the deceased husband was a separated Hindu, nor was it based upon the fact that at the time of the adoption, the widow who made the adoption had vested in her the whole or any part of the property which had belonged to her husband. Their Lordships regard it as equally applicable to an adoption by a Hindu widow of the Mahratta country of the Province of Bombay, whether her husband at the time of his death was joint or separate, and whether his property was or was not vested in her as his heir at the time when she made the adoption, and consider that it is a decision to be applied in this appeal.

The learned Judges in *Rakhmabai v. Radhabai* (7), having expressed their decision which has been quoted on the authorities which they had reviewed, proceeded to consider whether the elder of the two

widows had power to adopt without the consent of the other, and having referred on that subject to Strange's Hindu Law, Appendix 83, to a decision of the Supreme Court, to a decision of the High Court, to West and Bühler's Digest of Hindu Law of Inheritance and to Steele's Summary of the Law and Custom of Hindu Inheritance, said:—

“Considering the act of adoption as the performance of a religious duty, we think these authorities are sufficient to justify us in holding that Rakhmabai, the elder of the two widows, had the right to adopt. In the judgment of the Privy Council their Lordships say that ‘in the case of an undivided family, if there be no father of the husband living, the consent of all the brothers, who in default of adoption would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing another coparcener against their will.’ The interest of the younger of two widows cannot, we think, be regarded in the same light as that of a member of an undivided family, and probably their Lordships would not consider the remark applicable in cases where, by the law which governs them, no consent of kinsmen is required. We must not omit to notice the judgment of Mr. Justice Westropp in Regular Appeal No. 17 of 1863 [*Bayabai v. Bala Venkatish* (6)], which was cited by the Respondent's counsel. The judgment was not a written one, and we have no report of it, but we understand that the opinion given by the learned Judge was that a widow had no power to adopt a son to her husband where he had expressly, or by his conduct impliedly, forbidden her to do so. In this we quite concur, and the Judicial Committee have so held in the judgment we have referred to. There is no question of prohibition in this case.”

Their Lordships will now consider the case of *Bayabai v. Bala Venkatish* (6), which was decided in the High Court at Bombay on the 7th March 1866, by Westropp, Tucker and Warden, JJ., and

(7) 5 Bom. H. C. R. A. C. J. 181 (1866).

(6) 7 Bom. H. C. R. App. 1 (1866).

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is one of the three decisions referred to by Sir Michael Westropp, C. J., in *Ramji v. Ghamau* (4), as the cases in which the authorities in relation to the taking in adoption by a Hindu widow in the Presidency of Bombay were so fully collected and discussed that it was unnecessary to set them forth in the judgment of the Full Bench in *Ramji v. Ghamau* (4), by which it will be remembered that Full Bench decided that in the Presidency of Bombay a Hindu widow, who has not the family estate vested in her and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his coparceners.

It is necessary to make a few prefatory observations about the judgment of Mr. Justice Westropp which is reported in 7 Bomb. H. C. R., Appendix 1, as having been delivered in *Bayabai v. Bala Venkatish* (6) on the 7th March 1866, in Regular Appeal No. 17 of 1863. In the first place it appears that Mr. Justice Warden was one of the Judges in that case, and was also one of the Judges in *Rakhmabai v. Radhabai* (7), which was decided on the 26th August 1868, and is reported in 5 Bomb. H. C. R. A. C. 181. In the judgment of the Court in the latter case, at page 193 of the Report, it is stated that the judgment of Mr. Justice Westropp in Regular Appeal No. 17 of 1863 was not a written judgment, and "we have no report of it." It may be assumed that a decree of the High Court in *Bayabai v. Bala Venkatish* (6) was drawn up, and that it was drawn up as of the 7th March 1866. A decree must be justified by the judgment upon which it is based. Their Lordships are of opinion that the judgment of Mr.

Justice Westropp in *Bayabai v. Bala Venkatish* (6), as reported in 7 Bomb. H. C. R., Appendix I, could not possibly have been an orally delivered judgment, and they are further of opinion, strange though that opinion may seem, that no judgment was written in that case until after the judgment of Sir Richard Couch, C. J., Newton and Warden, JJ., in *Rakhmabai v. Radhabai* (7), had been reported in 1869 in 5 Bomb. H. C. R. A. C. 181.

The points which were considered by Mr. Justice Westropp in *Bayabai v. Bala Venkatish* (6), as appears from an examination of his judgment as it is reported, were: point (1), the power of a Hindu widow to adopt a son to her deceased husband without an authority from him to do so; point (2) whether the husband in the case before him had given authority to his wife to adopt or had not impliedly forbidden her to do so, and point (3) whether the widow had not been cajoled into making the alleged adoption by being kept in ignorance of her rights, and of the effect of an adoption. To the consideration of point (1), Mr. Justice Westropp devoted seventeen pages of his judgment as it is reported; to the consideration of point (2) he devoted about one page; to the consideration of point (3) he devoted two pages. In considering point (1), Mr. Justice Westropp is reported at pages xvi and xvii of the Appendix to 7 Bomb. H. C. R. to have said:—

"Baji Rav, the last of the Peshwas, as a general rule, treated adoptions by widows without the order of their husbands as illegal. But it is certain that he was swayed by interested motives. . . . The disapprobation which the deviation of the Maratha school met with in such high quarters may to some extent account for the fact that, for a long time afterwards,

(4) 1 L. R. 6 Bom. 498 (1879).

(5) 7 Bom. H. C. R. App. 1 (1866).

(7) 5 Bom. H. C. R. A. C. J. 181 (1868).

(6) 7 Bom. H. C. R. App. 1 (1866).

(7) 5 Bom. H. C. R. A. C. J. 181 (1868).

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and down even to the hearing of this case, we find that adoptions by widows without express authority from their husbands have been constantly and vigorously contested, but, it must be admitted, generally speaking, without success, unless there were some other defect in the adoption than the absence of express authority from the husband. . . . Assuming, but not deciding, that the deviation of the Maratha school is established to the furthest extent to which any of the foregoing authorities reach (namely, that the widow may, without express authority or order from her husband, and without the consent either of his or her relations, adopt a son), and without in the least degree wishing or intending to infringe on the law of adoption by a widow so far as it can be considered as established in the Maharashtra, cherished as I believe that law to be by the Hindu community, or a very considerable proportion of it, yet I am not disposed to extend it, or to depart from the general Hindu law one single step further than provincial or local usage has firmly settled as admissible. And I have not any doubt that we should extend it much beyond its present boundaries were we to hold that the widow may adopt, where the husband has, when perfectly in the possession of his senses, as well on the day preceding his death as on the day of his death, in reply to suggestions that he should adopt a son, positively refused to do so."

There is nothing in the judgment of Westropp, J., so far as their Lordships can see, which confined his observations as to the power of a Hindu widow to adopt in the Mahratta Country of the Bombay Presidency and in Gujarat without the consent of relations to cases in which the widow was the widow of a separated husband, or to cases in which the widow was the widow of an unseparated husband; his observations appear to their Lordships to have been general and to apply to either class of cases.

Mr. Justice Westropp in *Bayabai v. Bala*

Venkatish (6), if the report is to be trusted, found that the husband had forbidden his wife to adopt. If the other Judges in that case, Tucker and Warden, JJ., had agreed with him that the widow had been forbidden by her husband to adopt, there was nothing further to consider in the case. According to the report of his judgment, Mr. Justice Westropp finally found that the widow had been cajoled into making the alleged adoption by being kept in ignorance of her rights, and of the effect of an adoption. With that finding, the other two Judges agreed. Their judgments will be found reported at page xxiii of the Appendix thus:—

"Tucker, J., concurred in thinking that the Defendant Bayabai had been circumvented by unfair means, and that an adoption procured, as the alleged adoption in this case, by suppression and misrepresentation of facts, could not be permitted to stand. It was clear to him that this youthful widow had been led by those around her to believe that the act of adoption would not divest her of her interest in the property of her late husband, and that she had not been fully informed as to her position and rights. . . . As to the right of a widow in this Presidency to adopt without any authority from her husband, he did not consider it necessary now to give any final decision but his opinion inclined in favour of that right, and of its having been sufficiently recognised by the Courts of Justice at this side of India. Further, he was inclined to think that she had that right unless her husband expressly prohibited her from adopting, and that a mere refusal by him to adopt would not be sufficient. But on this point he would refrain from giving any positive opinion.

"Warden, J.: I concur in the observations of my brother Tucker."

Whether the judgment reported as that of Mr. Justice Tucker had been written by him or was prepared for the Report by the reporter from his note of the case,

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their Lordships do not know, but it reads as if it had been written by a reporter from his note, not by the Judge.

Mr. Justice Warden must apparently have forgotten when the case of *Rakhmabai v. Radhabai* (7) was being argued in 1868, what was the actual point on which the case of *Bayabai v. Bala Venkatesh* (6) had been decided in 1866.

Their Lordships have come to the conclusion that the adoption of the Plaintiff who is the Appellant, was valid, and they will humbly advise His Majesty, that the decree of the Court of the Judicial Commissioner should be set aside with costs and the preliminary decree of the Additional Judge should be affirmed and restored. The Respondent must pay the costs of this appeal.

Solicitors: *Messrs. Lattey and Hart* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

R. M. P.

[PRIVY COUNCIL.]

[APPEAL FROM PATNA.]

VISCOUNT CAVE.

LORD SHAW.

SIR JOHN EDGE.

MR. AMER ALJ.

1921,

Heard, 7, June.

Judgment, 9, June.]

BANDHU RAM and

ors., Appellants,

v.

CHINTAMAN SINGH

and ors., Respondents.

Hindu law—Mitakshara—Joint family—Bond held in the name of a member—Separate private transactions by individual members—Presumption of jointness, if rebutted.

The presumption is that a bond held in the name of the managing member of a joint Mitakshara Hindu family is joint property and it is for those who assert the contrary to make good their case.

Proof that some of the members of the

joint family had some private transactions by no means proves that the particular bond in question was the private property of the member in whose name it was held.

Held—That while the evidence on both sides was somewhat meagre the presumption in favour of joint ownership was not displaced.

This was an appeal from a decree of the High Court at Patna, dated the 30th January 1919, which reversed a decree of the Additional Subordinate Judge of Bhagalpur, dated the 9th August 1916.

The facts of the case sufficiently appear from the judgment of their Lordships.

Mr. L. DeGruylher, K. C. (with *Mr. Kenworthy Brown*) for the Appellants.—The family was joint in all respects till 1892 when there was a suit for partition by Madan Singh. The property was then partitioned by metes and bounds into three parts; Chandan Singh's sons, Rajdhari, Chintaman and Gobardhan, taking a one-third share. These three sons of Chandan remained joint. In 1902 Chintaman Singh brought a suit for partition and this property was divided. In 1908 Rajdhari bought the property now sued in execution of a decree against Pyare on a bond executed in 1891. Rajdhari sued for it in 1904 and bought the property in 1908. Rajdhari sold the property in 1908 (same year) to the present Appellant. Chintaman instituted the suit in 1914 for one-third of the property. What I say is that if the bond was joint family property then Chintaman's remedy was to get a share in the sale money. He has no claim in the property in the hands of a third person, unless the property was purchased on behalf of the joint family.

If the bond in favour of Rajdhari was not joint then Chintaman has clearly no claim.

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The Subordinate Judge finds that each of these brothers had separate property and separate money with which they traded. The Subordinate Judge decided in our favour.

The burden is on the other side to prove that the property is joint.

My contention is that he bought the property for himself. In no case could Rajdhari be regarded as a trustee for the estate. He might sue for the moneys.

[MR. AMEER ALI.—If the property had remained with Rajdhari, the burden would have been on him to prove that the transaction was not in any way connected with the family, nor was it purchased with the family money.]

[LORD SHAH.—The whole thing was joint going back to 1891, and this transaction goes back to there.]

Mr. Kenworthy Brown followed.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT CAVE.—This appeal has been fully argued on behalf of the Appellants, and all the material facts have been brought to their Lordships' notice, but in the result their Lordships see no reason to differ from the conclusion reached by the High Court at Patna.

The question raised is one of fact, and it is unnecessary to state the circumstances at length. It is sufficient to say that the title to the land in dispute must, in their Lordships' opinion, depend on the title to the bond given by Pyare Mander to Rajdhari on the 17th August 1891. If that bond was the separate property of Rajdhari, then the land which he purchased in the suit brought by him to enforce the bond was also his separate property, and he could give a good title to the Appellants. But if he held the bond on behalf of himself and his two brothers, Chintaman and Gobardhan, then he could

in the circumstances of this case have no better title to the land, and the first Respondent is entitled to retain the decree granted by the High Court.

Now it is plain that at the date of the bond Rajdhari and his brothers were members with their three cousins (sons of their uncles) of a Mitakshara joint family, and that when in the year 1892 the cousins separated from the family and disclaimed all interest in the bond, Rajdhari and his two brothers continued joint. Rajdhari was the managing member throughout, and the presumption is that the bond held in his name was joint property; and it is for those who (like the Appellants) assert the contrary to make good their case.

It is said on behalf of the Appellants that the members of the family had some separate business transactions, and this appears both from a statement in the terms of compromise, dated the 28th July 1892, and from other evidence. But proof that some of the members had some private transactions by no means proves that the particular bond in question was the private property of Rajdhari; and there are several circumstances which tend to show that this was not the case. Thus in the first partition suit in 1892 the Plaintiff claimed as joint property a bond of Pyare Mander for 945 rupees, which must be assumed, in the absence of any evidence to the contrary, to be the bond in question; and by the terms of compromise in that suit it was admitted that all the debts (which would include that bond) belonged to the Defendants Nos. 1 to 3, that is, to Rajdhari and his two brothers. If the bond had been the separate property of Rajdhari, this would almost certainly have been stated.

Again, in the second partition suit of 1902, the Plaintiff Chintaman claimed as joint property a sum due to Rajdhari under a bond from Pyare Mander, and the award

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in that suit, dated the 30th March 1904, found that the three brothers were members of a joint family, and that all the moveable and immoveable properties were joint between them. It is not clearly shown that the bond here mentioned was the bond in question; but it appears unlikely that, if Rajdhari held a separate bond from Pyare Mander, it would not have been referred to and excepted from the award.

Further, in the subsequent proceedings in the same suit Rajdhari admitted that Chintaman was entitled to be credited with 1,000 rupees, being one-third of the purchase money for the property comprised in the bond, an admission which could only have been made if the bond was joint property; and while it is true that this was after the sale to the Appellants, it cannot be assumed without proof that Rajdhari was a party to a fraud.

Lastly, it is (to say the least of it) remarkable that, when in 1908 Ram Gulam made an attempt to execute the order which he had obtained against Rajdhari by a sale of this property, and Chintaman objected, no further proceedings were taken in execution, but a private sale was made to the first Appellant, who appears to be connected with Ram Gulam. Neither Rajdhari nor anyone else gave evidence that the bond was the separate property of Rajdhari, nor was any document produced in which it was referred to as his private property.

Upon the whole, while the evidence on both sides is somewhat meagre, it appears to their Lordships that the presumption in favour of joint ownership is not displaced, and therefore this appeal should be dismissed; and they will humbly advise His Majesty accordingly.

As the Respondents have not appeared there will be no order as to costs.

Solicitors: Messrs. Pugh & Co. for the Appellants.

R. M. P.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE ORDER

No. 395 of 1920.

MOOKERJEE, J.	RAI CHARAN BHUIYA
PANTON, J.	and ors., Judgment-
1921,	debtors, Appellants,
Heard, 2 and	v.
3, August.	DEBI PRASAD BHAKAT,
Judgment,	Decree-holder,
3, August.	Respondent.

Civil Procedure Code (Act V of 1908), sec. 144, application for restitution of money paid to mortgagee auction-purchaser after the date of sale and before confirmation of the sale—Jurisdiction of Court to order restitution in execution proceedings—Separate suit for restitution, if necessary.

A mortgagee got a mortgage decree and in the sale in execution thereof purchased the mortgaged property "for whatever was due to him on the decree at the time of the sale," without offering any specific bid. In subsequent proceedings by the judgment-debtor to set aside the sale, the mortgagee auction-purchaser and the judgment-debtor came to a settlement to the effect that if a specific sum was paid off before a certain date, the sale would stand cancelled, but on default the sale would stand confirmed. The judgment-debtor, however, did not pay the entire sum but made part payments on two occasions and the auction-purchaser, with the sanction of the Court, from time to time extended the time on the above conditions. Finally, default having been made, the sale was confirmed under sec. 65, C. P. C., and the judgment-debt was satisfied in full by the purchase of the mortgaged property. The judgment-debtor subsequently made an application, in the execution proceedings, for restitution of the sums paid by him to the decree-holder purchaser. The lower

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Appellate Court held that the remedy of the judgment-debtor was by way of a regular suit:

Held—That it is competent to the execution Court, in the exercise of its inherent power, to make an order for restitution with a view to secure complete justice between the parties concerned, even in cases not comprised within the terms of sec. 144, C. P. C.

DINESH PRASAD v. SANKAR CHAUDHURI (1), PRAYAG NATH SINGH v. SHEO PRASAD (2) and RAI RAGHUBIR v. JAI INDRA (3) distinguished.

BENI MADHAV v. PRAN SINGH (4), NARENDRA CHANDRA v. JOGENDRA NARAYAN (5), ASUTOSH v. UPENDRA PROSHAD (6), ATUL CHANDRA v. KUNJA BEHARI (7) and AMIRANNESSA v. KURIMANNESSA (8) followed.

COLLECTOR OF MEERUT v. KALKA PRASAD (9) and SUKHDEO v. RITO SINGH (10) referred to and approved.

As precisely the same relief would be obtained whether the application was made in a separate suit or in the execution proceedings, the litigant should not be driven to a separate suit, merely because the case may not fall within the purview of the appropriate section of the Code.

PRAYAG NARAN v. KAMIKHYA (12), SHAMA PATTAR v. ABDUL RAJAB SAHIB (13)

(1) 2 C. L. J. 537 (1904).

(2) 16 C. L. J. 135 (1911).

(3) L. R. 48 I. A. 223 (1919).

(4) 16 C. L. J. 187 (1911).

(5) 19 C. W. N. 537: s. c. 20 C. L. J. 469 (1914).

(6) 21 C. W. N. 564: s. c. 24 C. L. J. 467 (1916).

(7) 27 C. L. J. 451 (1917).

(8) 18 C. W. N. 1299 (1914).

(9) I. L. R. 28 All. 665 (1906).

(10) 2 P. L. J. 361 (1917).

(12) L. R. 36 I. A. 197: s. c. 14 C. W. N. 55 (1909).

(13) L. R. 39 I. A. 418: s. c. I. L. R. 35 Mad. 695; 16 C. W. N. 1009 (1912).

and PARBHUDAYAL v. KOLYAN DAS (14) referred to and followed.

It being clear that if the matter had not been overlooked at the time of the confirmation of the sale an order for restitution would have been made, any Court can rightly consider itself to possess an inherent power to rectify the mistake or omission which had been inadvertently made.

DEBI BAKSH v. HABIB SINGH (16) referred to and followed.

The Court has an inherent power to recall money improperly paid out.

MRINALINI v. ABINAS CHANDRA (17) and other cases referred to.

The difficulty of invoking the inherent power of the Court under sec. 151, C. P. C., when there is an express provision to the contrary in a statute, does not arise in the present case, as sec. 144 does not define the full measure of the power of the Court to make an order for restitution. Sec. 144 may be taken as a guide to determine in what class of cases an order for restitution may be made so that complete justice may be made between the parties and they may be restored to the status quo ante.

SABITRI v. SAVI (20) referred to.

This was an appeal from a decision of M. Yusuf, Esq., District Judge, Midnapur, dated the 27th August 1920, reversing that of Babu Behari Lax Sarkar, Subordinate Judge, Midnapur, dated the 12th June 1920.

The facts will fully appear from the judgment.

(14) L. R. 43 I. A. 43: s. c. I. L. R. 38 All. 163; 20 C. W. N. 425 (1915).

(16) L. R. 40 I. A. 151: s. c. I. L. R. 35 All. 331; 17 C. W. N. 829 (1913).

(17) 11 C. L. J. 523 (1910).

(20) L. R. 48 I. A. 76: s. c. 25 C. W. N. 557 (1921).

RAI CHARAN BHUTIA v. DEBI PRASAD BHAKAT.

Babu Amarendra Nath Bose for the Appellants.

Babus Lalit Mohan Mitra and Santosh Kumar Pal for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the judgment-debtors against an order of dismissal made on an application for restitution in the course of proceedings in execution of a mortgage decree.

On the 21st February 1916 the Respondent obtained a mortgage decree against the Appellants. On the 17th July 1917 the mortgaged property was sold in execution and purchased by the decree-holder. No specific bid appears to have been offered by the decree-holder, but it was stated that he purchased the property for whatever was due to him on the decree at the time of the sale. On the 14th August 1917 the judgment-debtors applied to have the sale aside under Or. 21, r. 90, C. P. C., but this application was not heard for a considerable time.

On the 9th February 1918 the decree-holder auction-purchaser and the judgment-debtors came to a settlement to the effect that if the judgment-debtors paid to the decree-holder Rs. 1,313 on or before the 2nd April 1918, the sale would stand cancelled, but on default the sale would stand confirmed. Neither of the two contingencies contemplated by the parties, however, happened. The judgment-debtors did not pay the full amount specified on the day fixed; they paid only Rs. 317, whereupon the decree-holder agreed to extend the time for payment till the 20th April 1918, subject to the reservation that if the balance was not paid within the period specified, the sale would stand confirmed. This arrangement, like that made on the 9th February 1918, received the sanction of the Court. On the 20th April

1918, however, the judgment-debtors brought in only Rs. 230, whereupon the decree-holder again agreed to an extension of time till the 15th May 1918, subject to the condition that if what remained still due was not paid on or before that date the sale would stand confirmed. On the 16th May 1918, no payment was made and an application for further extension of time by the judgment-debtors was refused. The consequence was that on the day following the 17th May 1918, the sale was confirmed and the application for cancellation of the sale, made on the 14th August 1917, was dismissed. The effect of the order for confirmation was that under sec. 65 of the Civil Procedure Code, the title to the property purchased by the decree-holder vested in him as auction-purchaser from the date of the sale, and, as the decree-holder had agreed to take the property for whatever sum was due under the mortgage-decree, the result was complete satisfaction of the claim under the mortgage. The position then was that although the judgment-debt was satisfied in full by the purchase of the mortgaged property by the decree-holder, he still held in his hands the two sums of Rs. 317 and Rs. 230 paid to him by the judgment-debtors on the 2nd and 20th April 1918 respectively. This was overlooked at the time when the order for confirmation was made; for it is inconceivable that if the matter had been brought to the notice of the Court, an appropriate order would not have been made in this behalf. The judgment-debtors, however, waited till the 7th February 1920 when they made the present application for restitution of the two sums mentioned. The Court of first instance held that the judgment-debtors were entitled to a refund of the amount claimed. Upon appeal the District Judge has reversed that order on the ground that the remedy of the judg-

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ment-debtors lies by way of a regular suit in the Civil Court. We are of opinion that this view cannot be supported.

There is no doubt that the case before us is not covered by the express terms of sec. 144, C. P. C., which recognises the principle of restitution. The question consequently arises, whether it is competent to the execution Court, in the exercise of its inherent power, to make an order for restitution with a view to secure complete justice between the parties concerned. Our attention has been drawn to the decisions in *Dinesh Prosad v. Sankar Chaudhuri* (1), *Prayag Nath Singh v. Shro Prosad* (2) and *Rai Raghubir v. Jai Indra* (3), where restitution was directed on reversal of a decree under circumstances which might be taken to attract the operation of sec. 144, C. P. C. We need not consequently discuss the applicability of the principle deducible from those cases. But it is plain from the decisions of this Court in *Beni Madhav v. Pran Singh* (4), *Narendra Chandra v. Jogendra Narayan* (5), *Asutosh v. Upendra Proshad* (6), *Atul v. Kunja Behari* (7) and *Amirannessa v. Kurimannessa* (8), that the execution Court is competent, in the exercise of inherent power, to make an order for restitution even in cases not comprised within the terms of sec. 144. A similar view has been taken elsewhere, as appears from the judgments in *Collector of Meerut v. Kalka Prosad* (9) and *Sukdeo v. Rito Singh* (10). The only instance where a

restricted view has been taken of the competence of the Court to make an order for restitution in cases not governed by sec. 144, is *Safaraddi v. Durga Prosad* (11), which has been unfavourably commented upon in later cases, such as *Asutosh v. Upendra* (6) and *Sukdeo v. Rito Singh* (10). There can, in our opinion, be no room for dispute that the Court is competent to exercise its inherent power in cases of this description and this has indeed been recognised by the Judicial Committee. In the case of *Prayag Naran v. Kamikhyia* (12), it was ruled that the Court has inherent power to make restitution and a party entitled to it should not be referred to a regular suit, merely because the case may not fall within the purview of the appropriate section of the Code of Civil Procedure. Lord Macnaghten observed that as precisely the same relief would be obtained whether the application were made in a separate suit or in the execution proceedings, the litigant should not be driven to a separate suit. To the same effect is the observation in *Shama Pattar v. Abdul Rajab Sahib* (13), namely, that every Court trying civil cases has inherent jurisdiction to take cognizance of questions which go to the root of the subject-matter of controversy between the parties. The principle was recognised again in *Parbhudayal v. Kolyan Das* (14) where the Judicial Committee affirmed the decision of the Allahabad High Court in *Parbhu Dayal v. Ali*

(1) 2 C. L. J. 537 (1904).

(2) 16 C. L. J. 135 (1911).

(3) L. R. 46 I. A. 228 (1919).

(4) 15 C. L. J. 187 (1911).

(5) 19 C. W. N. 537: s. c. 20 C. L. J. 469 (1914).

(6) 21 C. W. N. 564: s. c. 24 C. L. J. 487 (1916).

(7) 27 C. L. J. 451 (1917).

(8) 18 C. W. N. 1299 (1914).

(9) I. L. R. 28 All. 665 (1906).

(10) 2 P. L. J. 361 (1917).

(6) 21 C. W. N. 564: s. c. 24 C. L. J. 464 (1916).

(10) 2 P. L. J. 361 (1917).

(11) 16 C. L. J. 83 (1912).

(12) L. R. 36 I. A. 197: s. c. 14 C. W. N. 55 (1909).

(13) L. R. 39 I. A. 218: s. c. I. L. R. 35 Mad. 605; 16 C. W. N. 1009 (1912).

(14) L. R. 43 I. A. 43: s. c. I. L. R. 38 All. 163; 20 C. W. N. 426 (1915).

RAI CHARAN BHUIYA v. DEBI PRASAD BHAKAT.

Ahmed (15). In the case before us, there is no question that if the matter had not been overlooked at the time of the confirmation of the sale, an order for restitution would have been made. Consequently the observation of Lord Shaw in *Debi Baksh v. Habib Singh* (16) applies, namely, that quite apart from sec. 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake or omission which had been inadvertently made. There is a long series of cases in this Court where it has been ruled that the Court has inherent power to recall money improperly paid out; amongst these, reference may be made to *Mrinalini v. Abinas Chandra* (17), *Nabinkali v. Banalata* (18) and *Jogesh Chandra Roy v. Yakub Ali* (19). We hold accordingly that the execution Court had ample power to make an order to prevent what would be essentially a miscarriage of justice. We may add that a possible difficulty, indicated by Lord Sumner, as to the applicability of sec. 151, in *Sabitri v. Savi* (20), namely, the difficulty of invoking the inherent power of the Court when there is an express provision to the contrary in a statute, does not arise in the case before us. Here sec. 144 does not define the full measure of the power of the Court to make an order for restitution; we may consequently take the provisions of that section as a guide to determine in what class of cases an order for restitution may be made, so that complete justice may be made between the parties and they may be restored to the status *quo ante*. There is

thus no escape from the conclusion that an order for restitution should be made in this case.

Finally, the Respondent has urged that as execution purchaser, he has suffered injury by reason of the delay in the confirmation of sale and that this circumstance should be borne in mind when an order for restitution is made. This contention is obviously entitled to some consideration. But we observe that the Court of first instance did not direct a refund of the sums paid by the judgment-debtors with interest. The decree-holder has had the benefit of those payments for a considerable length of time, and if there was delay in the confirmation of sale, he was in part at least responsible because he consented to an adjournment on receipt of sums handed over to him in partial satisfaction of the decree. The judgment-debtors were no doubt ultimately unable to carry out their engagement; but this does not justify the conclusion that they should forfeit the sums they paid. In these circumstances we hold that the proper order to make is to allow the appeal and to restore the order of the Court of first instance. There will be no order for costs either here or in the Court of the District Judge.

J. N. R.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2345 OF 1919.

CHARU CHANDRA
MAZUMDAR, Plaintiff,
Appellant,
v.

SHAMSUL HUDA, J.
1920,

22, December.

CHAIRMAN OF THE
FARIDPUR MUNICIPALITY and ors., Defendants, Respondents

(15) I. L. R. 32 All. 79 (1909).

(16) L. R. 40 I. A. 151; s. c. I. L. R. 35 All. 331; 17 C. W. N. 829 (1913).

(17) 11 C. L. J. 533 (1910).

(18) 2 C. L. J. 595 (1905).

(19) 17 C. W. N. 1057 (1913).

(20) L. R. 48 I. A. 76; s. c. 25 C. W. N. 557 (1921).

Bengal Municipal Act (II of 1884, B. C.), sec. 15, cl. (2), assessment of income tax upon the joint

CHARU CHANDRA MAZUMDAR v. CHAIRMAN, FARIDPUR MUNICIPALITY.

income of father and son as members of joint family, if entitles both of them to be voters—Cl. (3), son living with father, if a qualified voter as occupying a holding.

The income of a father and his son, as members of a joint Hindu family, were jointly assessed for purposes of income tax. The son brought a suit for a declaration that he was a qualified voter under sec. 15, cl. (2), of the Bengal Municipal Act because he was assessed to income tax, and under cl. (3), because he was a graduate and occupied a holding along with his father:

Held—That the income of both the father and the son having been assessed, both of them were qualified to claim to be a voter under cl. (2) of sec. 15.

NARENDRA NATH SINHA v. NAGENDRA NATH BISWAS (1) distinguished.

From the mere fact of a person living with another individual occupying a holding by reason of some connection with or relation to him, such as son or servant, he cannot be considered to be a person occupying a holding within the meaning of the section. Hence the son was not qualified to be a voter under cl. (3) of the section.

AMBIKA CHURN MOZUMDAR v. SATISH CHANDRA SEN² (2) followed.

MACDONELL v. DICKSON (3) and GOBINDA CHANDRA GANGULY v. KAILAS CHANDRA SANYAL (4) referred to.

This was an appeal against the decree of Girish Chandra Sen, Esq., Additional Judge of Zillah Faridpur, dated the 11th of July 1919, modifying the decree of Babu Probodh Chandra Basu, Acting Subordinate Judge, 1st Court of that District, dated the 13th of February 1919.

The facts of the case will appear from the judgment.

Babus Brojolal Chakraborty and Rupendra Kumar Mitra for the Appellant.

Babu Phanindra Lal Moitra for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit brought by the Plaintiff for declaration that he was a qualified voter under sec. 15 of the Bengal Municipal Act and that the Chairman's conduct in removing his name from the voters' register was illegal and without jurisdiction. There was also a prayer for an injunction. The first Court passed a decree in favour of the Plaintiff, declared that the Plaintiff was a qualified voter under sec. 15 of the Bengal Municipal Act and was entitled to have his name entered in the register of voters, but refused to declare that the whole election of the Municipal Commissioners was void and also dismissed the rest of the Plaintiff's suit. There was an appeal by the Plaintiff and a cross-appeal by the Defendant Chairman with the result that the whole suit was dismissed. The learned Vakil for the Plaintiff-Appellant argues that the Plaintiff had established his right as a voter by showing that he was qualified to vote under sec. 15 of the Bengal Municipal Act in two different ways. First it is urged that the Plaintiff was assessed to income tax and was therefore a qualified voter. There can be no doubt that the income of the Plaintiff along with that of his father was assessed for purposes of income tax, but the learned Judge having found that Plaintiff and his father were members of a Hindu joint family and the income of both were jointly assessed held that the assessment of the joint family gave the Plaintiff no right to vote. I do not think this is a

(1) I. L. R. 38 Cal. 501 (1911).

(2) 2 C. W. N. 689 (1898).

(3) 16 R. 143.

(4) 15 C. L. J. 689 (1905).

CHARU CHANDRA MAZUMDAR v. CHAIRMAN, FARIDPUR MUNICIPALITY.

correct view of the law. It is clear that the income of both of the father and the son was assessed and that in my opinion qualified both of them to claim to be a voter under cl. (2) of sec. 15. In support of the contrary view the case of *Narendra Nath Sinha v. Nugendra Nath Biswas* (1) was cited but I do not think that case has any bearing on the present question. There was no assessment in that case but there was undoubtedly an assessment in this case. Plaintiff also claims to be a qualified voter under cl. (3) of that section. He claims that he was a graduate of the Calcutta University and occupies a holding or part of a holding within the Municipality.

The Court below was of opinion that as the houses occupied in its ordinary sense by the Plaintiff belonged to the father and Plaintiff was living there as the son of his father and not as an owner and as his occupation was not exclusive, he cannot be regarded to be in occupation within the meaning of sec. 15 of the Act. This argument finds some support in a reported decision of this Court in *Ambika Churn Mozumdar v. Satish Chandra Sen* (2) in which it was held that from the mere fact of a person living with a particular individual occupying a holding by reason of some connection with or relation to him, such as son or servant, he cannot be considered to be a person occupying a holding within the meaning of sec. 85 and cannot be separately assessed under that section. In England it has been held that it is not sufficient to constitute occupation for the purpose of the franchise that a son living with his parents should be allowed to sole use of the rooms without contract or payment of rent [*Macdonell v. Dickson*

(3)]. A similar view was taken in the case of *Gobinda Chandra Ganguly v. Kailash Chandra Sanyal* (4). Having regard to these authorities I am not prepared to dissent from the view taken by the lower Court that Plaintiff is not a person qualified to vote under sec. 15 (3) of the Bengal Municipal Act. I, however, hold he is qualified under cl. (2) and accordingly set aside the decree of the lower Appellate Court and restore that of the Munsif.

The Plaintiff is entitled to half his costs both in this Court and the Courts below.

J. N. R.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

JURY REF.: No. 49 OF 1921.

NEWBOULD, J.

C. C. GHOSE, J.

1921,

Heard,

3, November.

Judgment,

4, November.

EMPEROR

v.

SADHU CHURN DASS,
Accused.

Evidence Act (I of 1872), sec. 32—Dying declaration—Signs made in answer to question, if a verbal statement within the meaning of the section.

Where shortly after the deceased had received the injury a Magistrate proceeded to record her dying declaration in the hospital and although she could not speak she in answer to questions put to her pointed out the accused as the assailant.

Held—That the questions and answers taken together might properly be regarded as verbal statements made by a person as to the cause of her death within the meaning of sec. 32 of the Evidence Act and were therefore admissible in evidence.

QUEEN-EMPRESS v. ABDULLAH (1) followed.

This was a Reference made by the

(3) 16 R. 143.

(4) 15 C. L. J. 689 (1905).

(1) I. L. R. 7 All. 885 (1885).

(1) I. L. R. 38 Cal. 501 (1911).

(2) 2 O. W. N. 689 (1898).

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Sessions Judge of Pabna and Bogra (Babu Baroda Kumar Mukerjee), dated the 20th July 1921 as he disagreed with the verdict of the majority of the jury who found the accused not guilty of the charges framed against him.

The facts of the case will appear from the judgment.

Mr. Orr for the Crown.

Babu Santosh Kumar Bosu for the Accused.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference by the learned Sessions Judge of Pabna and Bogra. The accused Sadhu Charan Dass was put on his trial on the charge of having committed murder by causing the death of Dasi Sundari Dasya—his wife. He was also charged with having committed culpable homicide not amounting to murder and also with having caused grievous hurt with a dangerous weapon to the said Dasi Sundari Dasya. The jury by a majority of 3 to 2 found the accused not guilty on all the charges. The learned Sessions Judge being clearly of the opinion that it was necessary for the ends of justice to submit the case to the High Court has forwarded the record with recommendation that the accused should be convicted under sec. 302, I. P. C.

The main facts of the case are as follows :—On the night of the 14th of April last, the accused Sadhu Charan and his wife Dasi Sundari slept together in the northern room of their house. At 6 A.M., in the following morning, their servant Kokan Chander Das a boy of 12 years old came to open the shop of the accused's sleeping room, but the accused did not allow him to do so. After this, Kokan saw that the accused Sadhu was vomiting and Dasi Sundari asked Kokan to call

Sadhu's brother and mother and Kokan went to fetch them. A short time after Kokan had gone, two sellers of charcoal cakes who were passing by heard cries from the accused's room and saw Dasi Sundari coming out of the shop with a blood-stained *dao* in her hand and with her throat cut. She went towards the house of Babu Adhur Chunder Das—a pleader. Adhur Chunder Das was coming from his house and met her and she fell on the ground. Adhur Babu secured a *dooli* and sent her off to the hospital. The medical examination discloses that she had one incised wound about four inches long and one inch and a half deep in front of the neck, the upper portion of the larynx and pharynx being divided. There were also two other slight incised wounds on the front of her left hand. Two constables who happened to be passing by Sadhu's shop saw a collection of people on the road side. They entered the shop where Sadhu was seated and found blood-stains on Sadhu's person and abrasions on his fingers. Sadhu was arrested and taken to the Police station. The Sub-Inspector found the accused slightly dozing and sent him to the hospital for treatment where he was admitted as a suspected case of opium poisoning. The Doctor washed out the stomach and sent the washing to the chemical examiner who detected opium in the washings. At 2-45 P.M., that afternoon, Dasi Sundari made what is described as a dying declaration which was recorded by a Sub-Deputy Magistrate. She was unable to speak; but, in answer to the question put to her, she pointed out the accused as the person who had inflicted the wounds on her. At 3-15 that afternoon, the accused made a confession which was recorded by the same Sub-Deputy Magistrate. In that confession, the accused stated that he had cut the throat of his wife as she was of bad character. Dasi

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Sundari died at about 11 P.M., on the following day—the 15th of April.

The case against the accused rests mainly on the statement of his deceased wife and on his confession and there is also certain circumstantial evidence. On the circumstantial evidence, there can be no doubt that the deceased woman Dasi Sundari was cut in the room where she and her husband—the accused—had slept and that she and the accused were the only persons present at the time. The only question therefore, is whether, as is contended by the learned Pleader on behalf of the accused, the wounds were self-inflicted or whether they were inflicted by the accused. As regards this point, the main evidence, as already stated, consists of the woman's statement and the statement of the accused. Objection has been taken to the admission of both these statements. As regards the statement of the deceased, it is contended that it cannot be regarded as a statement admissible under sec. 32 of the Indian Evidence Act because it is not actually a statement as the woman was unable to speak and could only make signs in answer to the question put to her. This point was considered by a Full Bench of the Allahabad High Court in the case of *Queen-Empress v. Abdullah* (1). The facts of that case, so far as this point is concerned, cannot be distinguished from the facts of the present case. We are in entire agreement with the majority of that Full Bench which held that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of sec. 32 of the Evidence Act and were, therefore, admissible in evidence.

As regards the confession of the accused, we see no reason why it should be rejected *in toto* because the accused at the

time of making it was under the influence of a dose of opium. From the evidence of the Assistant Surgeon and of the Sub-Deputy Magistrate, we are satisfied that the condition of the accused was such that he could understand the questions put to him. Also the confession itself, though not very elaborate, shows that the accused was in full possession of his senses at the time he made it. There is one noticeable point as regards this and that is that, when the statement was read over to him, he made an important correction. In the answer বহু চরিত্র, বলিয়া তাহাকে কাটিয়াছি which was recorded by the Magistrate, he corrected the word বলিয়া to দেখিয়া making the answer mean that he cut her throat seeing that her character was bad. There seems to be no reason to suspect that there was any undue influence or inducement of any kind that led the accused to make this confession and we can see no reason why he should have stated that he had cut his wife himself unless he had actually done so.

As regards the statement of the deceased, it is not quite clear what was the question put to her as there are slight variations in the different accounts. From the statement recorded at the time, it would appear that three persons including the accused were made to stand in front of the woman and she was asked to point out which of the three persons had wounded her and she pointed to her husband. We think that it is to be regretted that the question was put in a form which suggested that the injury was homicidal. But nevertheless the fact that the injured woman shortly after she had received the injury showed her husband as having caused it is a very important piece of evidence against him. There are other minor points in the case which support the theory that the wound was inflicted by the husband and not by the wife her-

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self. Opinion of the medical officer is that the wound was homicidal and not suicidal. He has given his reasons for his opinion and though it cannot be taken as a conclusive proof, we think his opinion is entitled to some respect. It is true that the wound was inflicted from left to right which would be consistent with a suicidal wound. But this is not the only point that has to be considered in determining the nature of the wound. There is evidence that the accused about a week before the occurrence purchased a *dao*. To this we attach no importance whatever. A *dao* is a common domestic implement and there is no reason for thinking that it was bought with the intention of being used in the manner in which it was actually used. The fact that the woman had a *dao* in her hand at the time she left her house is not inconsistent with the case for the prosecution that the injuries were not self-inflicted. The marks found on the accused's fingers appeared to the Assistant Surgeon to be such as might have been caused by biting by teeth and the marks on the woman's hand would indicate that she tried to seize the weapon at the time she was attacked. If this was so, it is not improbable that she succeeded in wrestling away the *dao* from her husband's hand and ran away with it in the manner described. On the evidence the whole of which has been read by us, we are satisfied that the view taken by the learned Sessions Judge is a correct view and that the injury was caused to the woman by her husband—the accused. Having regard to the nature of the injury, there can be no other conclusion than that the person who inflicted it intended to cause death and that the offence committed is that of murder. The murder was undoubtedly committed as the accused said because he believed his wife to be of bad character. From the relations

between the parties on the previous night as described by their servant Kokan, it seems probable that the murder was committed suddenly on a quarrel arising between the husband and the wife after Kokan had left the house. Possibly, the accused suspected that his vomiting was caused by some poison administered by his wife and that led him to attack her. But this is purely a conjecture. What actually happened, the husband can alone say. But, we think, that, under the circumstances of the case, the lesser punishment provided for such an offence will be sufficient. We, therefore, convict the accused Sadhu Charan Dass under sec. 302, I P. C. of having committed murder by causing the death of his wife and sentence him under that section to transportation for life.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

VISCOUNT HALDANE.

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

1921,

Heard, 29, April.

Judgment, 9, June.

PALANIAPPA
CHETTIAR, Appellant,
v.
ALAYAN CHETTI and
ors., Respondents.

Hindu law—Southern India—Inheritance—Division amongst sons by patnibhag, a provable as custom—Custom proved as prevailing amongst Chettis of certain villages, if open to objection as unreasonable, as a local custom—Chettis, if Sudras.

Though division of the inheritance amongst sons by putrabhag (i.e., according to the number of sons) is now the recognised rule of Hindu law, there are traces of division by patnibhag (i.e., according to wives). Therefore, though the prevailing law is putrabhag, patnibhag may be proved to exist as a territorial, family or caste custom, specially in

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Southern India, where it is possible that the matriarchal theories of the earlier inhabitants may have led to the prevalence of this custom and caused difficulties in the way of its being extirpated by the Brahmins when they introduced the law of the Smritis in Southern India.

The Chettis are generally deemed to be Sudras.

Held, on the evidence, that the custom of patnibhag proved in the case was one of the particular class of Chettis who happened to dwell in, and probably were at the moment the only dwellers in, an area of seven villages; and such a custom could not rightly be described as a local custom, which it would be unreasonable to impose upon all persons dwelling in the area.

This was an appeal from a judgment of the High Court of Judicature at Madras, dated the 12th January 1915, modifying the decision of the Subordinate Judge of Madura, dated the 23rd December 1911.

The facts of the case will appear from the judgment.

Mr. F. A. MacQuisten, K. C. (with Mr. W. Ingram) for the Appellant.—There has been an agreement in accordance with the custom. Not a single instance has been proved against the custom.

[MR. AMEER ALI referred to sec. 13 of Evidence Act.]

Refers to *Temmakal v. Subhammal* (3), 8th Edn., Mayne's Hindu Law, p. 659 (foot-note), sec. 417. It is clear that this custom was not entirely unknown at any rate in certain parts of India. It may be that the custom was so general that it was not challenged. *Rama Nand v. Sargiani* (4).

There is evidence that in Chetti families who do not enter into any such arrangements, division of property among male children *per stirpes* is observed rather than division *per capita*. Strange's Hindu Law, Vol. II, p. 351. *Suraj Narain v. Iqbal Narain* (5) and *Girja Bai v. Sadashiv Dhundiraj* (6).

[SIR JOHN EDGE.—'The question is whether, if a child is born before actual partition, that child is entitled to a share.]

Mayne's Hindu Law, para. 472.

Mr. L. DeGruyther (with Mr. B. Dubé) for the Respondents.—Custom must be widely established and practically have the force of law, before it could be recognised as such. The Plaintiff avers one custom and then tries to prove another. The same custom must be strictly proved. Custom alleged is that during the lifetime of the father a partition is made among the sons.

[LORD PHILLIMORE.—Secs. 6 and 7 of the plaint do not mean that. Has this point been taken before?]

Yes. If one wife has three children and the other four, are the three sons to take $\frac{1}{2}$ of $\frac{7}{8}$ after assigning $\frac{1}{8}$ to the father? Here they say $\frac{1}{3}$. How did they get $\frac{1}{3}$ if the custom they allege is true?

Again the evidence is that the partition takes place during the lifetime of the father. The judgment is in accordance with neither the pleadings nor the evidence.

Vol. I, Strange's Hindu Law, p. 205, Vol. II, pp. 351 and 357.

Strange says: "Such unnatural division is allowed only among Sudras and even then, etc., etc."

Vol. II, Strange, p. 351. *Temmakal*

(5) L. R. 40 I. A. 40; s. c. I. L. R. 35 All. 80, 87; 17 C. W. N. 333 (1912).

(6) L. R. 43 I. A. 151; s. c. I. L. R. 43 Cal. 1081; 20 C. W. N. 1085 (1916).

(3) 2 Mad. H. C. R. 47 at p. 49 (1864).

(4) I. L. R. 16 All. 221 at p. 223 (1894).

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v. *Subhammal* (3). Beyond this case there is no decided case.

Mr. Dubé (following), custom is not necessary to support the "moopu." That is a very ancient part of Hindu law. See *Bannerji's Hindu Marriage and Stridhan*, pp. 136 and 138. *Mitakshara*, c. 2, sec. 11, para. 2. *Strange's Hindu Law*, Vol. I, p. 52.

The Tinneveli District there referred to adjoins the Madura District. The document (p. 51) was quite consistent with Hindu law. It was a breaking up of the family estate, *Ramalakshmi v. Sivanatha* (7). Of the four instances attempted to be proved the High Court found that only two were supported by evidence, neither shews that what was attempted to be divided was joint property.

Respondents proved two instances to the contrary.

Examination of agreements is no proof of custom, *Ram Nand v. Sargiani* (4).

Mr. MacQuisten, K. C., in reply referred to *Kokla v. Piari Lal* (8).

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—The Plaintiff in this case, the present Appellant, instituted a suit for partition of family property against his father and three half-brothers. During the pendency of this suit, a fourth half-brother was born, and all these are Defendants and Respondents. The right of the Plaintiff to have partition was not seriously questioned; the dispute concerns the extent of his share. The Subordinate Judge decreed to him a third share, but the High Court only gave him one sixth, on the theory that the father would have one share, the Plaintiff one,

and each of his four step-brothers, one. There is a possible third view that the Plaintiff should have one-fifth, his youngest born step-brother not being counted for a share, as having been born since the unequivocal statement by the Plaintiff of his desire to have partition. But in the circumstances, their Lordships do not find it necessary to pronounce upon this contention.

It is not disputed that, according to the ordinary Hindu Law of the *Mitakshara*, upon the death of the father and a subsequent partition, the five children of the two marriages would each take an equal share, and that if there were a partition during the father's lifetime, he would count as one with the five, so that the shares would be in sixes.

The Appellant has contended before their Lordships that by the usage and custom of the sub-caste to which he belongs, the children of each wife take as a unit and sub-divide their share among themselves, so that he as the only son of the first marriage would, if his father were dead, be entitled to half, and each of the four half-brothers to an eighth. Applying this principle to partition during the father's lifetime, he now claims to divide the property into three shares, and take one for himself, leaving one-third for his four half-brothers, and one-third for his father. In addition, before the property was divided he claimed the sum of Rs. 600 as a first charge in his favour on the whole property as representing the Moopu provided according to the caste custom for a first wife when her husband married a second time, and descending from her to her son or sons.

He did not in his plaint state the custom as to application on partition in the precise form in which he insisted upon it in his evidence, and in which it was found in his favour by the Subordinate Judge,

(3) 2 Mad. H. C. R. 47 (1864).

(4) I. L. R. 16 All. 221 at p. 223 (1891).

(7) 14 M. I. A. 570, 590 (1872).

(8) I. L. R. 35 All. 502 (1913).

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and it has been contended by the Respondents that this variation is fatal to his case.

The paragraphs of his plaint which relate to the partition are the following :—

“6. It is the longstanding custom obtaining among the people of the said caste, that any one of the said caste desiring to marry a second wife during the lifetime of the first wife gets the assent of the first wife for it and sets apart certain properties suitably to his position for the Jeshtabhagam of the male children by first wife born or to be born, and divides the properties, giving one share to all the male children together by the first wife on one side and a share equal thereto to all the male children together by second wife on the other, irrespective of one wife begetting a greater, and the other a less, number of male children.”

“13. According to the custom of caste, 1st Defendant should live with his children by his second wife. Plaintiffs have no objection to make proper arrangements for him out of the common properties till his death if he were to claim separate maintenance. Plaintiffs believe that Rs. 20 per mensem will be a sufficient allowance for him.”

He also relied in paragraph 7 upon an agreement executed by his father on the occasion of his second marriage, which he asserted was made in pursuance of the custom by which the father stipulated that he would give for the Jeshtabhagam, which seems practically the same thing as the Moopu, the 600 rupees, or their equivalent, and further stipulated to divide the remaining family property between the families of his two wives, giving each a moiety.

When it came to giving evidence it appeared that there were few known instances of partition during the father's lifetime, and that there was a lack of authority for the contention that the father was in such a case reduced to maintenance, as contended by the Plaintiff in paragraph 13 of his plaint. The evidence

offered mainly related to division after the father's death and to the caste custom applying in this event.

It appears to their Lordships that the case in the Court of first instance was conducted upon this footing, and that what the Court was asked to decide was whether the caste custom as to division after the father's death was or was not a proved and binding custom; and that the mode of partition during the lifetime of the father was treated as consequential upon the custom, so that the Plaintiff would be not precluded by the language of his plaint from proving the custom which would operate upon the death of the father by reason of his having carried his claim too far and endeavoured to reduce the father's interest upon a partition in his lifetime to one of maintenance only. The Subordinate Judge who had control of the matter and could have allowed an amendment in the pleading, if it were necessary, and if no injustice was thereby done, stated among others the following issues: “(1) Whether the custom set up by the Plaintiff is true and valid; (8) To what share is the Plaintiff entitled?” He found the first issue in the affirmative, and as to the eighth issue he said :—

“8th Issue:—The division is *as per* number of wives having sons. This will naturally be after the husband's death. In some cases to which Plaintiffs' exhibits relate, the husband has made a division retaining nothing to him. It is open to him not to claim a share, but where the son enforces a partition, it can never be said that the father is not entitled to a share. The number of shares will be taken to be the number of wives having sons *plus* the father, if he is alive. So that in this case the property will have to be divided into three equal shares, of which the first Plaintiff will be entitled to one-third, first Defendant one-third, and Defendants Nos. 2 to 4 and 24th, one-third, first Plaintiff is therefore entitled to one-third share.

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No doubt in their memorandum of appeal to the High Court the Defendants took the objection that "the custom set up in paras. 6 and 13 of the plaint could not be split up piece-meal, and that the whole must stand or fall together." But there is no trace in the judgment of the High Court of this view having been taken by the learned Judges in that Court.

Their Lordships therefore think that it was open for the Appellant to contend at their Bar, as he did, that the effect of the custom would entitle him on a partition effected during his father's lifetime to one-third.

This being so, it is necessary to look somewhat closely into the custom and to the evidence given in support of it, evidence which was accepted by the Subordinate Judge, but considered insufficient by the High Court.

That the two modes of division between sons are both known in Hindu law is unquestionable. There are appropriate words for them. When the division is by number of sons, it is called putrabhaga, when the division is according to wives it is known as patnibhaga. That putrabhaga is now the recognised rule of Hindu law is not to be questioned; but there are traces of the other view. In the appendix to Strange's *Hindu Law*, Vol. II, p. 351, the answer of the Pundit to whom the case concerning the Zillah of Chittore was referred, states that there is much dispute in books as to which is the true view of division; and the Pundit in that case proceeded to decide in favour of the rule of division by wives as being the law in the superior castes and the custom in the Vaisya and Sudra castes. The parties in the particular case, were, as it happened, Sudras. This decision, as a statement of the general Hindu law, was incorrect, as is pointed out by Mr. Colebrooke and Mr. Ellis in their notes on the case; but both

these writers agree that there might be such a custom, and that it would support the Pundit's opinion.

Strange himself, in the first volume of his book, the first edition of which was in 1825 and the second in 1830, speaks of the two modes—patnibhaga, or division by wives, and putrabhaga, or division by sons. He speaks of the first as an "unnatural division" and says it "is therefore allowed only among Sudras, nor among them but where there is a custom for it, which must, of course, be strictly proved, though it is said to prevail in the Southern territories of India as much did formerly the custom of gavelkind in Kent, thus to a certain extent but still in the Sudra class only superseding the law of the Sastras; and to this opinion the frequency with which references of the kind appear to have been made in the Courts of the company in the Peninsula seems to give countenance."

There being this divergence of thought, it is not wonderful, that in a land where there are so many customs, appropriate to certain areas of territory, families, or castes, though the prevailing law is that of putrabhaga there should be in certain cases a customary law of patnibhaga. As was observed by their Lordships in the case of the *Collector of Madura v. Mootoo Ramalinga Sathupathy* (1): "Under the Hindu system of law clear proof of usage will outweigh the written text of the law."

Mayne in his *Hindu Law* (Edn. 7), sec. 472, states the general law as to the right to shares which pass by survivorship as follows: "Each class will take *per stirpes* as regards every other class, but the members of the class take *per capita* as regards each other. This rule applies equally whether the sons are all by the same wife or by different wives."

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But in a note he adds:—

"In some families, however, a custom called *Patnibhaga* prevails of dividing according to mothers, so that if A had two sons by his wife B and three sons by C, the property would be divided into moieties, one going to the sons by B, and the other to the sons by C [*Sumrun v. Khedun* (2)]. This practice prevails locally in Oudh as evidenced by numerous *Wajib-ularz*, which I have seen in cases under appeal to the Privy Council."

The case before the *Sudder Dewany Adawlut* to which *Mayne* refers carries him but a little way. It was decided in 1814, and held that two instances of the alleged peculiar usage of the family in which distribution had been regulated by the number of wives were not enough to prove the custom and that the general Hindu law must prevail. However, it shows the existence of the idea.

Their Lordships have not been referred to any other authority for the existence of the custom in Northern India, but as regards Southern India, it seems fairly prevalent. Mr. Ellis, on page 357 of Vol. II of *Strange*, is quoted as speaking strongly of the prevalence of the custom in many parts of Southern India; and at page 167, a paper of his, written in 1812 is set out, in which he gives certain deviations by the Dravidian people from the ordinary Hindu law, the third of which is as follows: "The division of estates in case of one person having several families by different women among the families in equal shares without reference to the number of persons in each."

He explains all these deviations as showing that, though the Brahmins were "successful in extirpating the aboriginal religion of the South . . . they succeeded but partially in introducing the laws of the *Smritis*, and were obliged to permit many inveterate practices to continue."

It is possible that the matriarchal theories of the earlier inhabitants of Southern India may have led to the prevalence of this custom and caused the difficulty in the way of its being extirpated by the Brahmins. If this theory were sound it would naturally lead us to expect that the extirpation of the custom would be less effective in the lower castes.

In the case of *Temmakal v. Subhammal* (3), decided in 1864, it was held to be within the power of a guardian to refer to the panchayat the question which of the two principles of division should apply. Incidentally it may be mentioned that the panchayat held that the division should be by mothers.

Their Lordships therefore have to approach the evidence in this case with a knowledge that such a custom does exist, and was not an improbable one in the particular case, the parties coming from Southern India and belonging to the sub-caste of Chettis. The Chettis are generally deemed to be Sudras. The judgment in the High Court in this case describes the parties as Vaisyas, but apparently without any foundation for this in the evidence. The explanation for this may be, as was suggested at the Bar, that the Chettis now forming a prosperous class of the community are gradually claiming to be considered as Vaisyas; but whether they are Vaisyas or Sudras does not make much difference for the purpose of considering the probability of the custom.

The evidence offered for the Plaintiff was to the effect that in seven villages, inhabited by this particular class of Chettis, there were several peculiar customs, two of them relating to the case where a man marries a second wife in the life of the first. One custom is that the first wife is entitled to have some property

(2) 2 S. D. 116 (147) (1814).

(3) 2 Mad. H. C. R. 47 (1864).

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set aside for her maintenance which would descend to her son if she had one, and is then called Moopu. The other, that the property is upon the second marriage, notionally divided, one moiety going to the sons of the first wife, and the other to the sons of the second. The custom further appears to have put some restriction on the liberty of a second marriage, and these marriages seem infrequent where the first wife has already a living son. It appears to be usual to execute an agreement or settlement, with the consent of the relatives and Nagarathars or villagers, represented by the heads of houses, providing for the Moopu, and at the same time stating that the property will be or is divided in moieties between the two families. In this particular case, such an agreement or deed of settlement was produced and proved, and the Plaintiff did alternatively base his case upon this agreement. It was said, however, and for the present purpose it may be taken, that the document being unregistered, could not be enforced as a conveyance.

This document, however (Ex. C), is only one of a series of documents lettered to M, where provisions of a like character were made. The earliest is Ex. M, and goes back to 1864. In that case the first wife had a son, but she was considered to be incapable of carrying on household affairs. The document proceeds to show that her relations had been consulted and that with their consent and with the consent of the wife the husband was building a separate house for her and her son, arranging to mess with each wife in turn, to allow the first wife and her son to take certain lands and goods as stridhanam, and that the rest of the man's property was to be divided one moiety to the first wife and the other moiety to the second.

The last document is Ex. B, in 1900.

Here the first wife had no children, and it is provided that there should be certain lands for her Moopu, that should she have a male child, the land shall be appropriated for Moopu, which apparently means that her son would succeed to it, and that the issues of the two marriages should take the properties remaining after excluding the Moopu lands, in equal shares.

Various comments were made upon these documents by counsel for the Respondents. It was suggested that several of them were mere agreements, and that it did not follow that they had ever been carried out: that where there was no son by the first marriage, the father, if at the moment separate from his family, was dominus of his property, and could arrange to placate his first wife by providing for her possible issue: it did not however appear that the father was separate from the other members of his family and in some cases he certainly was not. Then it was suggested that the very existence of these agreements proved that there was no legal custom, that it was a mere social usage, and matter of propriety among the inhabitants of the seven villages that a partition of this kind should be made, and therefore it was occasionally made by people who wished to stand well with their neighbours. But on the other hand, the witnesses who speak to these documents, also give oral evidence to the effect that it was and had always been the custom in their villages that property should be divided in this way.

Two special settlements showing a different arrangement were produced by the Defendants, but the cases were special, being cases where a senior wife adopted the child of a junior wife, and provision might have to be made for preventing the adopted son from getting a double portion. One settlement was put in where

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there was only a conditional Moopu and no provision as to the sons. In this case there was no son by the first wife, and it was suggested that perhaps she had passed the age of probable child bearing. But with these exceptions there were no documents pointing to a different custom.

As to the oral evidence the case in favour of the custom largely outweighed the evidence against it. Except the Defendant, the father, no witnesses spoke without qualification to the negative. The father had executed this particular deed, and tried to get out of it by saying that it was not meant to be acted upon, but as a blind to induce his wife to consent to the second marriage. One of the Defendant's witnesses said, "I do not know of any instance of partition according to the number of sons in all my seventy-five years' experience. I do not even remember to have heard of division by the number of sons."

As regards the argument that the existence of the several agreements shows that without them the law would have been otherwise, their Lordships on consideration are not inclined to attach much importance to it. It would be necessary to fix the Moopu; and this being so, it would be convenient at the same time that the settler should state his recognition of the custom. At any rate, the inference from the existence of settlements, that settlements are required, is not enough to outweigh the very positive evidence of the custom.

In the High Court it was said that there was no evidence that among the Chettis where settlements were not made division of property among male children *per stirpes* was observed; but the learned Judges must have omitted to notice some of the positive evidence given on both sides. Weight was also attached by them to a document drawn up in 1898 called

an agreement between the Nagarathars of the seven villages, stating various matters of conduct and of business on which they desired to come to an agreement among themselves, such as that they would refer all their disputes to the Nagarathars and not have recourse to the magistrates or even to the village panchayat. One provision is thus expressed: "Should any wish to take a second wife during the lifetime of his first wife, he shall do so after informing the Nagarathars of his village and after making sufficient provision for maintenance of his first wife. Any violation of this rule shall be communicated by the Nagarathars of that locality to the Nagarathars of all seven villages who shall all assemble at Navinapatti, and the party shall abide by their decision." This no doubt does not state the custom now sought to be proved; but the document is not a record of laws, but a provision *de futuro* as to social conduct; and one of the witnesses says that the rules as to Moopu and division were so well-known that it was not necessary to express them.

The High Court have treated the case as if it were an attempt to set up a local custom, and say it would be unreasonable to impose it upon all persons dwelling in the area. But their Lordships conceive that the custom is one of the particular class of Chettis, who happen, it is true, to dwell in and probably are at the moment the only dwellers in the area of the seven villages.

It was pointed out for the Appellant that when the High Court came to consider the second matter, said to be proved by custom, namely the giving of Moopu, they thought that it was proved by the evidence oral and documentary. For the Respondents, it was said that an arrangement similar to Moopu was known to ordinary Hindu law. This may or may

PALANIAPPA CHETTIAR v. ALAYAN CHETTI.

not be so; but the High Court considered Moopu as established by custom, and the evidence for the one matter is substantially as strong as for the other.

There is a curious possible effect of the custom upon general Hindu law, which may have some day to be considered. Upon a partition during the father's lifetime, the general Hindu rule is that he gets a share equal to that of one son, which if the partition were by sons would be one-sixth. The effect, in the view taken by the Subordinate Judge, of a division patnibhaga is that the father counts for one share, and the children of each wife for one share, and so he gets one-third. Their Lordships, however, have not to determine this point. If the division is patnibhaga, the Plaintiff as the only son of the first wife is certainly entitled to one-third. Their Lordships think that he proved the custom of patnibhaga, and that he was entitled first to the Moopu (which the Respondents do not now question), and secondly to a third share of the residue.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court be reversed, and the decree of the Subordinate Judge restored and that the Appellant have the costs in the High Court and in the Privy Council.

Solicitor: Mr. D. Graham Pole for the Appellant.

Solicitor: Mr. H. S. L. Polak for the first five Respondents.

R. M. P.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD BUCKMASTER.

LORD CARSON.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

1921,

Heard, 28 and

31, October.

Judgment,

2, December.

MUSAMMAT

SASIMAN CHOW-
DHURAIN and ors.

Appellants,

v.

SHIB NARAYAN
CHOWDHURY and
ors., Respondents.

Hindu law—Will—Construction—Bequest to widows by Mithila Hindu—Interest given whether absolute or limited—"Malik," "malkiyat," meaning and effect of—Danger of construing one Will by reference to another—Translation of vernacular documents, challenged in the High Court—Proper procedure.

The term "malik," when used in a Will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred. But the meaning of every word in an Indian Will must always depend upon the setting in which it is placed, the subject to which it related, and the locality of the testator from which it may receive its true shade of meaning.

Where a Hindu governed by the Mithila School of Hindu Law purported by his Will to confer on his wives "full power and all proprietary rights (malkiyat) over all his moveable and immoveable properties":

Held—That the rights intended to be conferred included full rights of alienation.

It is always dangerous to construe the words of one Will by the construction of more or less similar words in a different

MUSAMMAT SASIMAN CHOWDHURAIN v. SHIB NARAYAN CHOWDHURY.

Will which was adopted by a Court in another case.

Proper procedure where the correctness of the official translation of a vernacular document is challenged in the High Court indicated.

This was an appeal from a judgment and decree, dated the 23rd February 1917 of the High Court, Patna, which affirmed a judgment and decree, dated the 9th April 1914 of the Subordinate Judge, Darbhanga.

Bachcha Chowdhury, a Hindu, governed by the Mithila School of Law died in 1865.

On 5th June 1864 he entrusted the management of his property to his wives by a document which is called a deed of "atainama."

On the death of Bachcha his widows succeeded to his property, and acquired by purchase other property after his death.

In 1910 the surviving widow Musammat Sasiman purported to alienate certain of these properties, and the suit was brought by the presumptive reversioners of Bachcha for a declaration that she had no power to effect any such alienation.

The trial Judge made a declaration in favour of the Plaintiffs and the decree of the lower Court was upheld by the High Court on appeal. The widow appealed from the decree of the High Court to His Majesty in Council. The facts of the case are fully set out in the judgment of the Board.

Mr. L. DeGruyther, K. C. (with Mr. H. N. Sen) for the Appellants contended that under the deed of June 1864 the widows took full proprietary rights. The expression "malik" is fully discussed in *Musammat Surajmani v. Rabi Nath Ojha* (5). *Mahomed Shumsool Hooda v.*

Shewukram (1). The estate that was intended to be conferred must be ascertained by looking at the whole Will. Under the Mithila Law in Behar a widow takes an absolute estate in moveables, so that by inheritance she would take an absolute estate in the moveables and a limited estate in the immoveables. In this case the testator intended her to take the same estate in both the moveables and immoveables.

[SIR JOHN EDGE referred to *Amarendra Nath Bose v. Shuradhani* (6) and *Fateh Chand v. Rup Chand* (7).]

Mr. DeGruyther, K. C.—I do not intend to try and construe one Will according to the words of another; the only point is the principle of construction to adopt.

[SIR LAWRENCE JENKINS.—It is sufficient for you to argue that the widows took a life estate with full powers of disposition. You need not contend that they took an absolute estate.]

Mr. DeGruyther, K. C. also referred to Mayne's Hindu Law, para. 627.

Mr. H. N. Sen following: The form of marriage here was the "asura" form, an unauthorised form, after which the wife had greater powers over property. Banerjee on Stridhan and Marriage, 1st Edn., pp. 333 and 408.

Mr. B. Dubé for the Respondents:—It was never the case that this was a life estate with a power of transfer. There is no power of alienation given here.

The real intention was that the widow should have only a widow's estate. The real meaning of the words in the Will are "The Musammats after my death have all and complete rights of a land-holder in every circumstance." The grant of the

(1) L. E. 2 I. A. 7 at p. 14 (1874).

(6) 14 C. W. N. 458 (1909).

(7) L. E. 43 I. A. 183; s. c. 21 C. W. N. 102 (1916).

(5) L. E. 35 I. A. 17; s. c. I. L. E. 30 All. 84; 12 C. W. N. 331 (1907).

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powers of a land-holder does not necessarily imply powers of alienation. Reference was made to *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (4), *Musammat Surajmani v. Rabi Nath Ojha* (5) and *Fateh Chand v. Rup Chand* (7). In each of these cases the words were different. Here the words do not increase but merely set out an estate which is no more than a widow's estate. The mention of part of the property as ancestral is an indication that the testator wished it to remain in the family. Under Hindu law there is a presumption that a wife has no power of disposal over a gift from her husband unless it is given to her in unequivocal terms. Reference was also made to *Mahomed Shumsool Hooda v. Shewukram* (1), *Janki v. Bhairon* (11) and *Shib Lakhan v. Tarangini* (12).

Mr. DeGruyther, K. C. in reply, referred to Mayne's Hindu Law, para. 664. The word "*malik*" does not give an absolute estate which cannot be cut down. The word "*heir*" in all these documents merely means successor, and the cases show that "*malik*" imports proprietorship which may be increased or limited by the context.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—The suit in which this appeal has arisen was brought on the 12th August 1912, in the Court of the Subordinate Judge of Darbhanga in Behar, by the Plaintiffs, who are the presumptive reversioners of Bachcha Chowdhury, deceased, who in his lifetime was a land-

holder in and a resident of Mouzah Subhankarpur in Tirhoot. Bachcha Chowdhury died in 1865. The principal Defendant is Musammat Sasiman Chowdhurain, who is the surviving widow of Bachcha Chowdhury. His other widow was Musammat Subast Chowdhurain; she died before suit. Bachcha Chowdhury died possessed of considerable moveable and immoveable properties, which, on his death, came into the possession of his widows. Part of Bachcha Chowdhury's immoveable property was ancestral, and the remainder of it had been purchased by him.

Musammat Subast, shortly before she died, executed, on the 12th February 1867, an instrument by which she bequeathed her half-share in the property to Musammat Sasiman.

The suit relates to the nature of the title of Musammat Sasiman to the immoveable properties of which her husband, Bachcha Chowdhury, had died possessed, and to the nature of her title to other immoveable properties which she and Musammat Subast, or one of them, acquired by purchase, it being alleged by the reversioners that those immoveable properties which were acquired by the Musammats were purchased by them with moneys saved from the usufruct of the immoveable properties of which Bachcha Chowdhury had died possessed. The object of the suit is to obtain a declaration that Musammat Sasiman neither had nor has any power to alienate any of the immoveable properties. Her right, if any, to alienate, except for necessity, depends upon the nature of her title. Musammat Sasiman and some of the other Defendants are Appellants here. The Plaintiffs and others of the Defendants are the Respondents.

The Hindu family to which Bachcha Chowdhury had belonged was governed

(1) L. R. 2 I. A. 7 (1874)

(4) L. R. 24 I. A. 76; s. c. I. L. R. 24 Cal. 834; 1 C. W. N. 387 (1897).

(5) L. R. 35 I. A. 17; s. c. I. L. R. 30 All. 84; 12 C. W. N. 231 (1907).

(7) L. R. 43 I. A. 183; s. c. 21 C. W. N. 102 (1916).

(11) I. L. R. 19 All. 133 (1896).

(12) 8 C. L. J. 20 (1908).

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by the law of the Mithila School of Hindu Law. Bachcha Chowdhury had separated from that family. The suit and this appeal depend upon the true construction of a testamentary document which, although described as an *atainama* (deed of gift), must be regarded as a Hindu Will, which Bachcha Chowdhury made on the 5th of June 1864. On behalf of the Plaintiffs it is contended that the Musammats took no greater interest in the immoveable property which had belonged to Bachcha Chowdhury in his lifetime than that allowed by the law of the Mithila to the widow of separated and childless husband. On behalf of Musammat Sasiman and those claiming under her it is contended that she and Musammat Subast took in that property under the Will a full, absolute, and heritable interest as proprietors, with full rights of alienation, and not merely the interest of Hindu widows under the law of the Mithila. If her contention as to the construction of the Will is correct, this suit must fail, and should be dismissed, and it would not be necessary to consider whether the immoveable properties which were purchased by the Musammats, or either of them, were purchased with moneys derived by them after their husband's death from the usufruct of the immoveable properties which were left by him.

According to the official translation of the Will of the 5th June 1864 (15th Jeth 1217, F. S.), Bachcha Chowdhury stated that :—

“I am Bachcha Chowdhury, resident of Mouza Subhankarpur, pargana Hati, zila Tirhoot.”

He then mentioned lands, some of which were ancestral lands, and others of which he had purchased, and stated, as was the fact, that :

“the ancestral and purchased properties are held and possessed by me, without

participation or interference on the part of any person”—
and proceeded :

“I, the declarant, have no issue; I have to obtain bliss in the next world, caused to be sunk several ponds, and have constructed a temple of Sri Murli Manohar Ji within the compound of my own house, at a considerable cost; I often remain ill, although at present I am well, still on account of having no child, and placing no certainty in life, I intend to go on pilgrimage to Kashi and other places. Therefore I, the declarant, of my own accord and free will, in order to avoid future disputes and to perpetuate my name, gave all the mouzas in entirety or in part, both ancestral and purchased, thika properties, and all goods, and assets, articles of copper and silver, elephant, oxen, she-buffaloes, and all other properties, to both my first and second wives, Musammat Subast Chowdhurain and Musammat Sasiman Chowdhurain, who after my death will be heirs to all the moveable and immoveable properties. It is desired that the said Musammats by holding possession and occupation of all the moveable and immoveable properties should pay the Government revenue thereof, and they should collect rent of, and keep watch over, the mouzas either in entirety or in part and scattered lands, orchard, oxen, and elephant, etc., and they should give alms and charities. The said Musammats, after my death, shall have, in every way, full power and all proprietary rights over all the moveable and immoveable properties, and they should, under the deed executed by me, pay, annually, Rs. 360 to Musammat Lachhmi Chowdhurain, widow of my brother Dulār Chowdhury, until her death for her maintenance, and by this deed the said Musammats should get their names recorded in the Government Sherista in the columns of proprietors. To this I, the declarant, neither have nor shall have any objection. I have, therefore, given into writing these few words by way of a deed of *Atainama* so that they may be of use when required.”

Their Lordships have quoted from the translation which was made of the Will by the official translator in India, but it is

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admitted on behalf of the parties to this appeal that the vernacular word which has been translated as "gave" should have been translated as "give."

The important words in the Will which, in the official translation have been rendered as giving to the Musammats after the testator's death "in every way, full power and all proprietary rights," are in the vernacular *Kuli o Kuh haqy Malkiyat har bal akhtear Mosammat Majkuran Ko Hasil hai*, and were understood by the Trial Judge as a declaration by the testator of the rights which the Musammats would have in the properties by inheritance after his death, and not as giving them any greater right in the properties, or implying that they should have any greater right, such as a right of alienation, except for necessity. The Trial Judge, by his decree of the 9th April 1914 made a declaration in favour of the Plaintiffs as reversioners. From that decree Musammat Sasiman appealed to the High Court.

The appeal to the High Court was heard by Chapman and Roe, JJ., and was dismissed by the decree of that Court of the 23rd February 1917. The leading judgment in the High Court was delivered by Roe, J., with which Chapman, J. concurred. Mr. Justice Roe was of opinion that in one respect the official translation of the Will of the 5th June 1864, was not quite accurate. In his judgment he said :—

"A more accurate translation of clause beginning 'The said Musammats after my death . . .' would be—'And in respect of all the moveables and immoveables after my death all and complete rights, the power of a landholder in every circumstance, accrues to the said Musammats.' The Urdu words which I have translated 'accrues' are 'hasil hai.' The Urdu word which I have translated 'of a landholder' is 'Malikiyat.' There is no such word in the language. Either the long *a* is a mis-

take or the word is a manufactured word. The point has been pressed at some length in the argument. It is not to my mind material. 'Milkiyat' or 'Malikiyat' would equally imply something appertaining to a Malik. The word 'Malik' means literally one who holds *mulk* or land. The translation with the amendments which I suggest represents the terms of the Deed."

There does not appear to their Lordships to be any material difference in that respect between the official translation and that suggested by Mr. Justice Roe. In their Lordships' view they mean the same thing. But if they materially differ, their Lordships hold that they must accept the official translation as correct. If that translation was incorrect there was ample opportunity to have it judicially corrected in the High Court after evidence as to its correctness or incorrectness had been taken and recorded in the Court in which the correctness of the official translation was challenged. The Judicial Committee has no means of enquiring into the correctness of an official translation of a document in a vernacular language of India, except by sending the case back to the Court with a direction to make such enquiry. It is not necessary to adopt that course in this case.

The following decisions, which it has been contended should guide their Lordships in construing this Will, have been cited in argument at the Bar. Their Lordships may observe that it is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will, which was adopted by a Court in another case. Their Lordships will briefly refer to the decisions which have been cited in the order of their dates.

In 1874, in *Moulvie Mahomed Shumsool Hooda v. Shewulgram* (1), which came on appeal from the High Court of Calcutta, and related to the construction of a testa-

(1) L. R. 2 I. A. 7 (1874).

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mentary document executed by Roy Hurnarain, a Hindu of Behar, the Board held that :—

“In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the distribution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate.”

The Board, having regard to those considerations, and to the document as a whole, all the expressions of which should be taken together, held that Hurnarain, in using the expression “except Musammat Ranees Dhum Kowar aforesaid, none other is or shall be my heir or malik,” intended that Ranees Dhum Kowar should take in his property “a life interest immediately succeeding him, without that interest being shared by her daughters or by any other person,” but that she should not take an absolute estate which she should have power to dispose of absolutely. The Board so decided, although it held that there were expressions in the document which, if they stood alone, showed that Hurnarain intended to make an absolute gift to Ranees Dhum Kowar. She was the widow of Hurnarain's deceased son, by whom she had had two daughters, who were living at the date of the document, and were named in it.

In 1875, in *Musammat Kollany Koer v. Luchmee Pershad* (2), which depended on the construction of a Hindu Will, and came to the High Court at Calcutta on appeal from a decree of the Subordinate Judge of Sarun in the Patna Division of Bengal, and related to the title to immoveable property, Romesh Chundar

Mitter, J., in his judgment, from which the other Judge who heard the appeal, Glover, J., did not dissent, held :—

“Therefore the primary matter for our consideration is the language of the Will, or the words in which it is expressed. As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and his daughter. He says that after his death they shall be (maliks), and his entire estate shall devolve upon them.”

Mr. Justice Mitter considered that there being nothing to show a contrary intention, the words which were used gave an absolute estate, and not merely the estate of a Hindu female, to the testator's widow and daughter.

In 1884, Sir Richard Garth, C. J., and Cunningham, J., in *Punchoo Money Dossee v. Troylucko Mohiney Dossee* (3), which was an appeal from a decree of Wilkinson, J., in a suit on the original jurisdiction side of the High Court at Calcutta, and related to a Hindu Will, held that the description in the Will of a devisee, a woman, as malik, did not necessarily import an intention of the testator that by his Will an absolute or proprietary interest should pass to her.

In 1897, in *Lalit Mohun Singh Roy v. Chukkur Lal Roy* (4), which was an appeal from a decree of the High Court at Calcutta, which had reversed a decree of the District Court of Hooghley in a suit which related to a Hindu Will, the Board held that the words of gift in the Will to the effect that the donee shall “become owner (malik) of all my estate and properties” conferred an heritable and alienable estate in the absence of a context indicating a different meaning.

In 1907, in *Musammat Surajmani v.*

(3) I. L. R. 10 Cal. 342 (1884).

(4) L. R. 24 I. A. 76 : s. c. I. L. R. 24 Cal. 834; I. C. W. N. 387 (1897).

(2) 24 W. R. (Civ. Balings) 395 (1875).

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Rabi Nath Ojha (5), in an appeal from a decree of the High Court at Allahabad which had affirmed a decree of the Subordinate Judge of Gorakhpur in a suit which related to a deed of gift or testamentary instrument, by which a Hindu gave to his first and second wives and daughter-in-law respectively certain immoveable property, reserving to himself a life interest, but directing that after his death they shall be "*malik na khud ikhtiyar* (owners with proprietary rights)," the Board said :—

"This case of *Lalit Mohan Singh Roy v. Chakun Lal Roy* (4) seems to adopt and apply the same view of the word '*malik*' as was taken in the Calcutta case of [*Kollany Koer v. Luchmee* [*Prshad* (2)], with the result that in order to cut down the full proprietary rights that the word imports, something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances, or is relied upon by the Respondents, but the fact that the donee (*Surajmani*) is a woman and a widow which was expressly decided in the last-mentioned case not to suffice. But while there is nothing in the context or surrounding facts to displace the presumption of absolute ownership implied in the word '*malik*,' the context does seem to strengthen the presumption that the intention was that '*malik*' should bear its proper technical meaning.

In *Musammat Surajmani v. Rabi Nath Ojha* (5), the Subordinate Judge of Gorakhpur, who tried the suit, had held that *Surajmani* took a Hindu widow's estate, and was incompetent to alienate it, and the High Court on the appeal held :—

"that under the Hindu law, as interpreted up to the present in the case of im-

moveable property given or devised by a husband to his wife, the wife has no power to alienate, unless the power of alienation is conferred upon her in express terms. The learned Vakil for the Appellants (*Surajmani* and others) contended that the words of the document we have to consider, and that we have cited above, did expressly convey such power, or at any rate that from them the intention of the executant to confer a power of alienation was evident. We cannot so hold."

In 1909, in *Amarendra Nath Bose v. Shuradhani* (6), Mookerjee, J., held that the expression "*malik like myself*" in a Hindu Will, as describing the position which the donee would occupy, was an indication that the testator intended the donee to take an absolute interest in the property devised, but that the word "*malik*" by itself would not indicate that more than a limited interest was intended to be conferred.

In 1916, in *Fatch Chand v. Rup Chand* (7), in an appeal from a decree of the High Court at Allahabad which had varied a decree of the Subordinate Judge of Saharanpur in a suit which related to the title to immoveable property, the Board held that the words in a Hindu Will "I have bequeathed Mauza Khudda to Musammat Gomi . . . after my death she shall be owner in possession (*malik-o-qukiz*) of the entire property in Mauza Khudda aforesaid," conferred full ownership upon the devisee, there being in the Will, in the opinion of the Board, nothing from which a contrary intention of the testator should be inferred.

It appears from some of the decisions to which their Lordships have referred and from the judgment of the Board in *Bhaidas Shivdas v. Bai Gulab* (8) (not

(2) 24 W. R. (Civ. Rulings) 395 (1875).

(4) L. R. 24 I. A. 76; s. c. I. L. R. 24 Cal. 834; 1 O. W. N. 387 (1897).

(5) L. R. 35 I. A. 17; s. c. I. L. R. 30 All. 84; 12 C. W. N. 231 (1907).

(6) 14 C. W. N. 1458 (1909).

(7) L. R. 43 I. A. 183; s. c. 21 C. W. N. 102 (1916).

(8) Since reported: L. R. 48 I. A. 187; s. c. 26 C. W. N. 129 (1921).

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yet reported) that the term "malik," when used in a Will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred, but the meaning of every word in an Indian Will must always depend upon the setting in which it is placed, the subject to which it is related, and the locality of the testator from which it may receive its true shade of meaning, and their Lordships can find nothing in the quoted decisions contrary to this view.

Mr. Justice Chapman, in his concurring judgment in this suit said: "As regards the word 'malik,' I trust that a word in such common everyday use in this part of the country (Behar) will not be converted by the decisions into a technical term of conveyancing." At least outside the Presidency towns of Calcutta, Madras, and Bombay, the art of conveyancing is but little understood in India, and the drafting of documents, including Wills, is generally of a very simple and inartificial character. See the observations of the Board in *Gokuldoss Gopaldoss v. Rambux Seochand* (9) and in *Syed Mahomed Ibrahim Hossein Khan v. Ambika Persad Singh* (10).

In the present case the term "malik" does not occur in the Will, but the word "malkiyat," which has been rendered in the official translation as "all proprietary rights," does, and Mr. Justice Roe, who did not accept the official translation as literally quite accurate, considered that a mistake in the spelling of the word had

been made, or that the word was a manufactured word. His opinion was that whether the intended word was "malkiyat" or "malikiyat" it meant the same thing—that is, the power of a landholder and he stated that "malik" means literally one who holds land. Their Lordships cannot construe the words of the Will giving to the Musammats, as the testator's heirs, all his moveable and immoveable properties, as interpreted by the declaration that after his death they "shall have, in every way, full power and all proprietary rights over all the moveable and immoveable properties," as meaning anything less than that they should hold in his properties full and complete rights as proprietors, including full rights of alienation, and that was, their Lordships infer, what the testator intended.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed with costs, and the suit should be dismissed with costs.

Solicitors: *Messrs. Watkins and Hunter* for the Appellants.

Solicitors: *Messrs. W. W. Boe & Co.* for the Respondents.

G. D. M. *Appeal allowed.*

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 2417 of 1919.

CHATTERJEA, J.

CUMING, J.

1921,

Heard, 12 and

17, August.

Judgment,

22, August.

PANNA LAL BISWAS,
Plaintiff, Appellant,

v.

PANCHU RUIDAS,
Defendant, Respondent.

Specific Relief Act (I of 1877), sec. 42—Suit for declaration of title to property after it was attached under sec. 146, Criminal Procedure Code (Act V of 1898)—Effect of Magistrate's attachment on the question of possession—Limitation Act (IX of 1908), sec. 23 and Arts. 120 and 142, period of limitation applicable to the case.

(9) L. R. 11 I. A. 126, 128 (1884).

(10) L. R. 39 I. A. 68; s. c. I. L. R. 39 Cal. 711; 16 C. W. N. 505 (1912).

PANNA LAL BISWAS v. PANCHU RUIDAS.

Plaintiff was dispossessed from some lands by the Defendant in April 1904 and in June 1904 the lands were attached under sec. 146, Cr. P. Code owing to disputes between the parties. Plaintiff brought the present suit for recovery of possession in May 1916. The lower Courts held that Plaintiff had title but that the suit was barred by limitation :

Held—That, the suit though framed as a suit for possession cannot be treated as such, because the possession was not with the Defendant, but with the Magistrate who was not and could not be a party to the suit. The article therefore applicable to the suit was Art. 120 of the Limitation Act and not Art. 142.

GOSWAMI RANCHOR LALJI v. SRI GIRDHARJI (1), RAJA OF VENKATAGIRI v. ISAKPALLI (2) and BROJENDRA KISHORE ROY v. SAROJINI ROY (3) referred to.

The position of the Magistrate was that of a stake-holder and during the continuance of the attachment the property was in legal custody which must be held to be for the benefit of the true owner, i.e., the Plaintiff. And the possession of the Magistrate being in law the possession of the true owner, the Defendant's possession was determined upon the Magistrate's taking possession under the attachment, in other words, the Plaintiff must be taken to have been restored to possession constructively on the date of the attachment. He therefore got a fresh starting point for purposes of limitation, and the case can be treated as one of continuing wrong within the meaning of sec. 23 of the Limitation Act. The suit was therefore not barred by limitation.

KHAGENDRA NARAIN v. MATANGINI (4),

(1) I. L. R. 20 All. 120 (1887).

(2) I. L. R. 26 Mad. 410 (1902).

(3) 29 C. W. N. 481 (1915).

(4) I. L. R. 17 Cal. 814 (1890).

BENI PRASAD v. SHAHZADA OJHA (5), RAO KARAN v. RAJA BAKAR ALI (6), RAMSAMY v. MUTHUSAMY (7), TRUSTEES, EXECUTORS AND AGENCY COMPANY v. SHORT (8), SECRETARY OF STATE v. KRISHNAMONI (9) referred to.

DEO NARAIN v. WEBB (10) commented on.

This was an appeal preferred on the 15th of November 1919 against the decree of Paresch Nath Roy Chaudhury, Esq., 2nd Additional District Judge of Zillah 24-Paraganas, dated the 9th of August 1919, affirming the decree of Babu Kumud Kanta Sen, Munsif, 2nd Court at Barasat, dated the 31st of July 1918.

The facts will appear from the judgment.

Dr. Jadu Nath Kanjilal for the Appellant.

Babus Traylokshya Nath Ghose and Jatindra Mohon Ghose for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for declaration of the Plaintiff's title to the land in dispute, and for recovery of possession of the same with mesne profits.

It appears that in consequence of disputes between the Plaintiff's predecessor and the Defendant the land was attached under the provisions of sec. 146, Criminal Procedure Code, on the 10th June 1904. The Plaintiff's mother brought a suit in 1904 for declaration of title to the land,

(5) I. L. R. 32 Cal. 856 (1905).

(6) L. R. 9 I. A. 99 : s. c. I. L. R. 5 All. 1 (1882).

(7) I. L. R. 30 Mad. 12 (1906).

(8) L. R. 13 A. C. 793 (1888).

(9) I. L. R. 29 Cal. 518 : s. c. 6 C. W. N. 617 (1902).

(10) I. L. R. 28 Cal. 86 : s. c. 5 C. W. N. 180 (1900).

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but that was dismissed on the ground that she was *benamdar* for her husband. The Plaintiff's father subsequently brought a suit in 1907, but it was withdrawn with liberty to bring a fresh suit. The Plaintiff then brought the present suit on the 2nd May 1916 alleging that the cause of action arose on the 10th June 1904, the date of the attachment.

It was found by the Court of first instance that Plaintiff had proved his title to the land, but that he was dispossessed in April 1904, i.e., some time before the date of attachment by the Criminal Court under sec. 146, and that he could not get a fresh start for limitation from the date of attachment and accordingly dismissed the suit on the ground that it was barred by limitation. On appeal also the learned Subordinate Judge held that the suit was barred by limitation.

It is contended on behalf of the Plaintiff-Appellant that the Plaintiff having been found to have title to the land, the legal possession of the land must be taken to have been with him during the time the land was in the possession of the Magistrate and that therefore the suit was not barred by limitation.

The suit as framed was one for recovery of possession. There is some divergence of opinion upon the question whether such a suit is one for possession, or for a mere declaration. The Allahabad High Court in *Goswami Ranchor Lalji v. Sri Girdharji* (1) held that it was the former and therefore governed by the 12 years' rule of limitation. In *Raja of Venkatagiri v. Isakpalli* (2), it was held, dissenting from the above view, that the suit was one for declaration and governed by Art. 120, and further that there was no continuing wrong. In our Court also, in the case of *Brojendra Kishore Roy v. Sarojini Roy*

(3), it was held that the actual possession being with the Magistrate and not with the Defendant, the suit could not be treated as a suit for possession, and was not governed by Art. 142 of the Limitation Act, and must be treated as one for declaration of title under sec. 42 of the Specific Relief Act. The learned Judges were of opinion that although the suit was brought more than six years after the attachment, the case could aptly be treated as one of continuing wrong within the meaning of sec. 23 of the Limitation Act, and was not therefore barred.

We agree with the view that the suit though framed as a suit for possession cannot be treated as such, because the possession is not with the Defendant, but with the Magistrate who is not and cannot be a party to the suit. The article therefore applicable to the suit is Art. 120 of the Limitation Act. Then the question is whether the case can be treated as one of continuing wrong within the meaning of sec. 23. In *Brojendra Kishore's* case (3), it was so treated, but there the Plaintiff was deprived of the enjoyment of the property by the Defendants attempted interference with his possession in consequence of which the Magistrate intervened and attached it, and there was a continuing wrong from the date of the attachment. There was in that case no dispossession prior to the attachment by the Magistrate, and the cause of action might be said to have accrued from day to day commencing from the date of the attachment. In the present case the Plaintiff was dispossessed in April 1904, i.e., about two months before the date of attachment which took place on the 10th June 1904. The cause of action therefore arose in April 1904, and the suit was brought not only more than six years after but 12 years after that date.

(1) I. L. R. 20 All. 120 (1897).

(2) I. L. R. 26 Mad. 410 (1902).

(3) 20 C. W. N. 481, 484 (1915).

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Unless therefore the Plaintiff acquired a fresh starting point from the date of attachment the suit would be barred under Art. 120, and even under Art. 142.

The position of the Magistrate no doubt was that of a stake-holder [see *Khagendra Narain v. Matangini* (4)] and during the continuance of the attachment the property was in legal custody which must be held to be for the benefit of the true owner [see *Beni Prasad v. Shahzada Ojha* (5) and *Rao Karan v. Raja Bakar Ali* (6)]. The question, however, is what was the effect of the attachment so far as the possession of the land was concerned. In the case of *Raja of Venkatagiri v. Isakpalli* (2), it was held that "for purposes of limitation the seizin or legal possession will during the attachment be in the true owner and the attachment by the Magistrate will not amount either to dispossession of the owner or to his discontinuing possession." In the present case, however, as stated above the Plaintiff the true owner was dispossessed of the land before the attachment. Limitation having commenced from the date of such dispossession, the fact of attachment would not give him a fresh start unless it had the effect of determining the Defendant's possession.

In the case of *Ramsamy v. Muthusamy* (7), it was held that where property is seized by a Magistrate, the property passed into legal custody and such custody is for the benefit of the rightful owner. It was further held that time begins to run against such owner only when by an erroneous order of the Magistrate the property is delivered to some other person, and it is so even when such other person

had been in wrongful possession previous to the seizure by the Magistrate. In that case the property seized was paddy, and the Magistrate made it over to the other party. We refer to the case for showing that notwithstanding the Defendant's wrongful possession previous to the seizure of the Magistrate, it was held that the possession of the Magistrate was for the benefit of the rightful owner and that a fresh cause of action arose when the property was delivered to the Defendant by an erroneous order of the Magistrate.

As pointed out in *Trustees, Executors and Agency Company v. Short* (8), if a person enters upon the land of another, and holds possession for a time and then without having acquired title under the statute, abandons possession the rightful owner, on the abandonment is in the same position in all respects as he was before the intrusion took place. Here there was no abandonment. Possession was taken out of him by the Magistrate who held it for the true owner. But at the date of the attachment, the Plaintiff was out of possession only for about two months, he had therefore a subsisting title at that time, and if the Magistrate's possession was constructive possession of the true owner, the case might come within the principle of the case of *Secretary of State v. Krishnamoni* (9), where it was held that dispossession by the vis major of floods had the same effect as voluntary abandonment. If the possession of the Magistrate was in law the possession of the true owner, as we think it was, the Defendant's possession was determined upon the Magistrate's taking possession under the attachment, in other words, the Plaintiff must be taken to have been restored to possession constructively on the date of the

(2) I. L. R. 26 Mad. 410 (1902).

(4) I. L. R. 17 Cal. 814, 819 (1890).

(5) I. L. R. 32 Cal. 356 (1905).

(6) L. R. 9 I. A. 99; s. c. I. L. R. 5 All. 1 (1882).

(7) I. L. R. 30 Mad. 12 (1906).

(8) L. R. 13 A. C. 793 (1888).

(9) I. L. R. 29 Cal. 518; s. c. 6 C. W. N. 617 (1902).

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attachment. He therefore got a fresh starting point, and that being so, the case would fall within the principle of *Brojendra Kishore's* case (3), and the case can be treated as one of continuing wrong under sec. 23 of the Limitation Act.

In the case of *Deo Narain v. Webb* (10), it was no doubt held that limitation having already commenced to run from the date of actual dispossession, the Plaintiff could not have a fresh start of limitation from the date of the subsequent attachment by the Criminal Court, but the effect of the attachment upon the question of possession so far as the true owner is concerned which was dealt with in the cases cited above does not appear to have been considered by the learned Judges.

The result is that the decrees of the Courts below are set aside, and the suit is decreed to this extent that Plaintiff's title to the land will be declared. Regard being had however to the frame of the plaints, we direct that each party bear its own costs throughout.

J. N. R. Appeal decreed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1918 of 1918.

CHATTERJEA, J.	ANNODA MOHAN ROY
CUMING, J.	[CHOWDHURY, Defendant,
1921,	Appellant,
Heard,	v.
11, August.	NILPHAMARI LOAN
Judgment,	OFFICE LD., Plaintiff,
19, August.	Respondent.

Transfer of Property Act (IV of 1882), sec. 41—Rights of a mortgagee purchaser in execution of a decree upon a mortgage by a widow in whose benami her husband had purchased the property—Rights of a purchaser in execution of a money decree against the husband—Such purchaser if estopped from

disputing the rights of a mortgagee purchaser—Ponâ fide transferee for value without notice, actual or constructive.

A Hindu husband purchased some lands in the name of his wife, who after his death mortgaged them, and the mortgagee purchased them at a sale held in execution of the decree obtained upon the mortgage. In the meantime the lands had been sold in execution of a money decree against the husband and taken possession of by the decree-holder purchaser. The mortgagee purchaser thereupon sued for a declaration that the lands belonged to the wife and for possession. The kabuliyats, toujis, counterfoil rent receipts stood in the name of the wife and the mortgagee had taken the mortgage in good faith after making proper inquiry:

Held—That so far as there were occasions for doing so, the husband held out his wife as the real owner, and therefore the purchaser in execution of the money decree against the husband, being the successor-in-interest of the said husband, was estopped from disputing the title of the wife and should not be allowed to defeat the rights of the mortgagee who is a transferee in good faith from the ostensible owner without notice, actual or constructive, of the husband's title. The mortgagee was not bound to inquire into the financial position of the husband at the time when the purchase was made in the name of the wife.

LUCHMAN CHUNDER GOSSAIN v. KALLI CHARAN SINGH (1) and SARAT CHUNDER DEY v. GOPAL CHUNDER LAHA (2) followed.

This was an appeal preferred on the 14th March 1918 against a decree of the Officiating District Judge of Zillah Rungpur (Mr. G. C. Sankey), dated the 17th August 1918, modifying a decree of the

(3) 20 C. W. N. 481 (1915).

(10) I. L. R. 28 Cal. 86 : s. c. 5 C. W. N. 180 (1900).

(1) 19 W. R. 292 (1873).

(2) I. L. R. 20 Cal. 296 (P. C.) (1892).

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Subordinate Judge of that District (Babu Debendra Nath Banerjee), dated the 30th June 1917.

The facts of the case are briefly as follows :—One Krishna Nath purchased some lands in the *benami* of his wife Anandamoyee and died shortly after leaving Anandamoyee his widow and a daughter. The Respondents took a mortgage of the lands from Anandamoyee and her daughter, and at a sale held in execution of the decree obtained upon the mortgage purchased them on the 6th November 1913. In the meantime the lands were attached in execution of a money decree at the instance of a creditor of Krishna Nath and were sold and purchased by him on the 5th June 1905. He obtained possession of the lands and continued in possession. The Respondents after purchasing the lands in execution of their mortgage decree were resisted in taking possession by the aforesaid purchaser in execution of the money decree. Hence this suit was brought by the Respondents for a declaration that the lands belonged to Anandamoyee and for possession of the same. The first Court gave a decree to the Plaintiffs-Respondents for possession subject to the right of the Defendant No. 1 (purchaser in execution of the money decree) to redeem the mortgage. On appeal the District Judge held that the Defendant No. 1 was estopped from denying that the lands belonged to Anandamoyee and gave a decree to the Plaintiffs for possession of the lands. Against that decision the Defendant No. 1 preferred the present appeal to the High Court.

Babus Gunada Charan Sen and Jyotish Ch. Sircar (for Babu Bimal Ch. Das) for the Appellant.

Babus Mohendra Nath Roy and Atul Ch. Gupta for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The lands in dispute in this case originally belonged to two ladies. They executed a *kobala* in favour of one Anandamoyee the wife of one Krishna Nath Ghose in January 1898. Shortly after, Krishna Nath died leaving Anandamoyee his widow and a daughter Rohini who is no party to the suit.

The Plaintiffs who are the Respondents before us, took a mortgage of the lands in dispute from Anandamoyee the widow of Krishna Nath Ghose and their daughter Rohini Dassi on the 23rd June 1902, and at a sale held in execution of the decree obtained upon the mortgage purchased them on the 6th November 1913. In the meantime the lands were attached in execution of a money decree at the instance of a creditor of Krishna Nath. Anandamoyee preferred a claim on the ground that it was her *stridhan* property which however was disallowed. The lands were accordingly sold in execution of the money decree and purchased by the Defendant No. 1 on the 5th June 1905. He obtained possession of the lands and continued in possession. The Plaintiffs having purchased the lands in execution of his mortgage decree, were resisted in taking possession by the Defendant No. 1. This suit was accordingly brought by the Plaintiffs for a declaration that the lands belonged to Anandamoyee, and for possession of the same. Subsequently the Plaintiffs applied for amendment of the plaint to the effect that if the lands were found to belong to Krishna Nath and not to Anandamoyee, the latter had legal necessity to mortgage the lands.

The Court of first instance found that the lands were purchased by Krishna Nath with his own money in the *benami* of Anandamoyee, that the money was raised by her upon the mortgage for legal

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necessity, and as the Defendant No. 1 was not made a party to the suit brought by the Plaintiffs on the mortgage, that Court gave a decree to the Plaintiffs for possession subject to the right of the Defendant No. 1 to redeem the mortgage.

On appeal the learned District Judge agreed with the Court of first instance in holding that the lands were purchased by Krishna Nath in the *benami* of his wife Anandamoyee, but he was of opinion that the Defendant No. 1 was estopped from denying that the lands belonged to Anandamoyee, and accordingly reversed the decree of the Court of first instance, and gave a decree to the Plaintiffs for possession of the lands. The Defendant No. 1 has appealed to this Court.

The first question for consideration is whether the Defendant No. 1 was estopped from disputing the absolute title of Anandamoyee to the lands. The ground upon which the learned District Judge found the question of estoppel in favour of the Plaintiffs was that Krishna Nath by purchasing the property in the name of his wife had put her forward as the ostensible owner with an intention to deceive any person who had a claim to his estate, and the Plaintiffs having but the money on mortgage on the strength of the *kobala* which stood in her name, the Defendant No. 1 as the successor-in-interest of Krishna Nath was estopped from denying that the property was the *stridhan* property of Anandamoyee. The learned Judge relied upon the case of *Luchman Chunder Gossain v. Kalli Charan Singh* (1) in support of the view taken by him.

The question is whether the learned Judge was right in the view he took of the case.

We think that the case falls within the principle enunciated by the Judicial Committee in the case of *Luchman Chunder* (1) 12 W. R. 202 (1878).

Gossain v. Kalli Charan Singh (1). There the property was purchased by the father in the name of the mother and their Lordships observed:—

“That was a misrepresentation of the father by means of which the widow after his death was enabled to sell the property. It was said that the minor would not be bound by the acts of the father before his death. Suppose the father had actually sold this property to the mother and had made a misrepresentation by a deed of sale, would not the minor son have been bound by that deed, although the father might have some secret understanding with the mother that it was purchased in her name *benami* for the father? It appears to their Lordships that there was a misrepresentation by the father in allowing the property to be taken by the wife under a deed of sale, representing that the purchase-money was her *stridhan*, and in all his acts, both public and private, during his lifetime, representing that the property was his wife's. After that representation on the part of the father, his heirs were no more entitled to recover than the father would have been in his lifetime. The heirs were as much bound by the misrepresentations made by the father, as the father would have been if the wife in his lifetime had actually sold the property to a *bona fide* purchaser. In such case the father could not have recovered the property from the purchaser; and it appears to their Lordships that the minor claiming by descent from the father is equally bound by those misrepresentations, and that he cannot, as heir to the father, set up that that property belonged to the father, when the father could not in his own lifetime, under similar circumstances, have set up that the property belonged to him.”

This case was considered in the case of

(1) 12 W. R. 202 (1878).

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Sarat Chunder Dey v. Gopal Chunder Laha (2). In that case, their Lordships observed at page 305: "In the case of *Luchman Chunder Gossain v. Kalli Charan Singh* (1) a similar state of facts occurred, for there, as here, the mortgage was granted by the widow after her husband's death. But in that case the husband, Ubotar Singh, had never himself held the title to the property there in question in his own name. The title was derived from a third party and taken directly to his wife, and, according to the narrative of the conveyance, the price was paid from her *stridhan* fund. He was never in possession of it. His wife took possession and retained it, and, as stated by the High Court in their judgment in the present case, by a long series of public acts and declarations, he did all he could to cause his wife to bear towards the public the character of owner. There were thus continuous declarations and acts by the husband calculated to cause any person dealing with the widow to believe that she was and had been the proprietor in her own right and in possession of the property purchased."

In the present case, as in *Luchman Chunder's* case (1), Krishna Nath the husband of Anandamoyee had never himself held title to the property in his own name. The title was derived from a third party and taken directly to his wife.

It was contended before us that in *Luchman Chunder's* case (1), the Judicial Committee relied not only upon the fact that the *kobala* was taken in the name of the wife, but also upon the fact that there were continuous declarations by the husband that the property belonged to the wife. In the present case there was no mutation of names, but the property here was *lakheraj*, and there could be no muta-

tion of names either in the Collectorate or in the Zemindar's *sherista*. The *kabuliyats*, *toujis*, and counterfoil rent-receipts stood in her name, and it does not appear that there was any occasion for Krishna Nath making any other declarations that the property belonged to Anandamoyee. But the case does not rest merely upon the facts stated above.

The case was remanded for a finding upon the question whether the Plaintiffs in this case when they took the mortgage did so in good faith without any notice (actual or constructive) of the title of Krishna Nath to the property. Actual notice the Plaintiffs admittedly had none. The learned Judge has no doubt held that they had constructive notice; but in the first place he has misconstrued the document upon which he relies in support of his finding, and secondly, the facts found do not justify the inference that there was constructive notice. He finds that an officer of the Plaintiff Loan Office went to the village, looked at the *kobala* and other papers, namely, certain *kabuliyats*, *toujis* and rent-receipt counterfoils and found that they were given in Anandamoyee's name. The learned Judge, however, was of opinion that the *kobala* shows that Anandamoyee's husband paid part of the price of the property—about Rs. 250-7 as., which the vendor owed him at the time. That clearly is based upon a misconstruction of the *kobala*. The *kobala* states that the price of the property was fixed as Rs. 1,500 out of which Rs. 518-12 as., which was due to one Mahammad Mafat-ulla was to be paid by the vendee, that, out of the balance, *viz.*, Rs. 981-4, which was received through her husband Krishna Nath, Rs. 250-7 as. was paid to him (Krishna Nath) in satisfaction of the debt due under his decree to him, and that the balance Rs. 730-13 as. was received by the vendor in cash. This does not show that

(1) 19 W. R. 292 (1873).

(2) L. R. 20 Cal. 293 (P. C.) (1892).

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Anandamoyee's husband paid part of the consideration for the *kobala*.

Then, the learned Judge points out that Krishna Nath had previously purchased a share in the property, and the learned Judge says that the Plaintiff Loan Office should have inquired into Krishna Nath's financial position at the time when the purchase was made in the name of his wife.

We do not see, however, why it was necessary for the mortgagee to inquire into the financial position of Krishna Nath. We do not think that the facts found lead to the inference that the Plaintiffs had constructive notice of the title of Krishna Nath.

Krishna Nath purchased the property in the name of his wife directly from a third party, he himself acting as the agent of the wife in the transaction; and so far as there were occasions for doing so, he held her out as the real owner. The learned Judge finds that the Plaintiff made enquiries though he was in error in holding that Plaintiff should have enquired into the financial position of Krishna Nath. We think that, in these circumstances, the Defendant who is the successor-in-interest of Krishna Nath should not be allowed to defeat the right of the Plaintiffs who are transferees in good faith from the ostensible owner Anandamoyee without notice of Krishna Nath's title. As stated above we are of opinion that upon the facts found the learned Judge is not right in holding that the Plaintiff Company had constructive notice of the title of Krishna Nath.

In the result, the appeal is dismissed with costs.

J. N. R. *Appeal dismissed with costs.*

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORDER

No. 203 OF 1920.

BASANTA KUMAR
ADAK, Decree-holder,
Appellant,

v.

SM. RADHA RANI
DASI and anr.,
Judgment-debtors,
Respondents.

NEWBOULD, J.

CUMING, J.

1921,

3, March.

Civil Procedure Code (Act V of 1908), Or 34, r. 2, cl. (c)—Decree of first Court allowing redemption within six months of the date of the decree—Appeal by the judgment-debtor against the decree and cross-objection by the decree-holder both dismissed—"Six months' time," whether to run from the date of the original decree or of the Appellate decree.

A decree declared the right of the decree-holder to recover possession of certain property subject to the right of the judgment-debtor to redeem on payment of a certain sum within six months of the date of the decree. Against that decree, the judgment-debtor appealed and the decree-holder filed a petition of cross-objection, but both were dismissed and the decree of the first Court confirmed. Then within six months of the date of the Appellate decree but more than six months after the date of the original decree, the judgment-debtor paid into Court the sum necessary for the redemption. The decree-holder applied for execution of the decree:

Held—That where in a suit on a mortgage the decree of the Appellate Court simply dismisses the appeal leaving the decree of the first Court untouched, the time for redemption runs from the date of the decree of the first Court.

BHOLANATH BHUTTAGHARJEE v. KANTI CHUNDER MOOKERJEE (1) and FAIZUDDI SIBDAR v. ASIMUDDI BISWAS (2) followed.

(1) I. L. R. 25 Cal. 311 (1907).

(2) 11 C. W. N. 679 (1907).

BASANTA KUMAR ADAK v. SM. RADHA RANI DAS.

RAMASWAMI KONE v. SUNDARA KONE (3) and other cases referred to.

This was an appeal against the order of L. R. Fawcus, Esq., Additional District Judge of Howrah in Zillah Hooghly, dated the 15th of March 1920, affirming the order of Babu Jitendranath Sen, Munsif, 3rd Court at Howrah, dated the 26th of July 1919.

The facts will appear from the judgment.

Babu Manmatha Nath Ray for the Appellant.

Rabu Atul Chundra Dutt for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against an order dismissing an application for execution. The decree-holder obtained a decree declaring his right to recover possession of certain property subject to the right of the judgment-debtor to redeem on payment of a certain sum within six months of the date of the decree. Against that decree, the judgment-debtor appealed and the decree-holder filed a petition of cross-objection. Both the appeal and the cross-objection were dismissed and the decree of the first Court was confirmed. Then within six months of the date of the Appellate decree but more than six months after the date of the original decree, the judgment-debtor paid into Court the sum necessary for the redemption. The only question for determination in this appeal is whether the lower Courts were right in holding that the judgment-debtor was in time. In our opinion, on the authority of the decisions of this Court, we must hold that this appeal must succeed. In the case of *Bholanath Bhattacharjee v. Kanti Chunder Mookerjee* (1), the learned Judges

held that where in a suit on a mortgage the decree of the Appellate Court simply dismissed the appeal leaving the decree of the first Court untouched, the time for redemption would run from the date of the decree of the first Court. In that case, Maclean, C. J., decided the appeal on another ground. But, in a later case, *Faizuddi Sirdar v. Asimuddi Biswas* (2), the same learned Chief Justice expressly stated when the same point arose again that he entirely agreed with the view taken by Mr. Justice Bannerjee in the case of *Bholanath Bhattacharjee v. Kanti Chunder Mookerjee* (1) above referred to. In that case, the decree of the lower Court directed that the Defendants might pay up the mortgage decree of the Plaintiffs within six months and retain possession of the land and that, in default, the Plaintiffs would get *khas* possession and it was held that the six months' time allowed to the Defendants should run from the date of the first Court's decree and not the date of the Appellate Court's decree. This view is also supported by the decision of the Madras High Court in the case of *Ramaswami Kone v. Sundara Kone* (3). In that case also, the objection taken on behalf of the Respondent in the present case is met; for at p. 32 of the report of that case it was held that it was not open to the learned Judges to construe such a decree in one way when the condition was imposed on the Respondent in the appeal and in another way when it was imposed on the Appellant. This, we think, is the right view and is in no way affected by the fact relied on by the Respondent that the decree-holder filed a petition of cross-objection denying that the judgment-debtor had any right of redemption. On behalf of the Respondent, reliance is

(1) I. L. R. 25 Cal. 211 (1907).

(2) I. L. R. 31 Mad. 28 (1907).

(1) I. L. R. 25 Cal. 211 (1907).

(2) 11 O. W. N. 679 (1907).

(3) I. L. R. 31 Mad. 28 (1907).

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placed on the case of *Satwaji, Balajirao Deshamukh v. Sakharilal Atmaramshet* (4). In that case, we are unable to understand the reasons given for distinguishing the case of *Bholanath Bhattacharjee v. Kanti Chunder Mookerjee* (1) already referred to. The decision in that case is contrary to the decisions of the Calcutta cases which we are bound to follow. It is also contended on behalf of the Respondent that the decree-holder should have raised the objection to the redemption when he received notice of the payment of the money into Court. It was open to the decree-holder to ignore that payment and apply for execution of the decree on the ground that the payment was not made within the time fixed for the redemption of the property. Taking this view, we decree this appeal and set aside the decisions of the lower Courts. The objection made by the judgment-debtor in the execution proceedings is overruled and the execution will proceed at the instance of the decree-holder according to law. The Appellant will get his costs in this Court as well as in the Courts below. We assess the hearing-fee in this Court at one gold mohur.

J. N. R. Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION]

Full Bench Reference

No. 1 of 1921.

IN

CR. REV. NO. 518 OF 1921.

SANDERSON, C. J.	} RAM SAGAR MONDAL, 2nd party, Petitioner, v. ALEK NASKAR, 1st party, and anr., 2nd party, Opposite Parties.
TEUNON, J.	
RICHARDSON, J.	
NEWBOULD, J.	
C. C. GHOSE, J.	
1922,	
16, January.	

Criminal Procedure Code (Act V of 1898), sec. 435—Obstruction of way used by public—Claim of

(1) I. L. R. 25 Cal. 311 (1897).

(4) I. L. R. 30 Bom. 175 (1914).

right made in good faith in answer to conditional order does not oust Magistrate's jurisdiction—Magistrate if can allow objector time to establish claim by civil suit when such claim not well-founded though made in good faith—Proceedings if can be continued when objector does not go to Civil Court within time allowed or fails there.

Per CURIAM:—When in proceedings under sec. 133, Cr. P. C., arising out of an alleged abstrusion of a way used by the public, the Defendant sets up a claim of right which is found by the Magistrate to be made in good faith, the Magistrate's jurisdiction is not thereby ousted.

Per GHOSE, J.—But if the Magistrate finds that there is a real or substantial question to be tried out between the parties he ought, in the exercise of his discretion, to stay his hands and not proceed any further after making the conditional order under sec. 133.

Per SANDERSON, C. J.—The Magistrate, if he does not think the claim well-founded though he considers it made in good faith, may in his discretion allow the Defendant a reasonable time to assert the claim by a civil suit and if he does not go to the Civil Court within such time or fails there the Magistrate has jurisdiction to continue the proceedings under sec. 133, Cr. P. C.

Per TEUNON, J.—In the exercise of his discretion the Magistrate may take the course indicated above. Sub-sec. (2) of sec. 133 does not however appear to favour any reference of parties to Civil Court.

Per RICHARDSON and NEWBOULD, JJ.—The Magistrate may, if he does not think the claim well-founded though he considers it made in good faith, allow the Defendant a reasonable time to assert the claim by a civil suit.

Per GHOSE, J.—The Magistrate is entitled to continue the proceedings where the objector shows nothing more than a mere belief in the claim of right put for-

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ward. He is not entitled to direct the objector to go to the Civil Court because in his opinion the claim of right cannot be ultimately maintained.

Per SANDERSON, C. J. and TEUNON and GHOSE, JJ.—The case of BELAT ALI v. ABDUR RAHIM (4) was on the facts of that case rightly decided.

This was a Rule granted on the 21st June 1921 against an order of the Sub-Divisional Magistrate of Alipur (Mr. P. Sen), dated the 25th May 1921 in proceedings under sec. 133, Cr. P. C.

The Rule came on for hearing before the Criminal Bench which, by its order dated the 23rd August 1921, referred the case to a Full Bench.

The facts of the case will appear from the judgment.

The ORDER OF REFERENCE was as follows :—

NEWBOULD and SUMRAWARDY, JJ.—This rule is directed against an order passed by the Sub-Divisional Magistrate of Alipore in proceedings under sec. 133 of the Code of Criminal Procedure. Ali Naskar and others instituted proceedings under that section against the Petitioners before us, Ram Sagar Mondal and another person, alleging that they had obstructed a public road. Ram Sagar Mondal showed cause denying the existence of the alleged public road and setting up a claim to the land in dispute. On the 15th April last, the Magistrate passed the following order :—

"I have heard the Vakils for both the parties. The second party contend that in a criminal case I held that there was no pathway, so the conditional order ought to be discharged. The Vakil for the first party has urged that this was a case of assault and my finding ought not to bind the present parties. I have

given a careful consideration to the arguments advanced. I am of opinion that the claim of the second party though not substantiated is not mere pretence and is not raised to oust the jurisdiction of this Court but it is raised *bonâ fide*, so I think that following the ruling laid down in *Manipur Dey v. Bidhu Bhusan Sarkar* (1), I will give the second party a chance to go to the Civil Court. The second party should file a case within reasonable time and I allow them time till 25th May 1921 to do so, and if the second party does not go to the Civil Court within this time, the trial will be continued. Put up on 15th May 1921." The Petitioner did not go to the Civil Court and on the 25th May, the Magistrate refused to reconsider his order and directed witnesses to be summoned. On behalf of the Petitioner it is contended that on the Magistrate's finding that the Petitioner's claim was *bonâ fide* his jurisdiction under sec. 133, Criminal Procedure Code, came to an end and he was not justified in continuing these proceedings, because the Petitioner failed to bring a suit in the Civil Court. On behalf of the Opposite Party it is contended that the finding that the claim, though made *bonâ fide*, was not substantiated, justifies the Magistrate's order which is supported by decisions of this Court. There is ample authority for the general proposition that in proceedings of this nature a *bonâ fide* claim of right raised by the person who is alleged to have obstructed a public way ousts the Magistrate's jurisdiction. This rule is clearly stated in *Queen-Empress v. Bissessur Sahu* (2) which has been frequently followed. But in the case of *Lukhee Narain Banerjee v. Ram Kumar Mukher-*

(1) I. L. R. 42 Cal. 158 : s. c. 18 C. W. N. 1086 (1914).

(2) I. L. R. 17 Cal. 562 (1890).

(4) 8 C. W. N. 143 (1903).

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jee (3) a distinction is drawn at p. 578 between a claim of right which the Magistrate thinks well-founded and claim of right which the Magistrate does not think well-founded but considers to have been made *bonâ fide*. It was laid down that in the former case the Magistrate will take no further proceedings but in the latter he should allow the Defendant an opportunity of asserting his claim by Civil proceedings and that if he does not go to a Civil Court within a reasonable time or fails there the Magistrate will proceed.

We doubt the correctness of this view of the law. It seems to us that once the Magistrate has found that claim of right is made in good faith by the Defendant he should stay proceedings under sec. 133, C. P. C. We think it would be a waste of his time for him to enquire whether the Defendant's claim is well-founded when he has no jurisdiction to decide the question of right. Also it appears to us unfair that a person in possession of land under a *bonâ fide* claim of right should be compelled by the Magistrate's order to be the Plaintiff in a civil suit to maintain his right. A Magistrate might have doubts as to the *bonâ fides* of the Defendant's claim and give him an opportunity of bringing a suit in order to prove his good faith but that is quite a different matter from compelling the Defendant to institute a suit after the Magistrate has held that his claim is made *bonâ fide*.

In *Lukhee Narain's* case (3), it was found that the Magistrate was justified in coming to the conclusion that the claim of right was not *bonâ fide* raised and his order directing the removal of the obstruction was upheld. But though the remarks are an *obiter dictum* they have been followed and effect given to them in at least one decision of this Court, *Belat Ali*

(2), I. L. R. 15 Cal. 504 (1883).

v. *Abdur Rahim* (4). In that case the same point arose as arises in the present case and the learned Judges, who upheld an order of the Magistrate similar to that passed in the present case, cited the remarks in *Lukhee Narain's* case (3) in support of their decision. It is therefore necessary to make a reference to a Full Bench to give effect to our opinion that the Magistrate's order is wrong.

It is not necessary to cite a large number of cases in which the broad principle, that a *bonâ fide* claim of right ousts the Magistrate's jurisdiction under sec. 133, C. P. C., has been affirmed. In many of them *Lukhee Narain's* case (3) has been relied on in support of this principle without any reference to the exception introduced by what may be called the doctrine of two degrees of *bonâ fide*. In one of them *Nasiruddi v. Akiluddi* (5), Prinsep, J., who was one of the Judges who decided *Lukhee Narain's* case (3) held that the Magistrate's order should be set aside on a finding that the plea was raised in good faith without any reference to the distinction between such a plea that is well-founded and one that is not well-founded. None of the other High Courts in India appear to have made such a distinction. It will be sufficient to cite those cases of this Court in which this distinction has been considered. In *Mukanda Lal Dey v. Haribole Saha* (6), Banerjee and Stevens, JJ., at the conclusion of their judgment reserved their opinion on this point. *Manipur Dey v. Bidhu Bhusan Sarkar* (1) is the case relied on by the trying Magistrate. There, though Sharfuddin, J., in his judgment held that

(1) I. L. R. 42 Cal. 158: s. c. 18 C. W. N. 1046 (1914).

(2) I. L. R. 15 Cal. 504 (1883).

(4) 5 C. W. N. 143 (1903).

(5) 3 C. W. N. 345 (1899).

(6) 2 C. W. N. 554 (1898).

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the party should be referred to the Civil Court if the claim is not substantiated though raised *bond fide* Teunon, J., while holding that the Magistrate must decide whether the question was raised in good faith stated that he did not agree in all the reasons advanced by his learned colleague. The case of *Peary Lal Mullik v. Surendra Krishna Mitter* (7) and (8) came up to this Court twice. In this case the Magistrate's order was similar to that passed in the present case. On the first occasion Richardson and Shamsul Huda, JJ., held that the Magistrate should not have passed the order in the form in which he made it without taking evidence and remanded the case. On the second occasion Shamsul Huda and Ghose, JJ., held that the claim was based on substantial grounds and that it was not "necessary to consider whether, if and when a claim is found to be *bond fide* and not a mere pretence to oust the jurisdiction of the Civil Court it is necessary to consider further, as appears to have been laid down in *Lukhee Narain Banerjee v. Ram Kumar Mukherjee* (3), whether the claim is well-founded, and if not well-founded whether the Magistrate has a right to direct one of the parties within a reasonable time and on his failure to do so to resume the proceedings." We may also refer to the case of *Kamini Kumar Biswas v. Emperor* (9). There the Magistrate passed an order suspending proceedings for one month to allow the Defendants an opportunity of establishing their claims in the Civil Court and cited *Lukhee Narain's* case (3) in support of this order. The Magistrate's order was set aside by Rampini and Sharfuddin, JJ., on the

ground that the Petitioner's claim appeared to be *bond fide*. It therefore appears that though the general rule has been frequently applied, some doubt has been felt as to the correctness of the *dictum* which makes an exception by distinguishing well-founded and ill-founded *bond fide* claims. The point is one of considerable importance and as we doubt the correctness of the decision in the case of *Belat Ali v. Abdur Rahim* (4) a reference to a Full Bench is necessary and we refer it accordingly. We formulate the points to be decided as follows :—

When in proceedings under sec. 133, C. P. C., arising out of an alleged obstruction of a way used by the public, the Defendant sets up a claim of right which is found by the Magistrate to be made in good faith, is the Magistrate's jurisdiction entirely ousted?

Or can the Magistrate, if he does not think this claim well-founded though he considers it made in good faith, allow the Defendant a reasonable time to assert this claim by a civil suit and if he does not go to the Civil Court within such time or fails there, can the Magistrate continue the proceedings under sec. 133, Criminal Procedure Code? Was the case of *Belat Ali v. Abdur Rahim* (4) giving effect to the *dictum* in *Lukhee Narain Banerjee v. Ram Kumar Mukherjee* (3) rightly decided?

On the case coming before the Full Bench.

Babu Manmatha Nath Mookerjee (with *Babu Srish Chandra Biswas*) for the Petitioner.—When not dealing with matters which primarily come within its purview there are some limitations to the exercise of jurisdiction by the Criminal Court.

There is a well-known principle which implies an ouster of jurisdiction of Justices,

(3) I. L. R. 15 Cal. 564 (1888).

(7) 23 C. W. N. 774 (1919).

(8) 24 C. W. N. 247 (1919).

(9) I. L. R. 25 Cal. 283; s. c. 12 C. W. N. 367 (1907).

(3) I. L. R. 15 Cal. 564 at p. 573 (1888).

(4) 9 C. W. N. 143 (1903).

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the moment it is proved that the claim set up by the Defendant is a *bonâ fide* one—Paley on Summary Convictions; Craies on Statutes, Vol. II, p. 472.

On this principle, Chap. X of the Code of Criminal Procedure should be construed and the Courts have also for about 50 years followed that principle in dealing with cases under sec. 133, Cr. P. C.

This principle is not to be found in the section itself but a rule of natural Justice not militating against the particular statute should be given effect to. It affects the property of subjects. I am entitled to tell the Court that it has no jurisdiction on the ground that it is my property and the public have no right over it. If my claim is a *bonâ fide* one the Magistrate must stay his hands and proceed no further. I have every right to challenge the Magistrate's jurisdiction by showing I have a *bonâ fide* claim.

It is wrong to say that as there is no statute to that effect the principle cannot be invoked in this country. It is a principle of natural justice and of construction of statute which is applicable to every civilised country unless there is anything repugnant in the statute-book of that country.

Cited *Becharam Bhattacharji* (15), *Umesh Chandra v. Ichanath* (16), *Re Chunder Nath Sen* (18), *Basaruddin v. Baharali* (31), *Askar Mea v. Sardar Mea* (32), *Lal Mea v. Nazir Khalasi* (33) and *Lukhee Narain Banerjee v. Ram Kumar* (3).

[SANDERSON, C. J.—What they say is that in the circumstances the Magistrate

ought not to make an order under the section.

This is not a question of jurisdiction nor do the cases go to that length. What they say is that although Magistrates have power they should not exercise it when a *bonâ fide* claim is raised.]

The decision in *Lukhee Narain's* case (3) is wrong when it says that the Defendant should be referred to the Civil Court. Up to this there was no decision that the party setting up the claim is to go to the Civil Court. It will be sufficient if you hold that the Magistrate ought not to proceed, in which case the Magistrate cannot refer me to the Civil Court.

[SANDERSON, C. J.—If he has jurisdiction he can exercise it in exceptional cases.]

Yes. For example in cases of emergency but if it is a *bonâ fide* claim there can be no exceptional case.

The artificial distinction between well-founded *bonâ fide* claim and ill-founded *bonâ fide* claim is incomprehensible. It is an impossibility to say that a claim is *bonâ fide* but not well-founded.

[SANDERSON, C. J.—I can't understand it.]

This distinction does not appear to have entered the minds of any Judge of any other High Court.

Reg v. Sandford (35) gives only a test of *bonâ fides*.

Cited *Mukanda Lal Dey v. Haribole Saha* (6), *Nasiruddi v. Akiluddi* (5), *Belat Ali v. Abdur Rahim* (4), *Matukdhari v. Hari Madhab* (36), *Queen-Empress v.*

(3) I. L. R. 15 Cal. 564 (1888).

(15) 15 W. R. Cr. 67 (1871).

(16) 25 W. R. Cr. 64 (1874).

(18) I. L. R. 5 Cal. 875 (1880).

(31) I. L. R. 11 Cal. 8 (1884).

(32) I. L. R. 12 Cal. 137 (1885).

(33) I. L. R. 12 Cal. 696 (1886).

(3) I. L. R. 15 Cal. 564 (1888).

(4) 8 C. W. N. 143 (1903).

(5) 3 C. W. N. 345 (1899).

(6) 2 C. W. N. 554 (1898).

(35) 30 L. T. 601 N. S. (1874).

(36) I. L. R. 31 Cal. 979, s. o. 9 C. W. N. 72 (1904).

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Bissessur Sahu (2), *Manipur Dey v. Bidhu Bhusan Sarkar* (1), *Mahomed Ashrafuddin v. Karim Baksh* (37), *Preonath v. Gobordhone* (30), *Kamini Kumar Biswas v. Emperor* (9), *Peary Lal Mullik v. Surendra Krishna Mitter* (7) and (8), *Bhagat Prasad v. Ramrup Karmakar* (38) and *Fakir Mullick v. King-Emperor* (14).

Unreported Criminal Rev. No. 176 of 1920 decided on 10th February 1920 by Beachcroft and Ghose, JJ.

Babu Dasarathi Sanyal (with *Babus Debendra Narayan Bhattacharya* and *Lalit Mohan Sanyal*) for the Opposite Party.—The jurisdiction of the Magistrate is not ousted as contended by the other side. The plain language of the statute does not show that.

The provisions in the Chap. X have been very carefully framed. Magistrates of superior rank only are authorised to take action and an elaborate mode of enquiry is provided.

[RICHARDSON, J.—The question is whether or not after the Defendant has established the *bonâ fides* of his claim the Magistrate is bound to hold that his order is not reasonable and proper and after that he has no jurisdiction to proceed further.]

Yes.

[TEUNON, J.—You mean to say that after satisfying himself as to *bonâ fides* he has to see if it is good claim.]

On the rule of construction referred to

(1) I. L. R. 42 Cal. 158 : s. c. 18 C. W. N. 1086 (1914).

(2) I. L. R. 17 Cal. 562 (1890).

(7) 24 C. W. N. 774 (1919).

(8) 22 C. W. N. 247 (1919).

(9) I. L. R. 35 Cal. 288 : s. c. 12 C. W. N. 267 (1907).

(14) 28 C. L. J. 211 (1916).

(30) I. L. R. 25 Cal. 278 (1897).

(37) 18 C. W. N. 1148 (1914).

(38) 21 C. L. J. 116 (1914).

Narendra Nath Sircar v. Kamalbashini Dasi (11).

The provisions of Chap. X are not penal.

[SANDERSON, C. J.—It is penal as disobedience of the order is punishable under sec. 188.

TEUNON, J.—He is also punishable for contempt.]

It is by the operation of the Penal Code that it is punishable.

The jurisdiction exercised under Chap. X is not summary jurisdiction as understood in England. Paley, p. 16.

The Code does not recognise any such distinction excepting where it calls a form of trial summary.

Refers to the earlier Codes to show how the expression *bonâ fide* claim came into our case law.

Refers to *Angelo v. Cargell* (12), (Code of 1861). Refers to argument of Advocate-General and judgment of Couch, C. J.

Cited *Pettumber Jugi v. Nasaruddy* (17); *Re Chunder Nath Sen* (18), *Askar Mea v. Sardar Mea* (32), *Lal Mea v. Nazir Khalasi* (33) and *Lukhee Narain Bannercjee v. Ram Kumar Mukherjee* (3). It is not a question of jurisdiction; it is only whether something "should" not" or "ought not to be done."

[SANDERSON, C. J.—As I read the judgment in *Lukhee Narain's* case (3) it holds that the Magistrate has jurisdiction but as the High Court in revision has directed the Magistrate to follow the English rule they should follow this.

(3) I. L. R. 15 Cal. 544 (1888).

(11) L. R. 23 I. A. 18 : s. c. I. L. R. 23 Cal. 568 at p. 578 (1896).

(12) 9 B. L. R. 417 (1872).

(17) 25 W. R. Cr. 4 (1875).

(18) I. L. R. 5 Cal. 875 (1890).

(32) I. L. R. 12 Cal. 137 (1895).

(33) I. L. R. 12 Cal. 696 (1896).

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Your opponent really accedes to this but he objects to the passage at p. 573.]

[SANDERSON, C. J.—What should be the form of the order, i.e., to drop the proceedings altogether referring both parties to the Civil Court or stay the proceedings and refer the Defendant to the Civil Court?]

That depends on the facts of each case.

Reference to Paley, 8th Edn., p. 164 shows that even when title is in issue, Justices may decide.

Babu Manmatha Nath Mookerjee replied.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is a reference to a Full Bench by my learned brothers Newbould and Suhrawardy, JJ. The questions which are submitted are,

1. "When in proceedings under sec. 133, Criminal Procedure Code, arising out of an alleged obstruction of a way used by the public, the Defendant sets up a claim of right which is found by the Magistrate to be made in good faith, is the Magistrate's jurisdiction entirely ousted?"

2. "Or can the Magistrate, if he does not think this claim well-founded though he considers it made in good faith, allow the Defendant a reasonable time to assert this claim by a civil suit and if he does not go to the Civil Court within such time or fails there, can the Magistrate continue the proceedings, under sec. 133, Criminal Procedure Code?"

"Was the case of *Belat Ali v. Abdur Rahim* (4) giving effect to the dictum in *Lukhee Narain Banerjee v. Ram Kumar Mukherjee* (3) rightly decided?"

The following facts may be taken from the case:—

"This rule is directed against an order

passed by the Sub-Divisional Magistrate of Alipore in proceedings under sec. 133 of the Code of Criminal Procedure. Ali Naskar and others instituted proceedings under that section against the Petitioners before us, Ram Sagar Mondal and another person, alleging that they had obstructed a public road. Ram Sagar Mondal showed cause denying the existence of the alleged public road and setting up a claim to the land in dispute. On the 15th April last, the Magistrate passed the following order:—

"I have heard the Vakils for both the parties. The second party contend that in a criminal case I held that there was no pathway, so the conditional order ought to be discharged. The Vakil for the first party has urged that this was a case of assault and my finding ought not to bind the present parties. I have given a careful consideration to the arguments advanced. I am of opinion that the claim of the second party though not substantiated is not mere pretence and is not raised to oust the jurisdiction of this Court but it is raised *bona fide*, so I think that following the rule laid down in *Manipur Dey v. Bidhu Bhusan Sarkar* (1), I will give the second party a chance to go to the Civil Court. The second party should file a case within a reasonable time and I allow them time till 25th May 1921, to do so, and if the second party does not go to the Civil Court within this time, the trial will be continued. Put on 25th May 1921." The Petitioner did not go to the Civil Court and on the 25th May the Magistrate refused to reconsider and directed witnesses to be summoned."

On behalf of the Petitioner it was contended that on the Magistrate's finding that the Petitioner's claim was "*bona fide*" his jurisdiction under sec. 133,

(3) I. L. R. 15 Cal. 584 at p. 573 (1888).
(4) 8 C. W. N. 143 (1903).

(1) I. L. R. 43 Cal. 158; s. c. 18 C. W. N. 1096 (1914).

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Criminal Procedure Code, came to an end and he was not justified in continuing the proceedings, because the Petitioner failed to bring a suit in the Civil Court. On behalf of the Opposite Party it was contended that the finding that the claim, though made *bonâ fide* was not substantiated, justified the Magistrate's order which is supported by decisions of this Court.

The case of *Lukhee Narain Banerjee v. Ram Kumar Mukherjee* (3) is referred to in the case as follows:—"But in the case of *Lukhee Narain Banerjee v. Ram Kumar Mukherjee* (3) a distinction is drawn at page 573 between a claim of right which the Magistrate thinks well-founded and a claim of right which the Magistrate does not think well-founded but considers to have been made *bonâ fide*. It was laid down that in the former case the Magistrate will take no further proceedings but in the latter he should allow the Defendant an opportunity of asserting his claim by civil proceedings and that if he does not go to a Civil Court within a reasonable time or fails there the Magistrate will proceed."

The two learned Judges doubted the correctness of this view of the law and consequently they made this reference to the Full Court.

With regard to the first question, in my judgment, the first step to be taken is to examine the sections of the Criminal Procedure Code, applicable to this matter, which are secs. 133 to 139 and to interpret these sections according to the natural meaning of the language used.

I do not propose to discuss these sections in detail. It is sufficient for me to say that if the ordinary and natural meaning is given to the language used in these sections, in my judgment it is clear that the Magistrate had jurisdiction there-

under to decide the case even though a claim of title was raised by the Petitioner, and even though, as the Magistrate held, the claim was "raised *bonâ fide*" and "was not a mere pretence and was not raised to oust the jurisdiction of the Court."

It was, however, argued on behalf of the Petitioner that it had been held in England that, when the title to property is in question, the exercise of a summary jurisdiction by Justices of the Peace is ousted, and it was further argued that the same principle should be applied to the sections now under consideration. It was also urged that the principle is a principle of natural justice and should be applied unless an exception is made in the Act.

I cannot accept these arguments. In the first place I do not agree that the rule laid down in the English cases should be taken to bind the Court in construing the Indian Act in question. Secondly, it is to be noted that the Code of Criminal Procedure is an Act for consolidating and amending the law relating to Criminal Procedure, and in my judgment the principle of construction laid down by Lord Herschell in the case of the *Bank of England v. Vagliano* (10) and affirmed by the Privy Council in *Narendra Nath Sircar v. Kamalbhashini Dasi* (11) should be applied to this Act. The passage in the latter case is as follows:—"It is hardly necessary for their Lordships to do more than express their concurrence with the judgment of the High Court. But they think it may be useful to refer to some observations in a recent case before the House of Lords as to the proper mode of dealing with an Act intended to codify a particular branch of the law. "I think," said Lord

(10) [1891] A. C. 107 at p. 144.

(11) L. R. 23 I. A. 18; a. c. I. L. R. 23 Cal 563 at p. 571 (1896).

(3) I. L. R. 15 Cal. 564 (1898).

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Herschell in the *Bank of England v. Vagliano* (10), "the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiry how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions" Applying that principle to the sections of the Consolidating and Amending Act now under consideration, and giving to the language of the sections the natural meaning, in my judgment the Magistrate had jurisdiction to decide the questions before him, even though the Defendants in the proceedings before the Magistrate set up a claim of title to the land in question.

Numerous cases were cited to us during the course of the argument, and it is said that there is a discrepancy to be found between the decisions of this Court. I think that to some extent there is a discrepancy. But on the whole, in my judgment, the weight of the decisions is in favour of the view which I have expressed.

For instance as long ago as 1872 in

Angelo v. Cargell (12), the Court, when dealing with a section of the Criminal Procedure Code then in force, held that the Magistrate had jurisdiction to decide whether the place was a thoroughfare and whether there was an obstruction, though the Defendants claimed the land as their own property. The sections then under discussion do not differ materially from the sections now under discussion and the Advocate-General appearing for the Defendants in that case, raised in his argument the identical points which have been raised on behalf of the Petitioner in this case, yet the Court held that the Magistrate had jurisdiction.

In *Lukhee Narain Banerjee v. Ram Kumar Mukherjee* (3), which was decided in 1888, the decision, in my judgment, implied that the Magistrate had jurisdiction though the learned Judges stated that this Court in revision in several cases had given directions as to the mode in which the Magistrates should exercise their powers. The following passages in the judgment may be referred to page 570 : "The ground upon which these decisions have proceeded is that there is no provision made in Chap. X of the Code for an enquiry into disputed questions of title; and that it cannot be held to have been the intention of the legislature that questions of this nature raised *bonâ fide* should be finally decided in a summary manner and to the exclusion of any recourse to the Civil Courts. These decisions go, not actually to the jurisdiction of the Magistrates, as the English rule referred to does, but rather to the mode in which, in revision, this Court has held that the Magistrate should exercise their powers, following the principle of the English rule so far as may be;" page 573 :—"Our observations in this judgment are of course

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directed to that part of sec. 133, which relates to the case now before us and deals with obstructions to public ways.

We may observe that in cases in which danger to public health or safety is involved, we by no means suggest that the Magistrate is fettered, in the exercise of the powers given to him under these sections, by the considerations to which we have adverted." It seems clear that if the Magistrate has jurisdiction in cases, where public health and safety are endangered, he must also have it in cases where they are not endangered, for the jurisdiction to deal with the two classes of cases is conferred by the same words in the Act.

These passages seem clearly to imply that the Magistrates had jurisdiction, but that this Court had from time to time given directions as to the mode of exercising that jurisdiction. It is to be noticed that the learned Judges in the last mentioned case drew attention to the case of *Chuni Lal v. Ram Kishen* (13) whereby it was decided that the right of an owner of land to bring a suit under sec. 42 of the Specific Relief Act against one of the public, who formally claimed to use such lands as a public road and who has thereby endangered the title of the owner, is not barred by an order of a Criminal Court under sec. 137 of the Criminal Procedure Code.

In the *Queen-Empress v. Bissessuar Sahu* (2) the learned Judges held that the Magistrate "ought not to have made the order if there was a *bond fide* contention on Bissessuar's part that the path was not a public way" and the learned Judges quoted with approval the passages from the judgment in *Lukhee Narain Banerjee v. Ram Kumar Mukherjee* (3). The

headnote of that case seems to me to go further than the actual decision.

Again *Fakir Mullick v. King-Emperor*, (14) (decided in 1916) is in my judgment a decision confirming my view that the Magistrate had jurisdiction even though a *bond fide* claim of right had been set up.

It was, at the end of the argument, practically conceded that to say that the Magistrate had no jurisdiction or "that the Magistrate's jurisdiction was entirely ousted" was putting the case too high, but the argument was urged that under the circumstances of the case the Magistrate ought to have stayed his hand and should not have proceeded with the enquiry when he found that the Defendants were putting forward a claim of title in the land, *bond fide*, and the Magistrate should have allowed the parties to litigate the question in the Civil Court.

In my judgment therefore the first question should be answered in the negative.

The second question may conveniently be divided into two parts. With regard to the first part the learned Vakil for the Petitioner did not complain of the ruling at p. 571 in *Lukhee Narain Banerjee v. Ram Kumar Mukherjee* (3) which runs as follows:—

"Where such a question is *bond fide* raised the Magistrate ought not to make an order under this section of the Code; he should allow an opportunity for the determination of the question by the Civil Court." But objection was taken by the learned Vakil to the passage at p. 573. "If the Magistrate does not think this claim well-founded, so far as he can judge, but considers that it is made *bond fide*, he should allow the Defendant an opportunity of asserting it by Civil Proceed-

(2) I. L. R. 17 Cal. 562 (1890).

(3) I. L. R. 15 Cal. 564 (1888).

(13) I. L. R. 15 Cal. 460 (F. B.) (1888).

(3) I. L. R. 15 Cal. 564 (1888).

(14) 28 C. L. J. 211 (1916).

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ings." It was urged that the Defendants who might be in possession of the land, should not be forced into the position of Plaintiffs in a civil suit to maintain the claim of right. It was argued further that the distinction between an ill-founded *bonâ fide* claim and a well-founded *bonâ fide* claim is unintelligible. In my judgment there is considerable force in those arguments: At the same time I am unable to say that the Magistrate had no jurisdiction to make the order of 15th April 1921. It seems to me that it was a matter for the discretion of the Magistrate. He had apparently on that date, on the materials then before him, come to the conclusion that the claim of title set up by the Defendants had no substance in it, although he believed that the claim was not set up as a mere pretence. Having given the Defendants an opportunity of instituting a suit in the Civil Court, of which the Defendants failed to avail themselves, the Magistrate proposed to enquire further into the facts of the case. In view of the judgment which I have already given on the first question I am unable to say that he had no jurisdiction to continue the proceedings under sec. 133 of the Criminal Procedure Code.

With regard to the case of *Belat Ali v. Abdur Rahim* (4) which is the subject of the second part of the second question, in my judgment, it cannot be said, having regard to the facts of that case, that it was wrongly decided.

It is necessary for the Court to decide whether the rule in this case should be made absolute or discharged. The Magistrate, as I read his judgment, came to the conclusion, on the materials then before him, that there was no real substance in the claim of title, and consequently in my judgment, the Rule should be discharged.

TRAYNOR, J.—In this matter the facts

(4) 8 C. W. N. 143 (1903).

have been sufficiently set out in the order made by the referring Bench and also in the judgment of his Lordship the Chief Justice. It is therefore unnecessary for me to recapitulate them.

In the many cases decided under Chap. X of the Code of Criminal Procedure there has been considerable conflict of judicial opinion, and much that is not to be found in the sections themselves has been imported into them by the Courts.

In a case such as the present it appears to me that there are but two questions for the Magistrate (or for the jury, if under secs. 135 and 138 a jury be substituted for the Magistrate) to decide namely, (1) whether the way in question is one which is or may be lawfully used by the public and (2) whether such way has been unlawfully obstructed. These two questions should be decided on evidence in the same manner as any other questions arising in Criminal proceedings. There appears to me to be no reason why in a codifying enactment such as the Code of Criminal Procedure we should introduce any rule of interpretation borrowed from English law. It is also not for us, but for the Legislature, to say whether questions of title should or should not be decided in the Courts of Magistrates. When in proceedings under sec. 133, a claim of private title is asserted the good faith or bad faith of the Defendant raising this plea in my opinion is immaterial. There is no reference to good faith in the sections themselves and if on evidence the Magistrate (or the jury) be satisfied that the path is a public path, the Magistrate should act on that decision and conclude the controversy for the time being. The Defendant if aggrieved still has his remedy in the Civil Courts.

Whether in any individual case before making his conditional order absolute, the Magistrate should give the Defendant an opportunity of establishing by suit his

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claim of private title is at most a question of discretion and I am not prepared to lay down any general rules for the exercise of such judicial discretion. I may however point out that sub-sec. (2) of sec. 133 does not appear to favour any such reference of parties to the Civil Courts.

In the result I should answer the question referred to us, which I take to be three in number, as follows:—To the first question my answer is 'No.' To the second question my answer is that in the exercise of his discretion the Magistrate may take the course indicated in the question.

To the third question my answer is that I am not prepared to say that on its own facts the case of *Belat Ali v. Abdur Rahim* (4) was wrongly decided.

For the reasons given I agree in discharging this rule.

RICHARDSON, J.—Sec. 133 and the following sections of the present Code substantially repeat the corresponding sections of the earlier Codes. The word 'thoroughfare' however, used in the Codes of 1861-1869 and 1872 is replaced in the Codes of 1882 and 1898 by the expression 'way which is or may be lawfully used by the public.' The purpose in view is the removal of unlawful obstructions from public ways and the abatement of certain other nuisances affecting the public health or safety such as the carrying on of a trade "injurious to the health or physical comfort of the community." Proceedings are initiated by a conditional order in appropriate terms. If the order is not obeyed, inquiry may follow whether it is a reasonable and proper order or not, the result depending on the finding arrived at upon that issue. The enquiry may be made, at the choice of the Defendant, by a Magistrate or by a jury.

(4) 8 C. W. N. 148 (1908).

The first and principal question referred to this Bench may be thus stated: Whether a conditional order having been made for the removal of an alleged unlawful obstruction from an alleged public way, the Magistrate's jurisdiction to proceed further is ousted if the Defendant raises a *bonâ fide* claim of right or title.

Under the Code of 1861-1869 it was held that it was for the Magistrate to determine whether a way was or was not a "thoroughfare" [*Becharam Bhattacharji* (15) and *Angelo v. Cargelt* (12)]. But under the Code of 1872 there seems to have been either an abrupt transition to a different view or a reversion to some earlier view; witness the observations of Pear, J., in *Umesh Chandra v. Ichannath* (16), less than two years after *Angelo's* case (12) and without any reference thereto, and see also *Pettambur Jugi v. Nasaruddy* (17) and *Re Chundernath Sen* (18).

The view then taken was apparently determined by two considerations. In the first place the power given the provision in the two earlier Codes corresponding to sec. 147 in the latter Codes, enabled a Magistrate to intervene in any case of dispute concerning a right of way, public or private. The provision was not restricted, as it now is, to disputes likely to lead to a breach of the peace. In the second place it was doubted at the time whether an order made by a Magistrate under what I may call the sec. 133 procedure would be conclusive in the Civil Courts on the question of highway or no highway. There was some conflict of opinion and it was not till 1888 that the point was decided by a Full Bench in favour of the Civil

(12) 9 B. L. R. 417 (1872).

(15) 15 W. R. Cr. 67 (1871).

(16) 25 W. R. Cr. 64 (1874).

(17) 25 W. R. Cr. 4 (1875).

(18) I. L. R. 5 Cal. 875 (1880).

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Court [*Chunilal v. Ram Kishen Shahu* (13)]. Upon these considerations, it was laid down that where there was any dispute concerning the existence of a "thoroughfare" the Magistrate should follow, not the sec. 133 procedure; but the different procedure appropriate to cases of dispute under which the Magistrate's final order would be subject, by express enactment, to the result of proceedings taken in a competent Court by a party aggrieved.

Sec. 147 assumed in the relevant particular its present form in the Code of 1882 and this change in the law made it clear that sec. 147 and sec. 133 were entirely independent provisions and that neither section could be used to throw any light on the interpretation of the other, the object, scope and language being totally different. If there was any over-lapping, that merely meant that in some cases where a public way was concerned, the Magistrate might have alternative procedures open to him. At the same time there was no reason why the restricted operation of sec. 147 as compared with the corresponding previous provision; should of itself enlarge the powers given by sec. 133. It became necessary, therefore, to re-examine the position and this was done in *Lukhee Narain Banerjee v. Ram Kumar Mukherjee* (3), which has since been treated as the leading case.

The judgment then delivered has already been referred to and I will only say that, as it seems to me, the learned Judges attempted to find a basis for previous decisions in the rule or maxim of English Law, that "where the title to property is in question, the exercise of a summary jurisdiction by Justices of the Peace is ousted." (*Paley on Summary Convictions*, 8th Edition, p. 157). It is this

maxim which they set before themselves as one to be followed in India "so far as may be." The difficulty lies in this qualification, as the Magistrate cannot in the same case both have and not have jurisdiction. No satisfactory conclusion can be reached without considering whether the maxim should be, not partially, but wholly accepted or rejected.

The maxim is probably due in its origin to conditions which no longer obtain. There was a time when few Justices of the Peace had any training in law. Formerly also statutes were less scientifically drawn than they now are and were in consequence more loosely interpreted according to their supposed reason or equity. An illustration lies ready to hand in the deer-killing case cited by Paley on page 158, where Holt, C. J., said this :—

"Thus if there was a dispute about the limits of a walk in a forest and one claims as part of his walk what is in fact a part of the division of another, and accordingly kills deer there, the case is out of the intent of the Act, though plainly within the words. The intent is to punish rogues and vagabonds and not persons who by mistake exceed what the law warrants." [*R. v. Speed* (19)].

But however the rule originated, it has been explained in more recent times as a presumption applicable to the construction of statutory powers conferred on Justices of the Peace—a presumption which may or may not be displaced by the language employed. In *R. v. Cridland* (20), Crompton, J., said "Being an old maxim of law, which has been so generally applied for ages, we must assume that it is still intended to be applied by every Act relating to such matters, though not specifically mentioned," and in *White v.*

(3) I. L. R. 15 Cal. 564 (1888).

(13) I. L. R. 15 Cal. 460 at p. 468 (F. B.) (1888).

(19) 1 Raymond's Rep. 583 (1700).

(20) 7 E. & B. 853 at p. 871 (1857).

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Feast (21), Blackburn, J., was explicit. "All summary jurisdiction," he observed "is the creation of statute and on the principle that title would not be intended to be decided by an inferior tribunal, there has arisen the well-established rule that every statute giving summary jurisdiction has the implied restriction as to title and the Justices must hold their hands if a *bonâ fide* claim of right is set up. On the other hand, in some statutes, as the Highway Acts, the terms used show that the Justices were not to hold their hands even if a right were set up."

No doubt the Justices were supposed to know all about the local highway and one reason why in my opinion this presumption should not be intruded into the Criminal Procedure Code, is that I doubt whether it has been consistently applied in England. It was not applied for instance in *Williams v. Adams* (22) and *Ex parte Vaughan* (23), while it was applied in *R. v. Justices of Dorset* (24) and *R. v. Stimpson* (25). At any rate where it is not applied, the Justices retain full jurisdiction of the nature affirmed in *R. v. Bolton* (26) and where it is applied the jurisdiction ceases on a *bonâ fide* claim of title being raised.

In England, again, the superior Courts derive their jurisdiction to decide questions of right and title from the common law and may at one time have regarded encroachments with suspicion. The jurisdiction of the Indian Courts from the highest to the lowest depends on statute. No doubt Civil Courts of various grades have been created for the special purpose of deciding questions of right and title. But as time goes on, various powers may

(21) L. R. 7 Q. B. 383 (1872).

(22) 2 B. & S. 312 (1862).

(23) L. R. 2 Q. B. 114 (1866).

(24) L. J. M. C. 211.

(25) 9 Cox, Cr. Cas. 356.

(26) 1 Q. B. 66 (1841).

be conferred either on existing Courts or on newly created Courts outside the range of the ordinary Civil Courts. If the presumption that none but a Civil Court is to decide a question of right or title is admitted in one case, it may be extended to other cases and to other tribunals created, it may be for some particular purpose or to administer some particular Act. Quite recently a tribunal was created by the Calcutta Improvement Act for purposes of that Act and only the other day the President of the Tribunal was vested with certain powers to deal with rents in Calcutta. Indian statutes being of the modern character, it seems to me wholly advantageous and desirable that they should be interpreted by the ordinary canons without resort to an adventitious presumption recognised it may be, in England, but not sanctioned by general principle and not authorised by anything in the Indian General Clauses Act, which is itself, so far as it goes, a statutory Code of construction. It is for the Legislature when it creates a new jurisdiction to define and limit the extent of that jurisdiction, as it does, for example, in the Small Cause Court Acts, and when the question arises what powers are or are not conferred, the answer ought to be found within the four corners of the statute.

In conferring powers relating to land or any other subject-matter on Magistrates, it is easy to say, if that is the intention, that the Magistrate's jurisdiction is ousted if a *bonâ fide* claim of right or title is raised, or, the restriction may be qualified so that the Magistrate's jurisdiction will not be affected unless the claim made is not merely *bonâ fide*, but also fair and reasonable [cf., *White v. Feast* (21) and *R. v. French* (21)].

When we come to the actual language

(21) L. R. 7 Q. B. 383 (1872).

(27) L. R. 1 K. B. 687 (1902).

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and scheme of these sections, it is clear that the question of public way or no public way, if it arises, is directly involved in the enquiry which the Magistrate or the jury have to make. To use words which occur in the cases, the question is an essential element in, or goes to the foundation and merits of, the enquiry. Even therefore if this were an English statute it might well be debated whether the Magistrate had not a complete jurisdiction. But if, as I think, the language should be interpreted without any presumption one way or the other, it is plain that the Magistrate or the jury have full jurisdiction to deal with a question of right or title for the purpose of determining whether a conditional order is reasonable and proper. The jury, where there is a jury, would presumably be persons acquainted with the locality, the Legislature relying not on their knowledge of law but on their local knowledge.

That construction is supported by the authority of Sir Richard Couch, C. J., in *Angelo's* case (12), though the learned Chief Justice did not consider the question of ouster of jurisdiction now raised. It is strange that *Angelo's* case (12) does not appear to have been cited in argument or referred to in any subsequent case before the present. The case was decided as I have mentioned under the Code of 1861-1869. I do not know whether the subsequent enlargement of the revisional jurisdiction of this Court was a factor in altering the course of opinion. Under the Code of 1861-69, the High Court could only intervene in respect of error in law. Under later Codes the High Court in revision may question "the correctness, legality or propriety" of any finding, sentence or order of an inferior Court and make an appropriate order.

If then the Magistrate has this jurisdic-

(12) 9 B. L. R. 417 (1872).

tion, it is difficult to justify the general instructions laid down in *Lukhee Narain's* case (3), dictating how he should act in the exercise of his discretion. Such rules, with all respect, trespass beyond the legitimate sphere of interpretation and revision into the sphere of legislation. It is "wrong in principle for any Court or Judge to impose fetters on the exercise by themselves or others of powers which are left by law to their discretion in each case as it arises." [*Saunders v. Saunders* (28)].

The instructions involve the distinction referred to in the second question submitted between *bond fide* claims of title which are well-founded and *bond fide* claims which are ill-founded. This distinction was a new departure, which has not met with undiluted favour. [See *Mukunda Lal Dey v. Haribole Shaha* (6) and *Peary Lall Mullick v. Surendra Krishna Mitter* (8)].

I do not say that an order giving a Defendant whose claim the Magistrate considers ill-founded a limited opportunity to go to the Civil Court is not within the Magistrate's jurisdiction, but he also has jurisdiction, and in some cases it may be his duty, to act himself on his own finding that the claim is ill-founded. It is matter for his discretion. As I apprehend, it would in the same sense be within the Magistrate's discretion in such cases to terminate his proceedings leaving it to either party desiring to do so to seek a remedy in the Civil Court in the usual way. All that can be said beforehand is that the existence of a *bond fide* dispute of title may be an element for the Magistrate's consideration.

Then, again, there is the difference

(3) I. L. R. 15 Cal. 564 (1888).

(6) 2 O. W. N. 554 (1898).

(8) 23 O. W. N. 247 (1910).

(28) [1897] P. 38.

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which the learned Judges authorise between the treatment of obstructions to public ways and the treatment of the other nuisances specified in sec. 133, which affect the public health or safety. In the case of these other nuisances, the learned Judges say, the Magistrate is not to be fettered in the exercise of the powers given him by the considerations applicable to obstructions to public ways. This difference of treatment is not easy to support. Questions of right, if not of title, may arise for instance in connection with the issue whether some trade should or should not be carried on in some locality. That no real distinction exists is shown by the fact that in one or two subsequent cases (no doubt of an exceptional character) this doctrine of urgency has been extended to obstructions to public ways though nothing in the way of danger to the public health or safety seems to have been involved [*Belat Ali v. Abdur Rahim* (4) and *Pakir Mullick v. R.* (14)].

It cannot be said that the possibility of a conflict between the Civil and the Criminal Courts was eliminated by the judgment in *Lukhee Narain's* case (3). Even under the procedure there laid down a Defendant might neglect the opportunity given him of going to the Civil Court pending the Magistrate's proceedings. But he might still succeed, after the Magistrate had made a final order against him, in establishing in the Civil Court that the way was not a public way. Would the Magistrate be bound by the Civil Court decree? Sir Richard Couch thought that the Civil Court had no power, in effect, to reverse the Magistrate's order because otherwise there might be a conflict of jurisdiction. "The consequences of that," he said, "would be that there might be another

order by the Magistrate, another jury appointed, another similar finding, and then another suit, and so on. The law does not allow that" [*Meechoo Chunder Sircar v. Ravenshaw* (29)]. The Full Bench in *Chuni Lal's* case (13) overruled the view that the Magistrate's order could not be brought in question in the Civil Court, but were silent as to the effect of conflicting decisions. It may be that few Magistrates would go against a decree of the Civil Court. The danger may be remote. Nevertheless it exists and in some combination of circumstances the point may arise and cause difficulty.

In my opinion the attempt made in *Lukhee Narain's* case (3) to find a half-way house between holding that the Magistrate has no jurisdiction where a *bonâ fide* claim of title is raised and holding that he has full jurisdiction, placed the law on an unsound and uncertain basis. There can only be two alternatives, either the Magistrate has this jurisdiction or he has not. If he has the jurisdiction, it is beyond the province of this Court to curtail it. And the real difficulty in choosing between the two alternatives for the purpose of answering the first question submitted is this, that in actual practice the distinction which *Lukhee Narain's* case (3) draws between well and ill founded claims has been generally disregarded, and the raising of a *bonâ fide* claim of title has been treated, apart from exceptional cases decided on the ground of urgency, as being in itself an effective bar to the Magistrate proceeding further, [cf., *R. v. Bissessur Sahu* (2), *Preonath v. Gobordhone* (30) and *Kamini Kumar*

(3) I. L. R. 15 Cal. 564 (1888).

(4) S. O. W. N. 143 (1903).

(14) 28 C. L. J. 211 (1916).

(3) I. L. R. 15 Cal. 564 (1888).

(2) I. L. R. 17 Cal. 562 (1890).

(13) I. L. R. 15 Cal. 460 (F. B.) (1888).

(29) 19 W. R. 845 (1873).

(30) I. L. R. 25 Cal. 278 (1897).

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Biswas v. Emperor (9)]. The case is often cited and profession is made of following it, but in general the result has been as I have said. In that state of things my doubt has been whether this Bench should radically alter a practice which goes back to the Code of 1872 or whether it should be left to the Legislature which is understood to be engaged in the revision of the present Code, to put its intentions beyond all doubt. On the whole however for the reasons which I have endeavoured to express I agree with my Lord and Teunon, J., that the first question referred to us should be answered in the negative. If it were answered in the affirmative further questions would arise which need not now be considered as to the time at which the objection to the Magistrate's jurisdiction should be taken and as to the position of a jury where the claim is made after the case goes to them. Subject to what I have already said I agree that an affirmative answer should be returned to the first branch of the second question. Further than that I express no opinion in regard to *Belat Ali's* case (4).

I agree that in the result the rule should be discharged.

NEWBOULD, J.—There is very little difference in practice between the rule of English Law that a *bona fide* claim of title ousts the jurisdiction of Justices proceeding in a summary way and the effect of decisions of this Court in revision that a Magistrate should stay his hand when in proceedings under sec. 133, C. P. C., he finds that a claim of title is raised *bona fide*. No reference was made to this distinction when the case was argued before my learned brother Suhrawardy, J. and myself. Had there been we should have framed the questions which we referred

for decision by a Full Bench differently. The form in which we have put the questions requires a decision on the point of ouster of jurisdiction. Now that I have considered these questions from the point of view of a member of a Full Bench and am no longer bound to follow previous decisions of Divisional Benches, I am convinced that there is no ouster of jurisdiction. I have read the judgment which my learned brother Richardson, J., has just delivered and find myself so entirely in agreement with his views that I do not think it necessary to say more than that I fully agree with that judgment.

GHOSH, J.—The questions referred to the Full Bench for determination are as follows:—

“When in proceedings under sec. 133, Cr. P. C. arising out of an alleged obstruction of a way used by the public, the Defendant sets up a claim of right which is found by the Magistrate to be made in good faith, is the Magistrate's jurisdiction entirely ousted?”

Or can the Magistrate, if he does not think this claim well-founded though he considers it made in good faith, allow the Defendant a reasonable time to assert this claim by a civil suit and if he does not go to the Civil Court within such time or fails there, can the Magistrate continue the proceedings under sec. 133, Criminal Procedure Code? Was the case of *Belat Ali v. Abdur Rahim* (4) giving effect to the dictum in *Lukhee Narain Banerjee v. Ram Kumar Mukherjee* (3) rightly decided?”

The present reference has arisen out of an application to this Court under the provisions of sec. 439 of the Code of Criminal Procedure by one Ram Sagar Mondal, described as one of the second party, against whom proceedings under sec. 133,

(4) 8 C. W. N. 143 (1903).

(9) I. L. R. 35 Cal. 283; s. c. 12 C. W. N. 267 (1907).

(3) I. L. R. 15 Cal. 504 at p. 573 (1898).

(4) 8 C. W. N. 143 (1903).

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Cr. P. C. had been instituted on the complaint of one Alek Naskar and several others. It was alleged that Ram Sagar Mondal and another person had included within their homestead a portion of a public road and had erected a cowshed thereon. Ram Sagar Mondal showed cause denying the existence of the alleged public road and setting up a claim to the land in dispute. The Magistrate was of opinion that the claim of Ram Sagar Mondal, though not substantiated, was not a mere pretence and had not been raised to oust the jurisdiction of the Court but that it had been raised *bond fide*. He thereupon directed that the second party should go to the Civil Court within a date fixed by him, namely, within the 25th May 1921, and that in the event of the second party not going to the Civil Court within the said period, the trial should be continued. The Petitioner did not go to the Civil Court and thereupon the Magistrate directed witnesses to be summoned. On behalf of the prosecution it was contended before the Division Bench and also before us that on the Magistrate's finding that the Plaintiff's claim was *bond fide*, his jurisdiction under sec. 133, Cr. P. C. came to an end and that he was not justified in continuing the proceeding, under sec. 133, Cr. P. C. simply because the Petitioner had failed to bring a suit in the Civil Court. On behalf of the Opposite Party, the contention was put forward that, having regard to the findings arrived at by the Magistrate, the jurisdiction of the Magistrate had not been ousted and that he was justified in making the order in the manner in which he did.

In order to appreciate the contentions set out above, it is necessary to refer to the terms of sec. 133 and of the sections which follow in Chap. X of the Criminal Procedure Code and to some of the more important cases decided under sec. 133 of

the Criminal Procedure Code. The sections, it need hardly be stated, have to be interpreted according to the natural meaning of the words used. Sec. 133, so far as it relates to the case before us, lays down that whenever the Magistrates mentioned in the section consider on receiving a police report or other information and on taking such evidence, if any, as they think fit, that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place, they may make a conditional order directing the removal of such obstruction or nuisance or directing the person responsible for the obstruction or nuisance to appear before a Magistrate and move to have the order set aside or modified in manner indicated in the statute. Sec. 134 deals with the service of notification of the conditional order made under sec. 133. Sec. 135 lays down the courses open to the public against whom the conditional order has been made. He can either perform the act directed in the conditional order within the time limited therein or appear and show cause against the conditional order or he can apply to the Magistrate to appoint a jury to consider whether the conditional order is reasonable and proper. The procedure which is to be followed in the event of the person affected failing to take advantage of the provisions of sec. 135 and also in the event of the person affected following the provisions of sec. 135 is indicated in secs. 136 to 141 of the Criminal Procedure Code. Further, in cases where there is likelihood of imminent danger or injury of a serious kind to the public, the Magistrate is empowered by sec. 142 to issue, whether a jury is to be or has been appointed or not, such an injunction to the person against whom the conditional order has been made, as

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is required to obviate or prevent such danger or injury pending the determination of the matter.

It may be noted in passing that sec. 133 of the present Code of Criminal Procedure corresponds to sec. 521 of the Code of 1872 which again correspond to sec. 308 of the Code of 1861. Under the Code of 1872 it was held by this Court that in proceedings under sec. 521 of that Code, if a claim of private right were set up in respect of what was alleged to be a thoroughfare or public place, the Magistrate could not make any order under sec. 521 and the following sections, but was to proceed under sec. 532 (which corresponds to sec. 147 of the Code of 1882 and of the present Code), so that the person claiming such private right should have an opportunity of having the question raised by him duly enquired into and determined. It is unnecessary to refer to the cases in support of this view; they will be found collected in the case of *Chandra Nath Sen* (18). The ratio of the decisions was that it was no part of the duty either of the Magistrate or of a jury acting under sec. 526 of the Code of 1872 to determine the rights of parties in property. Then came the Code of 1882 and in the case of *Basaruddin v. Baharali* (31), Mr. Justice Wilson observed as follows:—"It has been more than once held by this Court that the powers now embodied in secs. 133 to 137 with regard to the obstruction of public ways, are not to be exercised where there is a *bonâ fide* dispute as to the existence of the public right. In the present case it is plain that the right of way is really in dispute, and that its existence is at least open to doubt. No order, therefore, can be made under the sections referred to, until the public right has been established by proper legal proceedings, Civil or Crimi-

nal." It is to be remembered that the Code of 1882 and the present Code of 1898 did not and does not in sec. 147 as in sec. 532, the corresponding section of the Code of 1872 give a Criminal Court power to deal with such a matter. The case in *Basaruddin v. Baharali* (31) was followed without any discussion in *Askar Mea v. Sardar Mea* (32) and *Lal Meah v. Nazir Khalasi* (33).

In *Lukhee Narain Banerjee v. Ram Kumar* (3) the question was discussed at some length and the cases under the Code of 1872 were referred to. It was pointed out by Prinsep and Pigot, JJ., that in accordance with the last mentioned decisions it had been held by this Court that a Magistrate proceeding under the like sections of the Code of 1882, was not, when a *bonâ fide* claim of title was set up, to proceed to make an order but was to allow the party setting up such a claim to substantiate it if he could do so by Civil proceedings. It was further pointed out that there were no proper provisions in Chap. X of the Code of Criminal Procedure for an enquiry into disputed questions of title and that it could not have been held to have been the intention of the legislature that questions of this nature raised *bonâ fide* should be finally decided in a summary manner and to the exclusion of any recourse to the Civil Courts. In the case in *Lukhee Narain Banerjee v. Ram Kumar* (3) the learned Judge after pointing out that these decisions in question did not go to the jurisdiction of the Magistrate but only to the mode in which Magistrates should exercise their powers, observed further as follows on p. 571:—

"When such a question is *bonâ fide* raised, the Magistrate ought not to make

(18) I. L. R. 5 Cal. 875 (1880).

*(31) I. L. R. 11 Cal. 8 (1884).

(3) I. L. R. 15 Cal. 564 (1888).

(31) I. L. R. 11 Cal. 8 (1884).

(32) I. L. R. 12 Cal. 137 (1885).

(33) I. L. R. 12 Cal. 696 (1886).

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an order under these sections of the Code, but should allow an opportunity for the determination of the question by the Civil Court.

The claim of title, must, however, in order that it should be allowed to have this effect, be *bonâ fide* and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim is *bonâ fide* or a mere pretence. The Magistrate cannot, of course, in determining this, decide contrary to the facts that the claim is not made *bonâ fide*, but must have reasonable and proper cause for his decision, which will be subject to revision by this Court. The rule, however, that a *bonâ fide* claim of title ought not to be determined in summary proceedings before the Magistrate is subject to this, that the objection must be raised by the Defendant at or before the hearing; he can not be heard afterwards to object to the result of proceedings to which he has deliberately submitted himself."

The principle thus laid down in *Lukhee Narain Banerjee v. Ram Kumar* (3) has been followed or referred to with approval or has been acted upon in numerous cases in this Court and does not seem to have been questioned at all in subsequent cases; but the controversy, such as it has been, has raged round a distinction drawn on p. 573 of *Lukhee Narain Banerjee v. Ram Kumar* (3) between a claim of right which the Magistrate thinks well-founded and a claim of right which the Magistrate does not think well-founded but considers to have been made *bonâ fide*. The remarks last referred to, have been considered in several cases as has been pointed out in the referring order; they have been followed and effect given to them in the case of *Belat Ali v. Abdur Rahim* (4).

The rule laid down in the case in

Lukhee Narain Banerjee v. Ram Kumar (3) that a *bonâ fide* claim of title ought not to be determined in summary proceedings before the Magistrate is often described as amounting to this namely that the Magistrate, having jurisdiction to enter upon the enquiry and having rightly entered upon it, becomes incapacitated to proceed because some fact appears which ousts his jurisdiction. No doubt it is a principle of the English Common Law that the jurisdiction of Justices is ousted by a *bonâ fide* claim of title on the part of a Defendant; but it is to be noted that in England it has been held that although a claim of title is put forward *bonâ fide* by the Defendant, if such a claim is necessarily involved in the very question which the Magistrates have to decide, their jurisdiction is not ousted [*R. v. Bradley* (34)]. In this country we have to proceed upon the words of the statute as we find them. Now excess of jurisdiction may either exist at the time when the Magistrate embarks upon the enquiry under sec. 133 and when the conditional order is made and in that case there is no jurisdiction to hear the case at all—a contingency which is excluded by the terms of the statute itself, or it may crop up in the course of the hearing. When the Magistrate embarks upon an enquiry under sec. 133, Cf. P. C., there is clearly no want of jurisdiction as has been shown above; and having regard to the very careful and guarded language used by the learned Judge in *Lukhee Narain Banerjee v. Ram Kumar* (3), I find it difficult to say that the assertion of a *bonâ fide* claim of title ousts the jurisdiction of the Magistrate in the sense in which the expression is used and understood in England. One test for ascertaining whether a matter is within the jurisdiction of

(3) I. L. R. 18 Cal. 564 (1888).

(4) 8 C. W. N. 143 (1908).

(3) I. L. R. 15 Cal. 564 (1888).

(34) 70 L. T. 279.

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the Magistrate or not is to consider the nature of the arguments used against the Magistrate. If there was no jurisdiction the Magistrate ought not to have entered into the enquiry at all; but if the argument is that the Magistrate's authority is not fettered in any way in cases where danger to public health or safety is involved but is fettered in other cases, it is quite clear that the Magistrate has jurisdiction. Where a Magistrate decides one way when he ought to have decided another way, that is not, in my opinion, absence or want of jurisdiction. The manner in which the Magistrate's discretion ought to be exercised in a particular set of circumstances is a different matter altogether and has nothing to do with questions of jurisdiction. In my opinion there cannot be any manner of doubt having regard to the provisions of sec. 133 that the Magistrate has complete jurisdiction when he makes the conditional order under sec. 133. If the person, against whom the conditional order has been made, has a *bonâ fide* claim of right, he should draw the attention of the Magistrate to it at the earliest possible moment. On such a claim being put forward it is for the Magistrate to say whether the claim has been advanced before him with some show of reason and whether it is something more than a bare assertion; in other words it is for the Magistrate to say whether there is a real or substantial question between the parties to be tried out. If the Magistrate is of opinion that there is such a question, he ought to stay his hands at once and take no further action in the matter but refer the parties to the Civil Court. Whether or not the claim can be ultimately maintained in the Civil Court is altogether another matter; it is not for the Magistrate to enquire into all the circumstances to see if it is impossible. But if the claim of right put forward is of a character un-

known to the law, the Magistrate is under no obligation to stay his hands although it is *bonâ fide*, in other words a mere belief in a right, although *bonâ fide*, ought not to be sufficient to induce the Magistrate to stay his hands. This does not mean, however, that the Magistrate is to embark upon a prolonged enquiry into what has been described as the degrees of *bonâ fides* in the claim of right advanced before him. For instance, where the encroachment or obstruction complained of is upon a way admittedly public, there cannot be any question that the Magistrate must proceed beyond the stage of the conditional order, even if a claim or right were put forward by a person believing in the claim.

The view taken above is not inconsistent with what has been held to be the proper procedure to be followed in cases of emergency where there is likelihood of imminent danger or injury of a serious kind to the public. Indeed the Magistrate's discretion in cases of danger to public health or safety cannot be fettered as is amply recognised at page 573 in *Lukhee Narain v. Ram Kumar* (3).

I therefore answer the first question by saying that if the Magistrate finds that there is a real or substantial question to be tried out between the parties he ought in the exercise of his discretion to stay his hands and not to proceed any further after making the conditional order under sec. 133. In my opinion it is not a case of ouster of jurisdiction and there is no ouster of jurisdiction.

I answer the second question by saying that the Magistrate is entitled to continue the proceedings where the objector shows nothing more than a mere belief in the claim of right put forward. The Magistrate is not entitled to direct the objector to go to the Civil Court because in his opinion the claim of right cannot be ultimate.

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ly maintained. So far as the case of *Belat Ali v. Abdur Rahim* (4) is not inconsistent with the above view, it was rightly decided. As regards the matter out of which the present reference has arisen, I read the Magistrate's order as meaning that he was of opinion that no real or substantial question of title between the parties had been raised before him. If I am right in this interpretation of the Magistrate's order, it follows that the Magistrate was not bound to stay his hands. In this view of the matter I would discharge the rule which was issued by the Division Bench.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 170 OF 1919.

MAHAMED KAMEL and

MOOKERJEE, J.

BUCKLAND, J.

1921,

27, January

ors., Plaintiffs,

Appellants,

v.

HAJI HEDAYETULLA,

Defendant, Respondent.

Indian Contract Act (IX of 1872), sec. 253, cl. (10)—*Dissolution of partnership by death of a partner*—*Execution of a trust deed by a partner, the other partner affixing his signature as an attesting witness, if can be treated as a "contract to the contrary"*—*Representatives of deceased partner, if entitled to profits of the business continued by the surviving partner.*

A partnership business was carried on by two persons, one of whom died in August 1915. On the day previous to his death he executed a trust deed for continuance of the business after his death and the other partner affixed his signature thereto only as an attesting witness, but after the execution of the deed said that he would not carry on the business unless his remuneration was fixed. The trustees too subsequently refused to carry on the business. The surviving partner continued the business alone.

(4) 8 C. W. N. 143 (1903).

Held—That by the execution of the trust deed and the signature of the other partner as an attesting witness thereto, there was no concluded "contract to the contrary" within the meaning of sec. 253 of the Contract Act, and the partnership was dissolved by the death of one of the partners in August 1915 by virtue of the operation of cl. (10) of the section.

Held further—That as to the profits made out of the business by the surviving partner subsequently, the latter was bound to share them with the representatives of the deceased partner, after making all just allowances including fair remuneration for his management, in accordance with the maxim *accessorium sequitur suum principale*.

AHMED MUSAJI SALEHJI v. HASHIM EBRAHIM SALEJI (1), BROWN v. D. TASTET (2) and YATES v. FINN (3) and other cases referred to and discussed.

This was an appeal against the decree of S. P. Bakshi, Esq., District Judge of Zillah Birbhum, dated the 5th of April 1919.

The facts of the case will appear from the judgment.

Babu Joges Chandra Roy and M. A. K. Fazlul Huq and Babus Probodh Chandra Kar and Atindra Nath Mukherji for the Appellants.

Babus Dwarka Nath Chakravarty, Hiralal Sanyal and Promotho Nath Bhandopadhyaya for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the Plaintiffs in a suit for dissolution of partnership, for appointment of a receiver and for incidental reliefs. The partnership

(1) I. L. R. 42 Cal. 914 at p. 935 : s. c. 19 C. W. N. 449 (P. C.) (1915).

(2) Jacob 284 (1821).

(3) 13 Ch. D. 839 (1880).

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business was carried on by Fazil and Hedayetulla. Fazil died on the 3rd August 1915 leaving the Plaintiffs as his representatives, who commenced the present litigation on the 13th September 1916 with a view to take the partnership accounts. The District Judge has made a decree for dissolution and has directed the accounts to be taken from the 11th October 1913 to the 3rd August 1915 inasmuch as the accounts had been settled up to the 10th October 1913. He has, however, omitted to give directions as to the profits which may have resulted from the business subsequent to the death of Fazil and this raised the real point in controversy in the present appeal.

We are of opinion that there is no room for doubt or discussion that the partnership was dissolved by the death of Fazil on the 3rd August 1915, by virtue of the operation of cl. (10) of sec. 253 of the Indian Contract Act. It has no doubt been suggested on behalf of the Appellants that there was a contract to the contrary and reference has been made to the terms of the trust deed executed by Fazil on the day previous to his death. It is asserted that by that deed the trustees had been appointed by Fazil to carry on the business and that Hedayetulla had assented to this arrangement. But Hedayetulla was not a party to this deed; he appears to have affixed his signature thereto only as an attesting witness. The deed, on the face of it, consequently, does not show that Hedayetulla had assented to this arrangement and that there was a contract to the contrary within the meaning of sec. 253. On the other hand, the oral evidence shows that Hedayetulla was not an assenting party. After the execution of the deed, Hedayetulla is reported to have said that he would not carry on the business jointly unless his remuneration was fixed, and subsequently the trustees appointed by the

deed did in fact refuse to carry on the business. It is impossible in these circumstances to hold that there was a concluded agreement between Fazil and Hedayetulla such as would nullify the effect of the rule contained in cl. 10 of sec. 253 of the Indian Contract Act. We must hence proceed on the assumption that the District Judge has correctly held that the partnership was dissolved on the 3rd August 1915.

The Plaintiffs have argued that as the business has been carried on since the death of Fazil, the Defendant who has carried on the business is bound to account for the profits made and to share them with the Plaintiffs. In support of this position, reliance has been placed upon the judgment of the Judicial Committee in *Ahmed Musaji Salehji v. Hashim Ebrahim Saleji* (1). In our opinion the Plaintiffs are entitled to share in the profits made out of the business since the death of Fazil. The principle applicable to cases of this character was enunciated by Lord Eldon in *Brown v. D. Taslet* (2). There on the death of one partner the surviving partner retained the capital and employed it in the trade. He was ordered to account for the profits derived from it and to make proper allowance for the management of the business. A similar view was adopted by Hall V. C. in *Yates v. Finn* (3), where he stated the correct principle to be applied (in the absence of the other special circumstances affecting the rights of the deceased partner on the one hand and the surviving partner on the other) in the following terms:—"The representatives of the deceased partner are entitled to say to the surviving partner: You have been using our testators' money in trade, and making profits by the use of it, and

(1) I. L. R. 42 Cal. 914 at p. 925: s. c. 19 C. W. N. 449 (P. C.) (1915).

(2) Jacob 284 (1821)."

(3) 13 Ch. D. 239 (1890).

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we are therefore entitled to an account of the profits you have made by continuing that money in the concern and trading with it." The profits may well be regarded as accretions to the property which has yielded them and ought to belong to the owner of such property, in accordance with the maxim *accessorium sequitur suum principale*—the accessory right follows the principal; see *Crawshaw v. Collins* (4) and *Heathcote v. Hulme* (5). It may be observed that the rule thus laid down has been incorporated in sec. 42 of the Partnership Act, 1890. The provisions of that Act are not applicable in this country; but the rule itself is manifestly consistent with the principles of justice, equity and good conscience.

The result is that this appeal is allowed in part and the decree of the District Judge varied. A direction will be inserted in the decree to the effect that accounts be taken of the profits of the business since the death of Fazil on the 3rd August 1915 up to the date when the final decree is made, all just allowance including fair remuneration to be allowed in favour of the Defendant for managing the business. The Plaintiffs as representatives of Fazil will be entitled to the same share as Fazil would have taken if the partnership had not been dissolved. The profits will be assessed on the basis of what may be found due to Fazil at the time of his death. There will be no order for costs in this appeal.

BUCKLAND, J.—I agree.

J. N. R. *Appeal allowed in part.*

(4) 15 Ves. 218; 1 Jac. & Wa. 267 (1820).

(5) 1 Jac. & Wa. 123 (1819).

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW.

LORD PHILLIMORE.

MR. AMEER ALI.

1921,

Heard, 10 and

11, May.

Judgment, 14, June.

BIPRADAS PAL CHOWDHURY, since deceased
(now represented by
Manmatha Pal Chowdhury and ors.),
Appellants,

v.

KAMINI KUMAR
LAHIRI and ors.,
Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 161 167—Suit by purchaser of putni taluk at rent sale to eject persons holding land as lakhiraj from time immemorial—Onus of proving origin of lakhiraj since creation of taluk—Adverse possession, if incumbrance.

In a suit under sec. 167 of the Bengal Tenancy Act by the purchaser at a rent sale of a putni taluk which was created in 1807 to recover lands which the Defendants were holding as lakhiraj for periods greatly exceeding twelve years, and apparently from as far back as anything could be traced:

Quære:—Whether an interest not directly created by the taluqdar but allowed to grow up by his sufferance and negligence is an incumbrance as defined in sec. 161 of the Act.

But assuming for the purpose of the decision that it was:

Held—That it lay upon the Plaintiff to show an origin of the holdings as lakhiraj, either by creation or by the sufferance of a putnidar subsequent to 1807, the proper presumption being that they ran back to a period antecedent to the creation of the putni taluq.

These were two appeals consolidated by the High Court, the first, No. 12 of 1920, composed of 63 appeals, and the second, No. 65 of 1920, of 88 appeals. Both appeals had been consolidated by an Order

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of His Majesty in Council. The first consolidated appeal was from one judgment and 63 decrees, dated the 29th May 1917, of the same High Court, which affirmed one judgment and 63 decrees, dated the 30th August 1915, of the Additional Subordinate Judge of Nadia, who had affirmed one judgment and 64 decrees, dated the 17th September 1914, of the Munsif of Ranaghat, District Nadia. The second consolidated appeal was from one judgment and 88 decrees, dated the 12th February 1914, of the High Court of Judicature at Fort William in Bengal, which reversed two judgments, dated the 2nd and 19th June 1911, and 88 decrees, made by the District Judge of Nadia, on appeal from five judgments and 103 decrees, dated the 28th August 1908, the 23rd September 1908, the 12th December 1908, and the 22nd December 1908, and the 15th February 1909, of the Munsif of Krishnagar, Nadia, who had dismissed 103 suits filed by the Plaintiff.

The judgment of the said High Court in the consolidated appeal No. 65 of 1920 was the governing judgment on which the decision of the High Court in the other appeal, No. 12 of 1920, was based. It is sufficient therefore to refer in some detail to the proceedings in that appeal only.

The main questions raised on the present consolidated appeals were, first, whether in view of the pleadings and of the findings of the Courts below, the High Court was competent to decide the appeals before them on points raised for the first time; secondly, whether the tenures which the Defendants-Respondents claimed to possess in the lands in dispute are incumbrances within the meaning of sec. 167 of the Bengal Tenancy Act, 1885; and, thirdly, whether the suits filed by the Appellants are barred by the Indian Limitation Act or by any other law.

* The facts which gave rise to the litigation

may be shortly stated as follows:—In or about the year 1799 Taruf Santipur comprising 38 villages was settled by Government with Maharajah Tej Chandra Bahadur of Burdwan who was then in possession of the said Taruf, which was recorded as Towsi No. 474 of the Nadia Collectorate, paying a specified annual revenue. Since its creation in the manner aforesaid the said Zemindari passed through several hands, and came ultimately to be owned and possessed by Babu Prasanna Kumar Tagore. The said Maharajah Tej Chandra Bahadur having taken the permanent settlement made a permanent *putni* settlement of the entire Taruf Santipur, and on the 26th June 1807, he accepted a *putni kabuliyat* from one Ramesh Chandra Mukerji. The said *putni* interest passed through several hands and came ultimately to be owned and possessed by Babu Haridas Roy and others, and while they were in possession of the *putni* villages, the Tagores instituted suits for rent in respect of the *putni*, and obtained decrees against the *putnidar*, and in execution thereof brought the said *putni* to sale under sec. 165 of the Bengal Tenancy Act, 1885, and the Plaintiff Bipradas Pal Chowdhury purchased the *putni* free of all incumbrances. Out of the aforesaid 38 villages some 18 of them, including Simulia, Raghunathpur, and Chandkuri, were let out in *darputni*, and the Plaintiff after his purchase served notices upon the *dar-putnidar* and other subordinate holders annulling the incumbrances. The present Respondents put forward claims contending that the lands held by them were not *mal* or revenue-paying, but *lakhiraj* lands, and that the rights and interests which they possessed therein could not be annulled by the said Plaintiff, who thereupon instituted the present suits on various dates, ranging from the 8th November 1907. The cause of action in all

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the suits was the same. Reference may be made to Suit No. 92 of 1908, which was filed on the 8th November 1907. In his plaint the Plaintiff stated the facts summarised above, and claimed to annul the incumbrances and to recover possession of the lands held by the Defendants. The Plaintiff dated his cause of action as accruing from the 28th November 1899, which was the day of his purchase at the auction sale.

The Defendants filed a written statement in which their main pleas were the following :—(1) That the lands in question were *lakhiraj* lands and not *mal* lands; (2) that the Plaintiff's suit was barred by limitation; (3) that their tenures were not incumbrances which the Plaintiff could annul by law.

The suit (92 of 1908) was tried by the Munsif of Nadia, along with the remaining 102 suits, which had been filed by the Plaintiff. The learned Munsif divided the suits into five groups; and he framed the following issues in the first group :—

(1) Is the suit not maintainable by reason of the fact that a record-of-rights is being prepared in relation to the disputed lands?

(2) Is the suit barred by the general or any special law of limitation?

(3) Do the lands in suit appertain to *putni* tenure alleged to have been purchased by Plaintiff? Or are they *lakhiraj* lands as alleged by Defendants? Is the *putni* tenure not a valid one?

(4) Did the Plaintiff purchase the tenure free of all incumbrances?

(5) Were Defendants served with a notice under sec. 167 of the Bengal Tenancy Act? Was the notice sufficient and legal? Was such notice necessary?

(6) Is Plaintiff entitled to *khas* possession and mesne profits? What amount, if any, should he recover as such profits?

(7) What other relief, if any, is Plaintiff entitled to?

After examining evidence produced by the parties the learned Munsif delivered five separate judgments on the dates already mentioned. The judgment in the first group was delivered on the 28th August 1908. He found the first issue and the second part of the second issue in favour of the Plaintiff, and the first part of the second issue and the third issue in favour of the Defendants. He held that the Plaintiff's suits are not barred by the special law of limitation mentioned in sec. 167 of the Bengal Tenancy Act, 1885. But he held that the Plaintiff had failed to prove that the lands in question were revenue-paying lands at the time the mahal was permanently settled, and that the Defendants were trespassers. He therefore held that Art. 121 of the second Schedule of the Indian Limitation Act, 1877, had no application, and that the Plaintiff's suits were barred by limitation. He therefore made 103 decrees dismissing the Plaintiff's suits without determining the remaining issues.

The Plaintiff filed 103 appeals in the Court of the District Judge of Nadia from the decrees of the said Munsif, and the said District Judge delivered one judgment on the 31st July 1909, dismissing the appeals. The Plaintiff appealed from that decision to the High Court of Judicature at Fort William in Bengal, which delivered judgment on the 11th May 1910, allowing the appeals of the Plaintiff and remanding the cases to the said District Judge to rehear them according to law.

On remand the learned District Judge tried the 103 appeals in two batches, one of 5 and the other of 98. In the second he delivered judgment on the 2nd June 1911, and in the first a separate judgment on the 19th June 1911. He allowed the 94 appeals, and dismissed the rest. He

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held that the evidence produced by the parties established that the lands in question were revenue-paying and not *lakhiraj* lands, and that the subordinate rights held by the Defendants in those lands were incumbrances which had been annulled by reason of the sale for arrears of rent. He also held that the suits are not barred by limitation, and said as follows :—

“It was said that the Plaintiff's suits were barred by limitation. But in view of my findings, as noted above, the Defendants in all the suits, except Suit No. 678, must be held to be trespassers, and Plaintiff's suits having been instituted within 12 years from the date of his purchase of the *putni taluq* free from all incumbrances, the suits must be held to have been in time [*Nafar Chandra Pal Chowdhury v. Rajendra Lal Goswami* (2)].”

The District Judge accordingly made decrees allowing 88 appeals of the Plaintiff, and from those decrees the Defendants appealed to the High Court of Judicature at Fort William in Bengal, which delivered one judgment on the 12th February 1914. The Judges of the High Court did not enter into the merits and facts of the cases because they were of opinion that the suits were barred by limitation. They assumed for the purpose of argument that Art. 121 of the second Schedule of the Indian Limitation Act, 1877, was applicable to a case in which a purchaser of *putni taluq* sold for arrears of rent sues to avoid incumbrances. But they held that “if a Plaintiff relies upon Art. 121 of the second Schedule of the Indian Limitation Act, he has to establish that the incumbrance he seeks to annul is due to adverse possession which commenced after the creation of the *putni*.” The District Judge has not found that in the cases before us the adverse possession of the Defendants, and their predecessors,

commenced after the creation of the *putni*. The High Court took the view that there was evidence upon the record to show that the adverse possession of the Defendants and their predecessors had commenced before the creation of the *putni*, and that in any case the Plaintiff had failed to prove affirmatively that his case came within Art. 121. They summed up their findings in the following terms :—“In these circumstances, we are of opinion that the Plaintiff has not established that the possession of the Defendants commenced after the creation of the *putni* or that the proprietor of the estate was in possession at the time when the *putni* was granted. Consequently, the interest acquired by the Defendants cannot be deemed to be an incumbrance within the meaning of Art. 121, nor is it an encumbrance within the meaning of the first clause of sec. II of Reg. VIII of 1819. In this view the decrees made by the District Judge cannot be supported. . . .

“In the cases before us, the Defendants have been unquestionably in possession for more than twelve years antecedent to the suit. The Plaintiff, therefore, had to make out an affirmative case to take his suit out of the Statute of limitation, and he based his case on the ground that the cause of action arose on the 20th November 1899, on the assumption that Art. 121 of the second Schedule of the Indian Limitation Act was applicable. But it cannot be disputed that the cause of action did not arise on the 20th November 1899.

“If the provisions of the Bengal Tenancy Act are applied, as they must be applied, the position of the Plaintiff becomes even more difficult than it is if reliance is placed only upon Art. 121 of the second Schedule of the Indian Limitation Act on the groundless assumption that the sale took place under the provisions of the *Putni Regulation*. We may add that the restric-

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tion mentioned in sec. 195, cl. (c) of the Bengal Tenancy Act does not touch the question of the applicability of sec. 167 to the lands in suit." In the result the High Court made decrees allowing 88 appeals of the Defendants and dismissing the Plaintiff's suits with costs.

In the first consolidated appeal, which comprised 63 appeals, the Additional Subordinate Judge of Nadia and the said High Court delivered judgments on the 30th August 1915, and the 29th May 1917, respectively. Both Courts followed the previous decision of the High Court in the second consolidated appeal.

The Appellants appealed from the said decree of the High Court to His Majesty in Council.

Mr. DeGruyther, K. C. (with Mr. B. Dubé) for the Appellants.—The first proceedings were under sec. 102 of the Bengal Tenancy Act, 1885.

The Defendants say they hold the land by valid title dating from before 1790. The main issue was, were the lands held by Defendants *mal* or *lakhiraj*. The other issue was limitation. The Munsif held that the Defendants had not established these as *mal* lands. This was confirmed by the District Judge. It came, for findings again before the District Judge and his finding was, except in 8 cases, that the lands were *mal* lands. The High Court decided on the ground that the suit was barred by the Statute of limitations, and did not touch this question at all. They say that under Bengal Tenancy Act, you can only annul encumbrances by giving notice within a year of the knowledge of the encumbrances. There is no doubt that there was this *mal* land or *lakhiraj* land at the time of the quinquennial settlement.

Refers to Art. 121 of Sch. II of the

Limitation Act and *Hurryhur Mookhopadhyaya v. Madub Chunder Baboo* (1).

If you decide on the merits against the Appellants then no question of limitation arises. If for the Appellant, then limitation arises. "The question now is whether the lands in suit formed part of the *mal* lands of the village." Bengal Reg. X of 1793 (preamble). Prior to this a settlement was made with zemindar. *Lakhiraj* lands were excluded. Reg. XIX of 1793 (preamble) and para. 10. These sections on the question of presumption came before the Board. See secs. 159 and 166 of the Bengal Tenancy Act. No issue on the question of knowledge.

Judgment of High Court is erroneous and does not give any reason and is insupportable if the District Judge is right (sec. 103). On the question of adverse possession, the High Court is wrong *Secretary of State for India v. Chelikani Rama Rao* (3).

Relied on the finding of fact by District Judge that these were *mal* lands. These lands were the *mal* lands of the zemindars at the time of *putni* settlement.

Why should there be a presumption that these are *lakhiraj* merely because they did not pay rent for 55 years. The *lakhiraj* lands were entered as such in the Government Register under Reg. VIII of 1800.

Reg. V of 1816 again repeats the same provision. Sec. 7 of this regulation lays down the duties of the Kanungo.

Mr. Dubé (following):—Referred to *Secretary of State for India v. Chelikani Rama Rao* (3), following *Mohima Chunder v. Mohesh Chunder* (4) as to onus.

(1) 14 M. I. A. 152 at p. 172; 8 B. L. R. 566 (1871)

(3) L. R. 43 I. A. 192 at p. 204; s. c. 20 C. W. N. 1811 (1916).

(4) L. R. 16 I. A. 23; s. c. I. L. R. 16 Cal. 473 (1888).

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The question of onus is fully dealt with in *Hurryhur Mookhopadiya v. Madub Chunder Baboo* (1).

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—The Plaintiff in the Courts below, now represented by the present Appellants, was the purchaser at a public auction of the *putni taluq* Taraf Santipur, the property having been put up to sale in execution of a decree for rent. When he came to take possession he found that in thirty-eight villages, the tenants, with some small exception, set up a claim to hold their lands as revenue free or as *lakhiraj*. He accordingly served notices under sec. 167 of the Bengal Tenancy Act of 1885 upon one hundred and three occupiers, treating the interests which they claimed as incumbrances upon his purchase, which he had power under the various sections of the Act to avoid or annul. As they persisted in their claims he instituted in the Court of the Munsif, one hundred and three suits which were heard together.

During the somewhat protracted litigation which followed, fifteen of these suits were disposed of, and do not now come before their Lordships. The remaining eighty-eight are the subject of the first appeal, and there is a further batch of appeals represented in the second consolidated appeal also before their Lordships. The principles governing all these cases are the same, and the decision in one would cover the rest.

The case made by the Plaintiff is that the *putni taluq* in question was created in 1807, that it was put up for sale on the 2nd October 1899, and was bought by him free of incumbrances; that the lands in question were not registered as *lakhiraj*

and were in fact *mal* lands, and that any right of the occupier to hold revenue free must be derived under some grant made by the *talukdar*, and that this would be an incumbrance upon the *taluk* which the Plaintiff would be entitled to avoid or annul.

The defences in general form were that no zemindar, *putnidar* or *darputnidar* had been in possession of the land within twelve years, and the claims therefore, were barred by limitation; that the lands never were *mal* lands; that they had in fact been registered as *lakhiraj*; and certain other objections not material to be discussed in the present judgment.

When the case came for trial before the Munsif he decided in favour of the Defendants and dismissed the various suits, and on appeal the District Judge confirmed his decision. The matter was then taken to the High Court of Judicature at Fort William in Bengal, which Court remanded the case to the District Judge for rehearing the parties upon the evidence, and then addressing himself to the determination of the questions of law, intimating that the whole case would be open before him, and that every question of fact and law that arose for consideration upon the issues must be decided.

On this second hearing the District Judge, who was not the same as the first District Judge, went very carefully into the evidence, and took the view that the burden of proving that the lands were *mal* lands lay upon the Plaintiff, but that he had discharged it except in eight suits, in which he held that the Defendants had proved that their lands were *lakhiraj*. The ground on which he rested his view that the onus was in the first instance upon the Plaintiff was that these suits were not suits "for the resumption of *lakhiraj* lands, but for the eviction of the persons holding them, on the ground that they are

(1) 14 M. I. A. 152 at p. 172; 8 B. L. R. 566
(1871).

BIPRADAS PAL CHOWDHURY v. KAMINI KUMAR LAHIRI.

trespassers, and therefore had not right or title to hold them."

The materials put before him were partly documentary and partly oral. The Plaintiff relied upon the Pergannah register kept under Reg. VIII of 1800, the Kanungo register prepared and kept under regulations of 1816 and 1819, the register kept under the Land Registration Act of 1876, and copies of the Thak Maps and Thak Statements. In none of these were the lands in question shown to be *lakheraj*, although there were instances in which other lands were mentioned as being *lakheraj*. This was all the evidence which he gave. He did not show that any rent had ever been received in respect of the lands in suit. The way in which the learned District Judge accounted for this is as follows :—

"It must be remembered that the Plaintiff is a new-comer having purchased the *putni* at an auction sale only recently, and when it is borne in mind that some of the outgoing *putnidars* are at the back of the contending Defendants, there is nothing extraordinary in the fact that Plaintiff could not produce any collection papers to show that any rents have ever been realised from the Defendants for the lands in suit. I therefore hold that the Plaintiff by producing series of Registers and Thakbust Maps and Thak Statements, and showing that the lands in suit do not find any entry in any of these documents as *lakheraj* succeeded in discharging the onus upon him, sufficiently to shift it on the Defendants to prove that the lands they hold are *lakheraj* lands."

The documentary evidence which the Defendants relied upon was the quinquennial Register, the Teraj Statements and the Taidad Registers. The learned District Judge thought that no useful assistance could be obtained from the two former; but with regard to the Taidad Register, he gave it force wherever the lands could be identified. He thought that there was sufficient identification in

eight cases and he decided these in favour of the Defendants. All the rest he decided in favour of the Plaintiff.

The eighty-eight Defendants who had been unsuccessful appealed to the High Court. The High Court first dealt with the application of Art. 121 of the second Schedule of the Limitation Act, which provides that suits to avoid incumbrances in a *putni taluq* sold for arrears of rent must be commenced within twelve years from the date when the sale becomes final and conclusive, and therefore by inference permits suits to be brought within that time. But the learned Judges observed that the adverse possession contemplated in these cases is possession which commenced after the creation of the *putni* tenure. They say truly that the principle is that the purchaser of the *putni taluq* at such a sale as the present takes the *taluk* in the state in which it was initially created; and after assuming the correctness of some decisions to which they refer, they add :—

"The purchaser takes the property not free merely of all incumbrances that may have accrued upon the tenure by the act of the defaulting proprietor, his representatives or assignees but also free of the interest acquired by an adverse possessor who has been able to acquire such interest by the inaction of the defaulting proprietor." But they add: "This doctrine is plainly limited in its application to cases where the adverse possession, commenced after the creation of the *putni*. In a case in which the proprietor of the estate is out of possession, he cannot, merely by the device of the creation of a subordinate *taluk* arrest the effect of the adverse possession which has already commenced to run against him, and such possession would be effective not only as against the subordinate tenure holder, but also as against the superior proprietor. Consequently, if a Plaintiff relies upon Art. 121 of the second Schedule of the India Limitation Act, he has to establish that the incumbrance which he seeks to annul is due

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to adverse possession which commenced after the creation of the *putni*." They then point out that "The District Judge has not found that in the cases before us the adverse possession of the Defendants and their predecessors commenced after the creation of the *putni*. On the other hand, there is ample evidence that the adverse possession of the Defendants and their predecessors commenced before the creation of the *putni*. There are traces on the record to show that there had been assertions of hostile title before the *putni* itself was created."

The High Court accordingly reversed the decision of the District Judge and dismissed all the suits.

The estate of the superior Zemindar was created in 1799 and even assuming that there were no *lakheraj* lands at the time of the creation of that estate, there would be room for the growth of interests by adverse possession between 1799 and 1807; and as the High Court observes, on the assumption that the possible interests acquired by the Defendants by adverse possession constitute incumbrances which can be annulled, the defect of the Plaintiff is that he has not established that the adverse possession of the Defendants and their predecessors commenced after 1807.

It is here that the strong body of oral evidence, to which the learned District Judge apparently paid little attention, comes in. There is a mass of evidence to show that the Defendants and their predecessors had occupied the lands in question revenue free for periods greatly exceeding twelve years, and there was no evidence of any suggestion in cross-examination to which their Lordships' attention could be drawn to show that this occupation had begun at any particular period. Apparently it went back as far as anything could be traced.

In the absence of any indication that these holdings as revenue free tenures had an origin either by creation or by the sufferance of a *putnidar* since 1807, their

Lordships think that the High Court was right in saying that the proper presumption was that they ran back to a period antecedent to the creation of the *taluk*, or to put it in another way, that it lay upon the Plaintiff to show an origin subsequent to the creation of the *putni taluk* if he were seeking to avail himself of sec. 167 of the Act, and to annul these interests as incumbrances. In effect the judgment of the learned District Judge had given no weight to the evidence of possession. Whether this possession is to be attributed to the fact that the predecessors of the Defendants were in by title lawfully created before the grant of *taluk* in 1807, or to be attributed, as Counsel for the Appellants insisted must be the case (if they were to prevail), to interests lawfully created before 1790, or is to be attributed to adverse possession acquired before 1807, makes no difference in the legal result.

The principle upon which their Lordships should proceed has been well expressed in the case of *Hurryhur Mookhopadiya v. Madub Chunder Baboo* (1).

"Again, their Lordships think that no just exception can be taken to the ruling of the High Court touching the burthen of proof which in such cases the Plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the Plaintiff to prove a *prima facie* case. His case is, that his *māl* land has, since 1790, been converted into *lakheraj*. He is surely bound to give some evidence that his land was once *māl*. The High Court, in the judgment already considered, has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the *māl* assets of the estate at the Decennial Settlement. His *prima facie* case once proved, the burthen of proof is shifted on the Defendant, who must

(1) 14 M. I. A. 152 at p. 172; 5 B. L. R. 506 (1871).

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make out that his tenure existed before December 1790.

"It may be objected that the result of this ruling may be that Plaintiffs will sometimes fail, where under the former and looser practice they would have succeeded in assessing or resuming the land. But this can only happen by reason of the inability of the Plaintiff to give *prima facie* proof of the facts which is the foundation of his title; a circumstance not likely to occur unless the Defendants, or those from whom they claim, have been long in possession of the tenure impeached. Nor is it, in their Lordships' opinion, to be regretted if, in such cases, effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations, which have now been decided to be inapplicable to suits of this nature, and by relieving Defendants from the burden which every year made it more difficult to support."

It is right to add one observation.

The case proceeded in the Courts below upon the footing that an interest, not directly created by the *taluqdar*, but allowed to grow up by his sufferance and negligence is an incumbrance within the definition given to that word in sec. 161 of the Act. There is apparently a current of decisions in India to this effect, and their Lordships have, for the purpose of their judgment assumed, as the Judges in the High Court assumed for their judgment, that this is correct. But it must not be taken that their Lordships have expressed a final opinion upon the point, it being unnecessary that they should do so.

One further point remains. In order to be in a position to use the powers of sec. 167, the purchaser must act "within one year from the date of the sale or the date on which he first has notice of the incumbrance whichever is the later." The Plaintiff here did not act within one year from the date of the sale; but it is suggested that he did act within one

year of his having notice. No point to the contrary was made in the Courts below the High Court, and no issue was taken. In these circumstances the High Court thought itself entitled to act upon probabilities and to hold that the Plaintiff must have had notice more than a year before he acted, and to decide against him on this ground also. Their Lordships cannot agree with this course of action, and if the point were now of importance they would have acceded to the application of the Appellants, and remitted the case in order that an issue as to this point might have been stated and found. But as for the reasons already given they think the Plaintiff has failed on the main point, it becomes immaterial to have this issue decided. Their Lordships will therefore humbly advise his Majesty that this appeal should be dismissed. There being no appearance for the Respondents, there will be no question as to costs.

Solicitors: *Messrs. Watkins and Hunter* for the Appellants.

R. M. P.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD BUCKMASTER.

LORD ATKINSON.

LORD CARSON.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1921,

Heard, 2 and

5, December.

Judgment,

5, December.

BAWA MAGNIRAM

SITARAM,

Appellant,

v.

SEETH KASTUR-

BHAI MANIBHAI

and anr., Res-
pondents.

Hindu law—Temple property, permanent lease of, questioned after 100 years—Presumption that alienation was lawfully made.

The disability of a shebait of a Hindu Deity to make a permanent grant of endowed property is not absolute.

BAWA MAGNIRAM SITARAM v. SHETH KASTURBHAI MANIBHAI.

Although the sheshait for the time being has no power to make a permanent alienation of such property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power.

CHOCKALINGHAM PILLAI v. MAYANDI CHETTIAR (1) followed.

The above principle was applied in the present case of a permanent lease of temple property which was challenged after the lapse of 100 years, when it had become completely impossible to ascertain the circumstances which caused the grant to be made.

The importance to parties to litigation in India of defining at the earliest moment and in the simplest terms the exact character and extent of the dispute which is going to be made the subject of litigation adverted to.

This was an appeal from a judgment and decree of the High Court, Bombay, dated the 22nd December 1916, dismissing an appeal from the Court of the District Judge, Ahmedabad, dated the 27th October 1914, which reversed a decree of the Subordinate Judge of Ahmedabad, dated the 10th February 1913.

The suit was brought by the Plaintiff (Appellant) to recover possession of a "wadi" outside the Delhi Gate at Ahmedabad.

The "wadi" was, on the 17th June 1756 conveyed to the deity Shri Ranchodji through one Sultansinghji as a "pasayta" or assignment of rent-free land for religious purposes.

In 1824 the following document was passed to Bai Krishnabai the wife of Sultansinghji by one Vakhatchand an ancestor of the Respondent.

(1) L. L. B. 19 Mad. 485 (1896).

Shri (i.e., prosperity.)

On the 8th of Maha Vad of the Samvat Year 1880 the day of the week Sunday (22nd February 1824) (this rent-note) is passed to Bai Krishnabai wife of Chowbdar Sultansang Maharajji by Shet Vakhatchand. Khushalchand. To wit: You have given a field and a well as "Dharmada" (i.e., charity) to the temple of Shri Ranchhodji, I have taken the said field and well (on lease) for making "Wadibag" (lit. a garden). In respect thereof I am to pay from year to year Rs 40 (in words) forty in cash of the Shakkai Currency for one year in your presence to the Sadhu who performs the worship at the temple of Shri Ranchhodji. Should I fail to pay the amount as above written I am to take off and remove the structure which I may have raised and also the trees and seeds which I may have planted and sown and to hand over the field and well to (the authorities of) the temple of Shri Ranchhodji. On (the security of) the said field and well Bawa Kisandas has borrowed from me Rs. 95-ninety-five of the Shakkai Currency. As to that I am to deduct Rs 10 and pay Rs 30 to you (for each) 1 one year. On the Rs 95 being paid up in full, I am to pay rupees forty for 1 one year as above stated. And in case the Government or any other person causes any hindrance or obstruction in connection with this field and well I am to hold you responsible therefor. What is thus written is agreed to

1. Here the signature. 1 Here the attestation.

1. The signature of Sheth Vakhatchand Khushalchand in the hand of Motibhai

1 Written by Shah Parbhudas Bulakhidas, (his) attestation (made) in the presence of the two parties.

1. Written by Shah Shamal Jamnadas, (his) attestation (made) in the presence of two parties.

It is largely on this document that the Respondents relied—in support of their claim to be permanent, and not annual, tenants as alleged by the Appellant.

BAWA MAGNIRAM SITARAM v. SHETH KASTURBAI MANTEHAI.

In 1909 the Appellant was authorised by the District Judge of Ahmedabad to lease the "wadi" to the Jehangir Vakil Mills for 999 years and it was in order to vindicate his title and give possession to the mills that the present suit was brought.

The trial Judge held that the Defendants (Respondents) were annual tenants and that no notice to quit need be given them as they had repudiated the Plaintiff's title.

This decree was reversed on appeal by the District Judge of Ahmedabad and the High Court of Bombay confirmed the decree of the lower Appellate Court.

The Plaintiff now appealed to His Majesty in Council.

Mr. Upjohn, K. C. (with Mr. E. B. Raikes) for the Appellant.—There are two main points in this appeal. (1) Was the lease a permanent one? (2) Was the lessor absolved from giving notice to quit? The main question is the construction of the rent note passed to Krishnabai.

It could not be a lease in perpetuity; if it purports to be so it was beyond the powers of the "shebait" to grant. It contains no words importing perpetuity. The rent is a yearly one. There is express power to determine the tenancy on failure to pay rent and the object is agricultural, i.e., to make a garden.* The District Judge has held this to be a building lease because there is a direction to remove a structure. This is not a fair interpretation of the terms of the grant. *Musammat Bilasmoni Dasi v. Rajah Sheo Pershad Singh* (2), *Toolshi Pershad Singh v. Rajah Ram Narain Singh* (3) and *Lala Beni Ram v. Kundan Lall* (4).

An important consideration in construing such a document is what are the powers of the lessor. A shebait cannot legally alienate. *Maharanee Shibessporee Debia v. Mothooranath Acharjo* (5). See too *Fateh Chand v. Rani Kishan Kunwar* (6) and *Vidya Varusi Thirtha v. Balusami Ayyar* (7).

Even giving the lease the longest operation it could have, at any rate after Krishnabai's death it would become a yearly tenancy.

Mr. E. B. Raikes (following):—On the question of notice, no notice to quit was necessary because the Respondents had publicly stated that they had a permanent lease. *Vikrama Deo Maharajuloom, Maharaja of Joypore v. Rukmini Pattamaha-devi* (8).

The evidence goes to show that the lease was granted, if not by a shebait, at any rate by some one in a fiduciary capacity. The grant of 1756 is plainly for religious purposes. So that the grantee holds in a fiduciary capacity for the performance of the ceremonies.

Apart from the question of proper notice, I am in any case entitled to come here and ask for a ruling on the question of whether the tenure is or is not permanent.

Mr. L. DeGruyther, K. C. (with him J. M. Parikh) for the Respondents.—The deed must first be construed. If that is in my favour the question then arises as to the grantor's power to grant a permanent tenancy. If the lease is ambiguous then the fact that for a great number of years it has been treated as permanent is evidence that it was intended to be

(2) L. R. 9 I. A. 33: s. c. I. L. R. 8 Cal. 664 (1882).

(3) L. R. 12 I. A. 205 at p. 214: s. c. I. L. R. 12 Cal. 117 (1885).

(4) L. R. 26 I. A. 58 at p. 68: s. c. I. L. R. 21 All. 495; 8 C. W. N. 502 (1899).

(5) 13 M. I. A. 270 (1869).

(6) L. R. 39 I. A. 247: s. c. I. L. R. 34 All. 579 (1912).

(7) L. R. 48 I. A. 302 at p. 327 (1921).

(8) L. R. 46 I. A. 109: s. c. I. L. R. 42 Mad. 589; 28 C. W. N. 889 (1919).

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permanent. *Upendra Krishna Mandal v. Ismail Khan Mahommed* (9).

In the document the only provision for a termination of the tenancy is on failure to pay rent. The purpose of the lease is for making "wadibag," i.e., a garden house, and the Government records show a bungalow on this property in 1836 and 1857. The temple on the property is a Jain temple erected by the lessees. They would not have erected such a building unless they considered that their tenure was permanent.

Reference was made to *Nabakumari Debi v. Behari Lal Sen* (10). The point as to whether grantor had power to grant a permanent lease was not raised in the lower Courts. A *shebait* can in special cases grant a permanent lease. From lapse of time and from the fact that this point was not raised, it may be assumed that the original grantor did have power to grant a permanent lease.

Banga Chandra Dhur Biswas v. Jagat Kishore Chowdhuri (11), *Murugesam Pillai v. Manickavasaka Pandara* (12) and *Vidya Varusi Thirtha v. Balusami Ayyar* (7).

If it had been pleaded that the grant by *Krishnabai* was invalid I say this is barred by limitation. Indian Limitation Act, IX of 1908, Art. 134. He also referred to:—*Chockalingham Pillai v. Mayandi Chettiar* (1).

Mr. E. B. Raikes replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—Their Lordships have come to a clear opinion upon the merits of this appeal, and as it relates to the possession of land, they will not reserve the expression of the advice that they will tender to His Majesty.

The Appellant is seeking to obtain possession of a piece of land some 5½ acres in extent, that is situated near the Delhi Gate of the city of Ahmedabad. That the Respondents are in possession by themselves or their tenants is not in dispute; it is indeed the foundation of the Appellant's claim, for the proceedings out of which this appeal has arisen were instituted by the Appellant as Plaintiff claiming to recover possession of the property upon the ground that the only right of the Respondents is as tenants from year to year, a tenancy which had been duly determined by notice, or in the alternative, that the conduct of the Respondents rendered it unnecessary that the Appellant should take any further steps to secure its determination.

The land in question was granted on the 17th June 1756, to one Sultansingh Maharajji for the deity of Shri Ranchhodji; in other words, the grant was a grant to a named person for a defined religious purpose.

On the 22nd February 1824, this land was dealt with by way of lease; the document recording the transaction takes the form of a recognition by the tenant of the rights that have been granted and its informality is largely responsible for this dispute. It states that it is a rent note given to the wife of Sultansingh Maharajji, the grantee under the original grant; that the tenant has taken the field and well for making a garden, and that in respect thereof Rs. 40 a year is to be paid. There then follows an important provi-

(1) I. L. R. 19 Mad. 485 (1896).

(7) L. R. 48 I. A. 302 (1921).

(9) L. R. 31 I. A. 144; s. c. I. L. R. 32 Cal. 41; 8 C. W. N. 889 (1904).

(10) L. R. 34 I. A. 180; s. c. I. L. R. 34 Cal. 302; 11 C. W. N. 865 (1907).

(11) L. R. 43 I. A. 249; s. c. I. L. R. 44 Cal. 186; 21 C. W. N. 225 (1916).

(12) L. R. 44 I. A. 98; s. c. I. L. R. 40 Mad. 402; 21 C. W. N. 781 (1917).

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sion. The money is to be paid, not to the lady who made the grant, but to the Sadhu who performed the worship at the temple of the deity, and the explanation of that is to be found in later clauses of the deed, by which it appears that one Bawa Kisandas, who had undoubtedly some official capacity in connection with the temple, had borrowed money from the lessee, and the amount of that loan being Rs. 95, the lease provides for its liquidation by the lessee retaining Rs. 10 a year until the discharge took place. There is also a provision that if the rent is not paid, the lessee should be at liberty to remove the structures which he may have placed upon the property, and also the trees and seeds. Their Lordships think this means that, in the event of the rent not being paid, re-entry will be possible, and that if re-entry is attempted the permanent structures which the lessee has erected may be removed by him. There are no words whatever in the document that suggest any other right of re-entry on the part of the lessors, nor is there anything in the actual language that gives much assistance in determining what the effect of the document might be. It has been argued that the object of taking the lease, which is said to be the making of a "wadibag," renders some assistance, as the meaning of wadibag is a garden, which it was intended to use for the purpose of adding thereto a house, and that in consequence the grant was for building purposes. Their Lordships cannot, however, find anything that will give them any material assistance in this or any of the descriptive words. All that can be said is that there are two constructions, and no third, to which the document lends itself; the one that the tenancy recognised was a tenancy from year to year; the other that it was a permanent lease, which could only be terminated by non-payment

of rent. After this lease had been granted, certain buildings were undoubtedly erected upon the land. What the nature of those buildings may be it is not easy to determine, and it appears that whatever they were they have been allowed to fall into disrepair. Their Lordships do not think that the Respondents can gain much assistance from inviting attention to the actual structures that exist upon the property as it stands now. Certainly no case can be established that would stop the lessors from asserting their right to possession, if under the terms of the document as construed by the circumstances known, that right exists. The evidence is unvarying to this effect—that from 1826 down to the time when this dispute arose, the tenants have been in continued and undisturbed possession of this land at the original rent, and that there is no case made of any act done or any document signed which suggests that during the whole of that period either one party or the other regarded the right of the Respondents as anything short of permanent. There is, indeed, both in 1829 and in a receipt for rent as late as 1906, the use of the word "*sadarmat*," which has satisfied the learned Judges in the Court below that the tenure was intended to be permanent. It is a matter of extreme difficulty for their Lordships here to give with confidence decisions as to the exact meaning of words in a language with which they are unfamiliar, and they always place the greatest reliance upon the learned Judges in India for the purpose of affording them an exact and accurate interpretation of any word that may be in dispute. They do not, however, in this case, intend to rest their opinion upon the use of this particular word. It may have been accidental, it is certainly not conclusive.

Apart from any inference due to the use of this word, their Lordships think that

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the terms of the document which, as pointed out by the learned District Judge, may not be satisfied if the tenancy were one from year to year, coupled with the fact that notwithstanding the low rent, which was never changed, the property has been in fact dealt with by the lessees on three separate occasions, in 1872, in 1888, and in 1900, by being sub-leased for substantial periods of years at increased rents, a circumstance which it is not unreasonable to assume must have come to the knowledge of the lessors at some time or another, and that no dispute has arisen as to their right to make such grants or to remain in occupation until the present time, is sufficient to justify them in saying that the memorandum signed on the 22nd February 1824, was intended to record a transaction by which a permanent right to occupy was conferred upon the Respondent's predecessors in title. With regard to the litigation that took place in 1893 for the purpose of partitioning the lessees' interest, it is only necessary to say that having examined all the details which are most carefully investigated by Mr. Mohile, the Additional First-class Subordinate Judge by whom this case was originally heard, their Lordships agree with him and the learned District Judge in appeal that nothing was then decided which bars the present litigation or prevents the Defendants from asserting their rights.

It is, however, further urged on behalf of the Appellant that if such be the meaning of the document, effect cannot be given to it because the property dealt with was property devoted to religious purposes, so that the power of leasing would not extend beyond the granting of a lease for the life of the head of the religious charity, whoever it might be, for the time being. There is no doubt great force in that argument, but it is subject to two defects. The first is that it certainly is not plain

that the original lease in 1824 was made by any body in the position of a *shebait* at all, because the note is given to the widow of the original grantee, and although it might have been fair to assume that the original grantee was intended to hold as a *shebait*, even if the widow could hold the office, it was not in virtue of that capacity that she granted the lease. Further, the disability of a *shebait* to make a permanent grant is not absolute.

In the case of *Chockalingham Pillai v. Mayandi Chettiar* (1), it was pointed out that although the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power. Their Lordships have no hesitation in applying that doctrine to the present case. If in fact the grant was made by a person who possessed the limited power of dealing under which a *shebait* holds lands devoted to the purposes of religious worship, yet none the less there is attached to the office in special and unusual circumstances, the power of making a wider grant than one which enures only for his life. At the lapse of 100 years, when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy which the Courts always adopt, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate, to assume that the grant was lawfully and not unlawfully made.

Their Lordships therefore hold that on

(1) L. L. R. 19 Mad. 485 (1896).

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both the grounds that have been mentioned this appeal must fail, and they have only to add that if in truth the real complaint that the Appellant desired to bring forward was a complaint based upon the limited power of the original grantor, such a case ought to have been carefully stated in the original plaint, and certainly urged before the High Court as a substantial reason why leave to appeal should have been granted. The absence of this circumstance has not had any influence upon their Lordships' conclusion. They only refer to the matter for the purpose of attempting once more to call the attention of parties in India to the importance of defining, at the earliest moment and in the simplest terms, the exact character and extent of the dispute which is going to be made the subject of litigation through the various Courts and upon which this tribunal ultimately advises.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors : *Mr. Edward Dalgado* for the Appellant.

Solicitors : *Messrs. Baker, Blaker and Hawes* for the Respondents.

G. D. M. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL

JURISDICTION

No. 110 of 1920.

<p>SANDERSON, C. J. RICHARDSON, J. 1921, 4, May.</p>	<p>SARAT CHANDRA GUPTA, Plaintiff, Appellant, v. KANAI LAL CHAKRA- BARTY and anr., Defend- ants, Respondents.</p>
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Indian Limitation Act (IX of 1908), Arts. 91, 95 and 120, sec. 18—Suit for setting aside or cancelling a written instrument on the ground of fraud and declaration of title—Deed if need be set aside when instrument void ab initio.

Plaintiff prayed inter alia (1) for a declaration that a deed of gift was void and inoperative in that the donor signed the deed believing, owing to the fraud and misrepresentation of the donee, that it was only a power of attorney, and (2) for a declaration of title in certain Government Promissory Notes, the subject of the deed of gift. The deed was signed on the 12th July 1906 and the donor came to know of the fraud on the 23rd January 1915, and the suit was instituted on the 22nd December 1919.

Held—That the three years' limitation provided by Arts. 95 and 91 of the Limitation Act did apply to the suit, inasmuch as the principle laid down in FOSTER v. MACKINNON (1), that the alleged deed is no deed was applicable so that the deed being void ab initio did not require to be set aside or cancelled.

Held, further, with reference to the relief sought for in cl. (2) of the prayer, that Art. 120 of the Act would apply and that sec. 18 would prevent the period of limitation from running until the fraud became known.

RANI JANKI KUNWAR v. RAJA AJIT SINGH (2) and MALKARJAN v. NARHARI (3) distinguished.

This was an appeal preferred on the 21st September 1920 against a decree of Mr. Justice Buckland, dated the 24th August 1920, passed in the exercise of Ordinary Original Civil Jurisdiction.

The material facts necessary for this report will appear from the judgment of the learned Chief Justice.

Mr. N. N. Sircar (with Messrs. B. C. Ghose, S. C. Bose and B. M. Sen) for the Appellant argued that the deed being a nullity—a non est factum—cl. (1) of the

(1) L. R. 4 C. P. 704 at p. 711 (1869).

(2) L. R. 14 I. A. 148 (1887)

(3) L. R. 27 I. A. 216; a. c. I. L. R. 25 Bom. 337; 5 O. W. N. 10 (1900).

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relief prayed for need not be considered and may even be struck out and the article applicable to cl. (2) is Art. 120 of the Limitation Act.

Messrs. P. N. Dutt and S. K. Chakraborty for the Respondents were heard in reply.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Buckland whereby he dismissed the suit, on the ground that it had been brought out of time. There was no investigation of facts. The case was decided upon the facts which were stated in the plaint. Having regard to those facts stated in the plaint the learned Judge came to the conclusion that the suit was barred under the Art. 95 of the Indian Limitation Act, holding that the suit was a suit for relief on the ground of fraud. It is, therefore, necessary to refer to the plaint to ascertain the facts which were therein relied upon. It was alleged that one Nanda Kissors Ganguly died on the 2nd day of June 1892, that by his Will he devised to his widow Ranganmoni Debi certain premises Nos. 27/1 and 27/2, Soorti Bagan Lane and a life interest in certain other premises No. 3, Soorti Bagan Lane, and that by the Will he left the latter property No. 3, Soorti Bagan Lane, to his nephew Kanai Lal Chuckerbutty after the termination of the widow's life interest. The original Plaintiffs in this case were Ranganmoni Debi (the widow) and Sarat Chandra Gupta and the original Defendant was Kanai Lal Chuckerbutty to whom I have just referred. But in August 1920 Ranganmoni the widow was struck out as a Plaintiff and was added as Defendant. It appears that Ranganmoni took possession of the property of her husband after his death and was in possession of the pro-

perty in question Nos. 27/1 and 27/2, Soorti Bagan Lane, until the time the property was acquired by the Calcutta Improvement Trust. It was then alleged in the plaint that in June or July 1906 the Defendant Kanai Lal Chuckerbutty induced the widow Ranganmoni Debi to sign a document and certain allegations with regard to the necessity for the document for the purpose of the management of the estate were relied upon. But the most important allegation was an allegation that relying upon the representation of the Defendant Kanai Lal Chuckerbutty, Ranganmoni Debi put her mark upon a paper which she was told by the Defendant Kanai Lal Chuckerbutty was a power-of-attorney and would enable the said Kanai Lal to institute suits for rent on behalf of Ranganmoni and that she signed it under the belief which was brought about by Kanai Lal that the document which she signed was nothing more than a power-of-attorney. It was further alleged that in June 1913 the premises were acquired by the Calcutta Improvement Trust and a sum of Rs. 10,000 was awarded as compensation and that such sum is now lying invested in Government Promissory Notes in the Bank of Bengal to the credit of the Calcutta Improvement Tribunal, that thereupon claims were made in respect of the said premises before the Improvement Tribunal by Ranganmoni and also by Kanai Lal Chuckerbutty and others. It was then alleged that an award was made by the President who directed that the compensation money should be invested in Government securities and the interest should be paid to Ranganmoni during her life, and that after her death the amount would be dealt with according to law. It was then alleged that during these proceedings Ranganmoni ascertained for the first time that the document, which she has signed in 1906 under the

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belief that she was signing a power-of-attorney was as a matter of fact a deed of gift and exchange whereby she purported to convey to the Defendant Kanai Lal Chuckerbutty the premises Nos. 27/1 and 27/2, Soorti Bagan Lane, subject to a right in herself to hold and occupy the premises during her life in exchange for the vested reversion of Kanai Lal Chuckerbutty in the other premises, namely, No. 3, Soorti Bagan Lane. Then the other material fact is that after this, namely, on the 23rd of November 1918, Ranganmoni assigned to the Plaintiff all her right title and interest in respect of the Rs. 10,000 and the Government Promissory Notes representing that sum of Rs. 10,000 together with all interest for valuable consideration covenanting with the assignee that she would give him all assistance which would be necessary for the purpose of instituting suits for a declaration of Ranganmoni's absolute right in, and over, the premises and to the Rs. 10,000. The plaint then set out the alleged deed of July 1906 after stating that enquiries had been made in the Registration Office. The suit was instituted on the 22nd of December 1920. In the suit it was submitted that the deed of exchange and gift was wholly void and inoperative and that the Defendant Kanai Lal Chuckerbutty never acquired any right title or interest in the said premises or in the Rs. 10,000 and it was stated that Ranganmoni was prevented by the fraud of the Defendant from acquiring any knowledge of the real nature of this deed and her right to institute the suit until the 23rd January 1915; and that consequently the cause of action arose on the 23rd of January 1915. Those are all the facts to which I need refer. The first prayer of the plaint was for a declaration that the said deed of exchange of 1906 was void and inopera-

tive; secondly for a declaration that the Plaintiff Sarat Chandra Gupta was absolutely entitled to the said sum of Rs. 10,000 in Government Promissory Notes now lying in deposit at the Bank of Bengal and for other receipts to which I need not refer. First of all it is necessary to say that of course the Plaintiff the assignee Sarat Chandra Gupta is in no better position than his assignor Ranganmoni Debi. The question is whether the learned Judge was right in holding that Art. 95 applies to this case on the ground that this is a suit asking for relief on the ground of fraud. The learned Counsel for the Appellant has argued that the relief asked for in this case is a declaration that the Plaintiff is absolutely entitled to the sum of Rs. 10,000 in the Government Promissory Notes and that the first paragraph of the prayer might have been struck out of this plaint altogether that it would no doubt have been necessary for the Plaintiff to prove the facts stated in the plaint but that no relief need be granted by the Court except the relief which is asked for in the second paragraph, namely, a declaration that the Plaintiff is entitled to the money represented by the Government Promissory Notes. That argument is based upon the ground that the deed of July 1906 was void and inoperative *ab initio*, that it was not merely a contract which was voidable at the instance of Ranganmoni but that it was no deed at all on the ground that Ranganmoni when she executed it thought that she was executing a power-of-attorney whereas by the fraud of the Defendant she was induced to execute a deed whereby the property was conveyed to the Defendant. We must approach this case upon the assumption that the allegations in the plaint are correct because so far there is no proof in this case. We must therefore assume for the purpose of this judg-

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ment that Ranganmoni signed this document under the belief that she was signing a power of attorney, whereas she was induced by the fraud of the Defendant to execute a deed of exchange and gift thereby alienating the property from herself to the Defendant subject to a life interest. I of course express no opinion as to what are the real facts in this case. I am giving this judgment upon the assumption that the facts alleged in the plaint are correct. Upon that assumption the deed was no deed, because Ranganmoni thought that she was signing one thing whereas as a matter of fact she was signing another and the principle which is applicable to this case if that assumption is made is the one which is laid down by Mr. Justice Byles in *Foster v. Mackinnon* (1). The allegation here is that the deed of July 1906 was void on the ground that the mind of Ranganmoni did not accompany her signature or mark, in other words that she never intended to sign and therefore in contemplation of law never did sign the deed to which her name and mark were attached. If then the allegation amounts to an assertion that the transaction which took place in July 1906 resulted in no deed being signed by Ranganmoni then the only declaration which the Plaintiff would require in this case would be the declaration which is asked for in para. 2 of the prayer. It would be necessary as I have said before for the Court to come to a decision on the facts as regards this transaction and if it came to a decision that in law the deed of exchange and gift was not executed by Ranganmoni, then all that would be necessary would be for the Court to declare that the Plaintiff is entitled to the money. It is not a case where the contract is voidable in which case the Court would have to make a declaration that the deed should be set aside. On the facts

(1) L. R. 4 C. P. 704 at p. 711 (1869),

assumed there would be no necessity for such a declaration for the Court would have come to the conclusion that in law Ranganmoni had not executed the deed of exchange and gift. Consequently in my judgment the contention of the Appellant in this case would be correct, viz., that the relief which is sought for is the declaration which is asked for in para. 2 of the prayer of the plaint. That being so Art. 120 of the Schedule to the Limitation Act would apply to this case and inasmuch as it is alleged that Ranganmoni's rights were concealed from her by the fraud of the Defendant until the 23rd of January 1915, sec. 18 of the Limitation Act would have effect and the period of limitation would not begin to run until the 23rd of January 1915. The period of limitation prescribed by Art. 120 is six years. This period would not expire until January 1921 and inasmuch as the suit was brought on the 22nd of December 1919, in my judgment the suit would be brought in time. Consequently this appeal is allowed with costs, the order of the learned Judge dismissing the suit is set aside and in view of this judgment the case is remitted to the Court of first instance to be tried on the merits. The costs of the first hearing in the Court below will abide the result of the further hearing and in the event of the suit not being further tried such costs will be in the discretion of the Judge on the Original Side.

RICHARDSON, J.—I agree. It seems to me that modern decisions founded in principle on the cases of *Rani Janki Kunwar v. Raja Ajit Singh* (2) and *Malkarjan v. Narhari* (3), lead to the following result. If a Plaintiff comes into Court to have a particular written instrument set aside or

(2) L. R. 14 I. A. 148 (1887).

(3) L. R. 27 I. A. 216; s. C. I. L. R. 25 Bom. 337; 5 C. W. N. 10 (1900).

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cancelled then *prima facie* the articles of the schedule of the Limitation Act applicable is Art. 91 whether the ground on which the claim is made is fraud or some other ground.

The Courts, however, draw a distinction between void and voidable instruments and hold that Art. 91 does not apply to instruments which are void *ab initio* so as not to require setting aside. When the instrument is voidable it is presumably valid, and binding on the Plaintiff until it is set aside, and any further relief which may be sought depends on the removal of the instrument from the Plaintiff's path. In such a case Art. 91 applies.

But if the facts alleged by the Plaintiff raise a case that the instrument, whether executed by the Plaintiff himself or by some third party through whom he claims is null and void *ab initio*, then as I understand the matter, Art. 91 ceases to be applicable and the circumstances may entitle the Plaintiff to the benefit of the longer period of limitation allowed by some other article, such as Art. 120 or Art. 144.

In the present case, as I read the plaint, the Plaintiff raises the plea known to English lawyers as *non est factum*.

If she should succeed in establishing that plea, then the instrument in question would be altogether void. It would not require setting aside and the prayer to set it aside would be therefore superfluous, so that Art. 91 would be inapplicable.

Now the Court below has come to no conclusion upon this plea. I do not know whether the point was taken before the learned Judge but it does seem to arise on the pleadings and it was taken before us without objection by the other side. I express no opinion of course on the merits of the Plaintiff's plea. The question is in the first instance a question of fact depending on evidence and it is impossible

to anticipate the conclusion at which the Court of trial may arrive after evidence has been taken.

I agree that the appeal should be allowed and the case remitted to the Court below to be further dealt with.

Mr. S. M. Dutt, Solicitor for the Appellant.

Messrs. Banerjee and Banerjee, Solicitors for the Respondents.

S. N. C.

(CIVIL APPELLATE JURISDICTION.)

APPEALS FROM APPELLATE DECREES

Nos. 1777 and 2047 of 1919.

RAJA SASI KANTA
SANDERSON, C. J. ACHARYA BAHADUR,
CHOTZNER, J. Plaintiff, Appellant,
1921, v.
10, August. SANDHYA MONI DASYA,
 Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 103B (3)—Presumption as to correctness of entry, if arises, when the entry in the record-of-rights relates to land not within the scope of the Act—Sec. 102 (b), proper entries—Weight to be attached to entries not properly made—"Chandina" land, meaning of.

Certain lands were described in the record-of-rights as Chandina, by which the settlement authorities meant bazar lands not subject to the provisions of the Bengal Tenancy Act. In a suit for khas possession of the lands, it was pleaded by the Defendant that the entry being with respect to lands which did not come within the scope of the Bengal Tenancy Act, the Revenue Officer had no jurisdiction to make the entry, and as such no presumption as to its correctness arose under sec. 103B (3). The landlord did not produce his papers which would have shown the origin and nature of the tenancy and the Defendant stated the lands to be jote or homestead lands:

Held—That though it cannot be said that no presumption arose under sec. 103B

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(3), the presumption cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the record-of-rights. The non-production of papers by the Plaintiff coupled with the statement of the Defendant was sufficient to rebut the statement in the record-of-rights.

BIPRODAS PAL CHOUDHURY v. AZAM OSTAGAR (1) discussed.

These were appeals against the decrees of E. Milsom, Esq., 2nd Additional District Judge of Zillah Mymensingh, dated the 31st of July 1919, affirming the decrees of Babu Atul Chandra Banerjee, Munsif, 3rd Court at Mymensingh, dated the 22nd of July 1918.

The material facts will appear from the judgment.

Babus Jogesh Chandra Dey and Gobind Chandra Dey Roy for the Appellant.

Dr. Sarat Chandra Basak and Babu Annoda Charn Karkun for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

No. 1777.

SANDERSON, C. J.—This is an appeal from the judgment of the learned Second Additional District Judge of Mymensingh ; and, the suit was brought for the purpose of obtaining *khas* possession of the lands in dispute.

The Defendant in one case was Brindaban Chandra De Sarkar, and the Defendant in the other case was his wife : and, it has been found that she was a *benamdar* for her husband, and the two cases have been treated as if Brindaban was the occupier of both the pieces of land.

The first Court dismissed the suit : and, upon appeal to the lower Appellate Court, the decision of the first Court was upheld, and the appeal was dismissed.

(1) 1. L. R. 46 Cal. 441 (1918).

The case raises a point of considerable interest, inasmuch as the record-of-rights which was published in February 1918 described the character of the holding in each case as *Chandina*, an expression which in this part of the district was, apparently prior to the entry in the record-of-rights, unknown. There was a considerable discussion as to what was the meaning of the word, but the learned Additional Judge for the purpose of his judgment said that he was prepared to hold, though with a certain amount of doubt, that the view urged by the Plaintiff was correct, namely, that by *Chandina* the settlement authorities meant *bazar* land not subject to the provisions of the Bengal Tenancy Act.

The first point, that the learned Vakeel for the Appellant has urged, is based upon sec. 103B (3) of the Bengal Tenancy Act which provides that "Every entry in a record-of-rights so published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect : " and, the argument was to the effect that the learned Judge in the lower Appellate Court had ignored that section and held that in this case the entry in the record-of-rights created no presumption. The words of the learned Judge may be cited : he said, "whatever land is dealt with by the settlement authorities as falling under the Tenancy Act, the law says that the various entries made are to be presumed correct until the contrary is shown. But I know of no authority for the view that if the settlement authorities decide that the land is not held under the Bengal Tenancy Act at all, the view should be deemed correct." My learned brother and I have had some difficulty in understanding how this entry came to be made by the Revenue Officer if the word "*Chandina*" is to be taken to bear the

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meaning which the learned Judge in the lower Appellate Court put upon it. If the Revenue authorities understood that it meant *bazar* land which was not subject to the provisions of the Bengal Tenancy Act at all, it is difficult to understand why they entered it upon the record-of-rights which was made in connection with lands which are subject to the Bengal Tenancy Act. The explanation of it may be that the Revenue Officer had not then the advantage which the two lower Courts had, of the discussion as to what the word really meant, and the entry may have been made under a misapprehension as to the real meaning. However that may be, the entry was made, and there it stands : and, the question is whether the learned Vakeel for the Appellant is right when he says that a presumption must be made that this description of the holding is correct until evidence is given to prove the contrary.

Dr. Basak, the learned Vakeel for the Defendant, has contended that the learned Judge was right in holding that no presumption arose for the reason that sec. 102 of the Bengal Tenancy Act describes the particulars which are to be recorded in the record-of-rights. It describes the classes of tenants with which the record-of-rights is to deal ; and, for the purpose of seeing what classes of tenants are to be dealt with he referred especially to cl. (b) of sec. 102, and he urged that it is only with regard to what I might call proper entries, i.e., the entries which ought to be made and could be made in accordance with the provisions of the Bengal Tenancy Act that the presumption which is referred to in sec. 103B (3) would arise. No authority directly upon this question has been cited to us, and consequently it is not unreasonable to assume that the learned Judge was correct when he said " I know of no authority for the view that if the

settlement authorities decide that the land is not held under the Bengal Tenancy Act at all, the view should be deemed correct." The only authority, in any way touching the question, which was cited to us, is the case of *Bipradas Pal Choudhury v. Azam Ostagar* (1), a decision of my learned brother Mr. Justice Woodroffe and Mr. Smither when he was acting as a Judge of this Court. There Mr. Justice Woodroffe, said, " The Legislature contemplated I think that only three classes of tenants should be regarded as holding lands within the meaning of the Bengal Tenancy Act, viz., a tenure-holder who has been held to mean a person collecting rents from raiyats, raiyats holding lands for the purpose of cultivation and under-raiyats holding under them." Again he said, " There seems to me no doubt that in its general scope the Bengal Tenancy Act is law for agricultural landlords and tenants." Basing his argument upon that, the learned Vakeel for the Defendant has supported his proposition that if an entry has been made in the record-of-rights with regard to land which does not come within the scope of the Bengal Tenancy Act and with regard to which the Revenue Officer had no jurisdiction to make the entry, no presumption arose under sec. 103B (3) of the Bengal Tenancy Act. I am not prepared to go so far as to say that in this case no presumption arose from the entry in the record-of-rights, but I am prepared to say that the presumption cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the record-of-rights. In this case, the first Court went so far as to hold that the entry was clearly wrong. Upon that point the learned Judge in the lower Appellate Court has not expressed any definite opinion, as I understand, because he

(1) I. L. R. 46 Cal. 441 (1918).

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came to the conclusion that no presumption ought to be drawn from the entry. But he discussed the evidence and came to the conclusion that if he had to rely upon the statement of the Defendant alone he would have had difficulty in finding in favour of the Defendant. He, however, drew attention to the fact that the Plaintiff was a landlord with large possession and it was an extraordinary thing that the papers which would have shown the origin and the nature of the tenancy had not been produced. That was the point upon which the first Court relied to a large extent, and held that the non-production of these papers is to be regarded as a matter which must weigh heavily against the Plaintiff's case. Taking that together with the evidence of the Defendant, the learned Judge in the lower Appellate Court came to the conclusion as I read his judgment that the Defendant had proved that the statement in the record-of-rights was rebutted and that the lands in question were either *jote* lands or homestead lands. Consequently, the first point, in my judgment, which the learned Vakeel for the Appellant urged is not sufficient to justify us in allowing this appeal or even in directing a remand.

Then there was a further point which the learned Vakeel raised. He urged that the facts were not sufficiently found by the learned Judge in the lower Appellate Court. He referred to the finding that the lands must be taken either as *jote* lands or as homestead lands and that the finding that the lands are homestead lands, by itself, is not sufficient, because in order to bring them within the purview of the Bengal Tenancy Act they must be homestead lands occupied either in connection with agriculture and for purposes of agriculture. In my judgment, although the learned Judge's words are not quite as definite as they might have been, reading

the judgment as a whole I have no doubt that the learned Judge meant to find and did find as a matter of fact that the lands were agricultural lands and that the homestead was used in connection with agriculture to some extent. I come to that conclusion upon the words of the judgment itself and I am fortified in that conclusion by the finding of the first Court that the Defendant actually used these lands partly for shop and partly for raising crops. Under those circumstances, the finding of the lower Appellate Court is sufficiently definite: and, I think that the learned Judge found that the holdings were not *Chandina* but that they were holdings which came within the purview of the Bengal Tenancy Act, and consequently the Plaintiff was not entitled to a decree for possession in accordance with the claim which he preferred.

The result is that in my judgment, for the reasons that I have given, the appeal should be dismissed with costs.

The other appeal will follow the event of this appeal, and it is accordingly dismissed with costs.

CHOTZNER, J.—I agree.

J. N. R. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 355 OF 1920.

CHATTERJEA, J.
NEWBOULD, J.

1921,

13, June.

PARESH NATH PAL
CHOUDHURY and ors.,
Decree-holders,
Appellants,

ISMAIL SARDAR and
anr., Judgment-
debtors, Respondents.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6—Application for execution more than three years after the date of a rent decree, if barred, when there were acknowledgments within three years of the date of the decree—Limitation Act (IX of

PARESH NATH PAL CHOUDHURY v. ISMAIL SARDAR.

1908), sec. 19, if applies to cases under the Bengal Tenancy Act—Bengal Tenancy Act, sec. 184, scope and effect of.

A rent decree for less than Rs. 500 was passed in January 1916, and application for execution was made in March 1919. There were some acknowledgments of liability within three years of the date of the decree :

Held—That sec. 19 of the Limitation Act applies to such cases, and an acknowledgment of liability under that section made by a judgment-debtor, in respect of the decree-holder's right to execute a rent decree, gives the decree-holder a fresh starting point for counting the period of limitation prescribed by Art. 6 of Sch. III of the Bengal Tenancy Act.

HARIHAR LAL v. GUNENDER PERSHAD (1) followed.

This was an appeal against the order of A. L. Mukherjee, Esq., District Judge of Zillah Nadia, dated the 2nd of July 1920, reversing the order of Babu Bepin Behary Mukherjee, Munsif, 1st Court at Krishnagar, dated the 7th of August 1919.

The facts will fully appear from the judgment.

Babu Rupendra Kumar Mitra for the Appellants.

Babus Satindra Nath Mookerjee and Satis Ch. Munshi for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

The question involved in the appeal is whether the application for execution of a decree is barred by limitation.

The decree was one for rent and the amount for which it was passed was less than Rs. 500. It was dated the 27th January 1916.

The present application for execution was made on the 28th March 1919, i.e., more than three years from the date of the

(1) 9 C. W. N. 1025 (1905).

decree. The decree-holder, however, relied upon certain acknowledgments of liability within three years of the date of the decree, and the Court of first instance held that such acknowledgments saved limitation.

On appeal the learned District Judge held that sec. 19 of the Limitation Act was inapplicable to the case as it was a decree for rent which is governed by the special limitation prescribed by Art. 6, Sch. III of the Bengal Tenancy Act.

There is no doubt that under Art. 6, Sch. III of the Bengal Tenancy Act, the period of limitation is three years from the date of the decree, and sec. 184 of that Act lays down that any application made after the period of limitation prescribed in Sch. III annexed to the Act shall be dismissed although limitation has not been pleaded. Sec. 185, sub-sec. (1) lays down that secs. 7, 8 and 9 of the Limitation Act, 1877, shall not apply to the suits and applications mentioned in sec. 184. Sub-sec. (2), however, provides that subject to the provisions of this chapter, the provisions of the Indian Limitation Act, 1877, shall apply to all suits, appeals and applications mentioned in the last foregoing section. Under that sub-section, therefore, it appears that sec. 19 of the Limitation Act would apply to a decree for rent.

Art. 6, Sch. III of the Bengal Tenancy Act provides that where the judgment-debtor has by fraud or force prevented the execution of the decree, the period of limitation shall be governed by the provisions of the Indian Limitation Act, 1877, but it does not follow that in cases where there is force or fraud the general provisions of the Indian Limitation Act (other than those mentioned in the sec. 185 (1) of the Bengal Tenancy Act), will not apply. The article merely says that the period of limitation shall be governed by the provi-

PARESH NATH PAL CHOUDHURY v. ISMAIL SARDAR.

sions of the Indian Limitation Act, 1877. The question appears to have been considered in the case of *Harihar Lal v. Gunender Pershad* (1). The learned Judges held that an acknowledgment of liability, under sec. 19 of the Limitation Act made by a judgment-debtor, in respect of the decree-holder's right to execute a rent decree gives the decree-holder a fresh starting point for counting the period of limitation prescribed by Art. 6 of Sch. III of the Bengal Tenancy Act.

It is contended on behalf of the Appellant that, if the decree-holder is allowed a fresh starting point for limitation for the execution of a rent decree from the date of acknowledgment under sec. 19 of the Indian Limitation Act, it would affect or alter the period of limitation prescribed by Art. 6 of the Bengal Tenancy Act.

As pointed out by the learned Judges in the case cited above, "the answer to this would seem to be that the acknowledgment under sec. 19 does not affect or alter the period of limitation so prescribed, though it may seem practically to do so, but only gives the decree-holder a fresh starting point for counting the period prescribed by Art. 6, Sch. III of the Bengal Tenancy Act which the judgment-debtor has himself given him by petitions containing the acknowledgments of his debt.

We are accordingly of opinion that sec. 19 of the Limitation Act applies to such a case.

It is contended on behalf of the Respondent that there was no acknowledgment of liability within the meaning of sec. 19 of the Limitation Act.

It appears, however, that the judgment-debtor expressly admitted that there was an instalment decree in favour of the decree-holder, that several instalments had already been paid, that the instalment for

Pous remained unpaid but as it had not become due, the decree-holder could not proceed with the execution. That was a sufficient acknowledgment within the meaning of the section.

It is contended that the admission should be confined to the actual amount payable for the Pous instalment. But there was an acknowledgment of liability under the decree and that we think, is sufficient for the purpose of the section.

The result is that the order of the lower Appellate Court is set aside and that of the Court of first instance restored with costs here and of the lower Appellate Court, the costs in this Court being assessed at one gold mohur.

The execution of the decree will be proceeded with.

J. N. R.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 524 OF 1921.

SUHRAWARDY, J.
CUMING, J.

1921,
1, December.

SITAL PROSHAD
PODDAR, Petitioner,

v.

KAIFUT SHEIKH,
Opposite Party.

Succession Certificate Act (VII of 1889) - Necessity of a certificate in case of a son belonging to a Mitakshara family - Limitation Act (IX of 1908), sec. 22 - Addition of Plaintiffs after period of limitation, if a sufficient ground for throwing out the suit as barred without any finding as to whether the added Plaintiffs were necessary parties.

In the case of a family governed by the Mitakshara law a son can maintain a suit for debts owing to his late father without a succession certificate under Act VII of 1889.

A finding that some of the Plaintiffs were made parties after the period of limitation is not sufficient to hold the suit barred. There may be circumstances in which addition of parties subsequently brought on the record may not be essential

SITAL PROSHAD PODDAR v. KAIFUT SHEIKH.

and may be merely for the protection of the Defendant and therefore there should be a finding as to whether the added parties are necessary parties to the suit and if not whether the suit can proceed without them.

THAKURMANI SINGH v. DAI RANI KOERI

(1) KISHAN PRASAD v. HAR NARAIN SINGH

GURUVAYYA GONDA v. DATTATRAYA ANANT (3) referred to.

This was a Rule granted on the 5th August 1921 against the judgment of the Small Cause Court Judge of Lalbagh (Babu Satish Ch. Chakerbutty), dated the 13th June 1921.

The Plaintiff brought the present suit in the Court of the Munsif of Lalbagh exercising Small Cause Court jurisdiction for realisation of some debt owing to his father. The suit was dismissed on the grounds that the suit was not maintainable without a succession certificate, and that as some of the Plaintiffs were made parties after the period of limitation the suit was barred under sec. 22 of the Limitation Act. Against this decision the present Rule was granted by the High Court.

Babu Apurba Charan Mookerjee (for Babu Khitish Ch. Chakrabarti) for the Petitioner.

No one appeared for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule is directed against the order of the Munsif of Lalbagh exercising Small Cause Court jurisdiction dismissing the Plaintiff's suit on two grounds : first, that the debt was owing to the Plaintiff's father and therefore the suit is not maintainable without a certificate under Act VII of 1889, and secondly that as some of the

Plaintiffs have been made parties after the period of limitation the suit is barred under sec. 22 of the Limitation Act.

With regard to the first point it is now beyond controversy that in the case of a family governed by Mitakshara law, as the Plaintiff's family appears to be, succession certificate is not necessary before bringing a suit of this nature.

As regards the second point the learned Munsif says : "The co-parceners were made parties on 6th June 1921. The suit was on that date clearly barred." This finding, in our opinion, is not sufficient to hold the suit barred. There may be circumstances, as existed in various cases [See the cases of *Thakurmani Singh v. Dai Rani Koeri* (1), *Kishan Prasad v. Har Narain Singh* (2) and *Guruvayya Gonda v. Dattatraya Anant* (3)] in which addition of parties subsequently brought on the record may not be essential and may be merely for the protection of the Defendant. It is therefore desirable that the learned Munsif should come to a finding as to whether the added Plaintiffs who, we are told, are minors are necessary parties to the suit and if not whether the suit can proceed without them.

We therefore make the Rule absolute, set aside the decree of the Munsif of Lalbagh exercising Small Cause Court jurisdiction, dated the 13th June 1921 and send back the case for trial in accordance with the above observations. We pass no order for costs.

J. N. R.

Rule made absolute.

(1) I. L. R. 33 Cal. 1079 (1906).

(2) I. L. R. 33 All. 272 : s. c. 15 C. W. N. 321 (P. C.) (1911).

(3) I. L. R. 28 Bom. 11 (1903).

(1) I. L. R. 33 Cal. 1079 (1906).

(2) I. L. R. 33 All. 272 : s. c. 15 C. W. N. 321 (P. C.) (1911).

(3) I. L. R. 28 Bom. 11 (1903).

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

LORD SHAW. MUSAMMAT KAMA-
LORD PHILLIMORE. WATI, Appellant,
MR. AMEER ALI. v.
1921, KUNWAR DIGBIJAI
21, June. SINGH, Respondent.

Purdanashin lady, deed by—Duty of disclosure of donee to donor of character of transaction—Failure operates to nullify transaction, apart from fraud—Indian Succession Act (X of 1865), secs. 2, 331—Person dying a Christian, succession to, if governed by Hindu law when he lived like a Hindu.

The parties to a contract may stand in such a relation as (apart from fraud or of conduct partaking of the quality of fraud), may give rise to an obligation on the part of one towards the other, failure to fulfil which will be a ground for rescission of the contract and for the consequent remedies. NOCTON, v. ASHBURTON (1) referred to.

The donee from a purdanashin lady stands towards her in such a relation that it is his duty to see that she fully understands the transaction.

The release in question in this case was set aside as the duty of disclosure resting upon the donee had not been discharged.

Succession to the estate of a person who died a Christian is governed by the Indian Succession Act, and cases such as ABRAHAM v. ABRAHAM (3) and RADHIKA PATTI MAHA DEVI GARU v. NILAMANI PATTI MAHA DEVI GARU (4), which preceded the Act, cannot be relied on to modify or interpret it.

This was an appeal from a judgment and decree, dated the 30th January 1917 of the High Court at Allahabad, reversing on appeal a judgment and decree of the Additional Subordinate Judge of Moradabad, dated the 12th August 1915.

(1) [1914] A. C. 932.

(3) 9 M. I. A. 195 at p. 245; 1 W. R. P. C. 1 (1863).

(4) 14 W. R. P. C. 33 (1870).

The facts of the case sufficiently appear from their Lordships' judgment.

Mr. B. Dubé for the Appellant.—On the question of burden of proof, relied on *Sajjad Husain v. Wazir Ali Khan* (2). The burden clearly had not been discharged in this case.

Mr. E. B. Raikes for the Respondent.—Referred to *Abraham v. Abraham* (3). Act 21 of 1850. *Radhika Patta Maha Devi Garu v. Nilamani Patta Maha Devi Garu* (4), *Re: Joseph Vathiar* (5), *Ponnusami v. Dorasami* (6), *Administrator-General of Madras v. Anandchari* (7), *Tellis v. Saldanha* (8), *Jalbhai Ardeshir v. Louis Manoel* (9) and *Dagree v. Pacotti San Jao* (10).

I cannot put it higher than this. It was known both to Kamawati and her husband that there was a case that the deceased was a Christian. Both Kamawati and Bhagwati must have known what it was that was compromised as Bhagwati refused to sign the deed on the ground that her allowance was insufficient.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a judgment and decree, dated the 30th January 1917, of the High Court of Judicature for the North-Western Provinces at Allahabad, which reversed a judgment and decree of the Additional Subordinate Judge of Moradabad, dated the 12th August 1915.

The suit was instituted by the Appel-

(2) L. R. 39 I. A. 156: s. c. 16 C. W. N. 889 (1912).

(3) 9 M. I. A. 195 at p. 245; 1 W. R. P. C. 1 (1863).

(4) 14 W. R. P. C. 33 (1870).

(5) 7 Mad. H. O. E. 121 (1872).

(6) I. L. R. 2 Mad. 209 (1880).

(7) I. L. R. 9 Mad. 466 (1886).

(8) I. L. R. 10 Mad. 69 (1886).

(9) I. L. R. 19 Bom. 680 (1894).

(10) I. L. R. 19 Bom. 783 (1895).

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lant, as the sister's daughter of one Kunwar Randhir Singh Sahib, deceased, to recover from the Respondent (who, as his surviving brother, was in possession of his estate) a one-twelfth share of that estate. To this one-twelfth share the Appellant would be entitled to succeed under the provisions of the Indian Succession Act. This would be so, Kunwar Randhir Singh having died a Christian, and the Act accordingly regulating the succession to his estate. An argument will be hereafter noted which challenges this proposition and alleges that in the circumstances of Randhir and his family it must be concluded that the Indian Succession Act does not apply to his case, and that the succession to his property is governed by the Mitakshara Law.

The Defendants, however, substantially found their case upon the existence of a deed, dated the 29th April 1912, whereby the Plaintiff is alleged to have relinquished all her rights in respect of her inheritance. It is part of the plaint accordingly to have this deed declared invalid. Its annulment was decreed by the Subordinate Judge, but the High Court have upheld it.

The deed is short, and is in the following terms :—

"We, Kameshar Nath, son of Chaudhri Bhagwan Singh, Taga by caste, old resident of Saharanpur, at present residing in Tajpur, district Bijnor; Bibi Kamawati, wife of Kishore Singh, Taga by caste, resident of Alaudinpur, district Bijnor; and Bibi Bhagwati, widow of Sher Singh, deceased, Taga by caste, at present residing in Tajpur, district Bijnor, declare as follows :—

"As regards the property left by Kunwar Randhir Singh, deceased, 'rais' of Sherkot, district Bijnor, there was a dispute between his own brother, Kunwar Digbijai Singh and Musammat Hira Dei. The matter was amicably settled and a compromise was written on the 27th of October 1908, and registered in the office of the Registrar of

district Moradabad, on the 31st October 1908. Under it monthly allowances were also fixed for us, the executants, out of the estate of Kunwar Randhir Singh. Now, there is again a dispute about his (Kunwar Randhir Singh's) estate between the aforesaid two persons. And it is alleged on behalf of Musammat Hira Dei that we, too, have a right in the estate of Kunwar Randhir Singh. Therefore, admitting the compromise, dated the 27th October 1908, we, the executants, while in a sound state of mind, and without being tutored or induced by anyone, willingly and voluntarily covenant and write that except the monthly allowances of Rs. 50 assigned to each of us, executants Nos. 1 and 2, and the monthly allowance of Rs. 100 assigned to me, executant No. 3, by Kunwar Digbijai Singh, of his own accord, according to the custom of the family, out of the estate of Kunwar Randhir Singh, deceased, under the aforesaid compromise, we have no kind of claim of inheritance, etc., in the estate of Kunwar Randhir Singh. Kunwar Digbijai Singh is the owner of the entire estate of Kunwar Randhir Singh, 'rais' of Sherkot, district Bijnor. We have, therefore, executed this deed of relinquishment in respect of every kind of property left by Kunwar Randhir Singh, that is, in respect of zamindari property and houses, etc., in order that it may be of use in time of need. If any of our representatives brings any claim at any time it shall be false.

"Dated the 29th April 1912. By the pen of Abdul Karim, scribe."

The deed is signed—

"Kameshar Nath Singh.

"Kamawati, in autograph.

"Bhagwati, in autograph."

It will be observed that the sole counterpart for this relinquishment by the Appellant of her share in the estate is a monthly allowance of Rs. 50, which is said to be "by Kunwar Digbijai Singh, of his own accord, according to the custom of the family."

It is abundantly proved that during the lifetime of the deceased, and since his death, there was according to custom

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given this trifling maintenance allowance to this lady, and the insertion of it in the deed was simply the insertion of the only possible item that was available which would stand as the semblance of a consideration for the document.

It is essential in such cases to consider what was the relation in which the parties stood to each other, because, for the reason so clearly pointed out (especially in the judgment of Viscount Haldane) in *Nocton v. Ashburton* (1) there may, quite apart from any question of fraud or of conduct partaking of the quality of fraud, arise from these relations an obligation by the one party towards the other, the failure to fulfil which obligation will be a ground for rescission of the contract and for the consequent remedies.

The point is clear and need not be laboured. In Lord Haldane's language :—

“Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled.”

Their Lordships hold this doctrine to be imbedded in the law both of this country and of India. It is, however, an interesting question to see how the essentially equitable principle which it expresses applies to the relations of parties in the present case.

So far as the Appellant is concerned, one outstanding fact to begin with is that she is a *pardanashin* lady, and the deed was signed within the *purda*. In the second place, she is married, but her husband was not communicated with when her signature was obtained, nor were the merits or expediency of any such transaction discussed with him. In the next place, the lady while relinquishing her entire share in a valuable estate (her twelfth being estimated at roughly

between Rs. 20,000 and Rs. 30,000) had no separate advice in the transaction whatsoever. Finally, the deed was framed by or by the authority of Digbijai Singh, a co-heir in the property and also the possessor of the whole of it, and Digbijai took no steps or precautions in the direction of having independent advice of any kind furnished to the lady who was relinquishing all her property in his favour.

The deed, in short, is a deed substantially without any consideration by a donor of her entire property in favour of a donee who, or whose representatives, submit the prepared document to her and obtain within the *purda* her signature. It is the established law of India in these circumstances that the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bonâ fide* one, and fully understood by the lady whose property is dealt with. The cases upon the subject were discussed and the law as thus cited was repeated in *Sajjad Husain v. Wazir Ali Khan* (2).

When, however, the law is that the lady must fully understand the transaction, this is but a secondary way of saying that it is the obligation of the donee in any transaction proceeding from her to see that she does so understand it. The relations of parties demand that this duty be performed, and when Courts of Law declare that the onus rests upon the donee of showing that he did so, that, of course, is founded upon the fundamental fact that it was his duty to do it. If accordingly this obligation thus arising out of the relations of the parties be not fulfilled, the case for rescission and consequent remedy is clear.

These principles applied to the present suit, while leaving the case important, very largely remove all difficulties from it,

(2) L. R. 39 I. A. 156; s. c. 16 C. W. N. 889 (1912).

(1) [1914] A. C. 922.

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and had it not been for the judgment of the High Court, to which allusion will presently be made, it would have been unnecessary for their Lordships to deal with the subject in more than a few further words.

The potent consideration which assists the mind in this case is that the Appellant whose deed is under challenge not only is not proved to have had explanations in the full sense required by law of the effect and purport of the deed, but it seems also to be beyond question that she had no knowledge whatsoever of the extent of the property to which she was relinquishing all right. The Board inclines to the view that all that was ever given as an explanation of her being asked to sign the deed was that it was said to be required in order to make her sure of always getting her Rs. 50 a month. But the fact that Randhir Singh was a Christian, and that, consequent upon that, his intestate estate fell to be distributed under the Indian Succession Act, and that—further consequent upon that—she was entitled in her own right to one-twelfth of that wealthy person's estate—not one of these facts was ever brought home to her mind or even suggested. It is quite unnecessary to pursue the details, because this outstanding feature of the case makes it impossible to sustain a transaction in which the duty of disclosure resting upon the donee was clearly not discharged. This deed of relinquishment was taken from her when in point of fact she did not know what she was giving away.

There are many other elements in the narrative which would produce points of attack upon the deed : but their Lordships content themselves with holding that in substance they are in agreement with the judgment of the learned Subordinate Judge who has analysed the case with great

patience and reached upon it what, in the view of the Board, is a sound conclusion.

With regard to the judgment of the High Court, it would rather appear that the learned Judges would have been entirely of the same opinion with regard to the deed in issue, *viz.*, that of the 29th April 1912, had it not been that they were in their view compelled to a different conclusion by reason of occurrences four years earlier. They say, in short :—

“ We think that if nothing happened prior to the 29th April 1912, the Plaintiff would have been entitled to far more time for reflection and to independent advice before she could be called upon to execute a deed relinquishing her rights. The learned Judge seems to have approached the consideration of the case having regard only to what occurred in 1912. If this is the proper point of view from which to approach the consideration of the case we think that the decision of the Court below might be correct.”

It is necessary accordingly to consider what had happened in the year 1908. In the opinion of the Board there is not sufficient justification for the reflection made upon the Subordinate Judge by the High Court that he has approached the consideration of the case without having taken fully into view what had happened in that earlier year. On the contrary, in view of this reflection, their Lordships have carefully considered the judgment of the Subordinate Judge and have been struck with the careful review which he gives of all the circumstances which occurred in that year leading up to and including the preparation of a deed of relinquishment. Their Lordships agree with that analysis. That deed of relinquishment was equally with the one under consideration (*viz.*, that of 1912), the subject of the obligations of disclosure, independent advice, and the like, which have already been alluded to; and, as in the

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later case, there is no trace of the obligation having been fulfilled or even regarded. Furthermore, neither she nor her husband signed it. Her name appears upon it as that of an attesting witness, but she denies her signature.

The deed of October 1908, was the subject of discussion in the judgment delivered by Sir John Edge on this Board on the 21st May 1917. It appears that a copy of it was alleged to have been made upon stamped paper:—"It has been traced to the possession of the Defendant, who has given no satisfactory explanation as to what has become of it," and strong observations were made as to the untrustworthiness of Digbijai's account.

So far as the effort made in 1908 was concerned it failed, and the interests of the wife of Kunwar Randhir Singh were separately compromised. So far as the sister, Bibi Bhagwati, was concerned, she refused to be a party to it or to execute it and so the transaction fell through.

In these circumstances the Board is somewhat at a loss to understand the view of the High Court that the deed of 1912 was a ratification of the transaction of 1908. Instead, however, of the Subordinate Judge having ignored that transaction, he has in several pages of his judgment given, in their Lordships' opinion, a full and sufficient analysis of the evidence regarding it, and it appears plain that it could never be relied upon as having either been the means of conveying the requisite information to the Appellant of her rights or of extracting from her any relinquishment thereof. Probably if the attention of the High Court had been more fully directed to those parts of the Subordinate Judge's opinion which have just been alluded to, his judgment on the whole case might have been affirmed. In the Board's opinion that judgment was right.

It is only necessary in a few words to allude to an argument submitted to the Board by the learned Counsel for the Respondent, the object of which seemed to be to suggest that, even accepting the view that the deceased was a Christian, still he had by his acts made such an indication as the law would respect, to the effect that his succession was not to be governed by the Indian Succession Act. Their Lordships can give no countenance to such a principle. It is unavailing to quote the cases of *Abraham v. Abraham* (3) or *Radhika Patta Maha Devi Garu v. Nilamani Patta Maha Devi Garu* (4). These cases preceded the Indian Succession Act and cannot modify or interpret it.

By sec. 2 of that Act it is enacted:—

"Except as provided by this Act, or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession."

This is the general rule, and the exception which bears upon the present case is sec. 331, which says that:—

"The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindoo"

If, accordingly, the late Randhir Singh had remained in or become a convert to Hinduism, the exception would apply.

The question accordingly is, was the late owner of this estate, or was he not, a Hindoo? If he was, the Mitakshara law would apply. If he was a Christian the Succession Act rules would apply. The matter has been fully investigated. Among other things, for instance, in the words of the Subordinate Judge:—

"The Plaintiff has proved the baptisms, marriage and burial certificates of the deceased: *vide* evidence given by the Chaplains Father J. Chrysostom and Father

(3) 9 M. I. A. 195 at p. 245; 1 W. R. P. C. 1 (1863).

(4) 14 W. R. P. C. 33 (1870).

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Angelo and by F. O'Neill, barrister-at-law. The above evidence proves beyond doubt that Kunwar Randhir Singh in his latter portion of life was a Christian and died as a Christian."

It is unnecessary to dwell upon the subject, because in a former litigation the Respondent himself admitted these facts.

But the argument is that, notwithstanding this, the Hindu law of succession shall apply to this deceased's estate. A situation of nothing but confusion could be thus produced. The plain law of the Succession Act would be eviscerated, and in each case enquiry might have to be entered upon as to whether a deceased subject of the Crown wished or by his acts compelled that the law of the land should not apply to his case. A particular subject can settle that in India, as in other parts of the Empire, by exercising—whatever be his religion—his power of testacy, and definitely declaring how he desires his affairs to be regulated so far as his own individual property is concerned. In this case Kunwar Randhir Singh did not do so, and it is not for a Court to enter upon an examination of his conduct so as to prevent the Indian law of intestate succession getting its full and proper application.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment of the Subordinate Judge should be restored, and that the Respondent should pay the costs of the appeal.

Solicitor: *Mr. H. S. L. Polak* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

R. M. P.

PRIVY COUNCIL.

[APPEAL FROM THE SUPREME COURT OF THE STRAIT SETTLEMENTS.]

LORD BUCKMASTER.

LORD ATKINSON.

LORD CARSON.

1921,

Heard, 20, October.

Judgment,

21, October.

KHAW SIM TEK and
ors., Appellants,
v.

CHUAH HOOI GNOH
NEOH, Respondent.

Straits Settlement, Ordinance No. 6 of 1896, sec. 10—"Specific purpose," meaning of.

A "specific purpose" within the meaning of sec. 10 of the (Limitation) Ordinance No. 6 of 1896 of the Straits Settlements (which in terms corresponds to sec. 10 of the Indian Limitation Act), must be a purpose that is either actually or specifically defined in the terms of the Will or settlement, or a purpose which, from the specified terms, can be certainly affirmed.

The statement in BALWANT RAO & PURAN MAL (2), that the purpose of following the property in the hands of the trustees referred to at the end of the section must be the purpose of restoring it to the trust which is specified in the earlier part of the section, provides a sound and critical test by which to consider whether or not any particular trust is within the provisions of the section.

This was an appeal from the unanimous judgment of the Court of Appeal of the Supreme Court of the Straits Settlements (Ebdon, Sproule and Farrer-Manby, JJ.), given on the 12th August 1919, confirming the judgment of Woodward, J., given on the 14th November 1918.

The facts of the case material to this report will sufficiently appear from the judgment of their Lordships.

The question at issue was one of limitation based on sec. 10 of the Limitation

(2) I. L. R. 6 All. 1 (P. C.) (1888).

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of Suits Ordinance, 1896, which is similar in terms to sec. 10 of the Indian Limitation Act, IX of 1871, which has been re-enacted with slight alterations in sec. 10 of the Limitation Act, IX of 1908.

Messrs. Upjohn, K. C., F. B. Fuller and W. E. Cleaver for the Appellants.

Messrs. Disturnal, K. C. and Guvin Simonds for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—The real question that arises on this appeal is whether the Respondent is disentitled by lapse of time from maintaining the proceedings which she instituted on the 25th February 1916, for the purpose of obtaining (1) a declaration as to the effect of a gift for yearly and other sacrifices contained in the Will of a testator who died on the 25th May 1882, and (2) the distribution of the estate upon the footing that the gift was void and the property so given passed to the next of kin. The Will is in Chinese form, and was made in 1874; the original has been lost, and there is nothing but a translation by a former interpreter of the Court in Penang by which it is possible to ascertain its contents. So far, however, as the critical question in this case is concerned, the translation, as it is before their Lordships, is adequate for the purpose. The testator provided that his property was to be dealt with by payment of a very large number of pecuniary legacies, and after they had been paid and satisfied, the residue was to be divided into 60 shares. As to sixteen of those 60 shares he directed that they should be the means of his maintenance during his life-time, and should be "Kong Lin for yearly and other sacrifices" after his death. Both by cl. 4 and by cl. 22 of the testator's Will it appears that he contemplated that this

residue should be left undistributed for sixteen years. It is unnecessary for their Lordships to say definitely whether the directions that he imposed upon his executors in this respect were in the nature of a mere appeal to their discretion or created an imperative trust, since for the Respondent's purpose the most favourable assumption is that the period of sixteen years was a definite period definitely fixed before which no division of the estate could take place, and for the purpose of this decision their Lordships will accept this view. At the expiration of sixteen years the testator declares by cl. 22 that the income of the shares shall "begin to be my sons and grandsons (or grandchildren) Kong Lin for yearly sacrifices as well as for sacrifices in spring and autumn." The Plaintiff is the legal representative of a granddaughter of the testator, her grandfather, the testator's son having died in the testator's life-time. Her claim, therefore, is as the legal personal representative of one of the female next of kin of the testator, and in this capacity she instituted these proceedings, asking that the gift of these sixteen 60ths of the residue to the Kong Lin should be declared void and distributed among the next of kin. Among other answers to that claim the Appellants urged that the right to bring the action is barred by virtue of the Statute of Limitations which exists in the Straits Settlements. The ordinance in question is Ordinance No. 6, 1896. This provides by sec. 4 that:—

"Subject to the provisions contained in secs. 5 to 25 inclusive, every suit instituted after a period of limitation prescribed therefor by the Second Schedule hereto shall be dismissed provided that limitation has been set up as a defence."

By Sch. II there is a provision in Art. 99 that a suit for obtaining a legacy or for a share of a residue bequeathed by a

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testator or for a distributive share of the property of an intestate cannot be maintained after the lapse of twelve years from the time when the legacy or share becomes payable or deliverable. Mr. Upjohn contended that in any circumstances that period must have elapsed before this suit was instituted. If it be taken from the date of the death, of course it is obvious that it has long gone by. If a further period of sixteen years be taken and the calculation is assumed to date from the period of division fixed by the testator for the estate, still the suit is out of time, for the period expired in 1898; but finally if it be taken, as has been urged on behalf of the Respondent, that it should be at the period when the trustees had in accordance with the trusts of the Will so dealt with the estate that it was ready for division, then again the Plaintiff is out of time, for elaborate accounts were prepared on the 15th January 1904, in which a full and proper allocation of the shares of the residue applicable for this rotation of the Kong Lin was set apart and fixed. Their Lordships think, therefore, that it is unnecessary for them to decide which of those three periods is the right one to fix, because whatever period may be taken the Plaintiff is too late. Their Lordships cannot support the view which appears to have found favour with the learned Judge before whom the case was first heard that the time runs from the date when the clause is construed by a competent Court, nor that suggested by Ebdon, J., in the Court of Appeal that the time fixed is when the intestacy is declared by a decree established beyond appeal. The intestacy, if it exists, has existed throughout, and the distributive share of one of the next of kin has been his to claim from the time when the intestacy arose and not when it was declared. The Probate

gives no efficacy to the provisions of the Will; it is merely proof of the contents, and their Lordships think Ebdon, J., was in error in saying, "When a Will has been admitted to probate its provisions stand good unless and until they are avoided by the declaration of a competent Court." Such provisions could be ignored from the outset, and the declaration of the Court is merely as to how the Will ought to have been construed throughout, nor is it necessary that "a suit to recover such a share would have to be preceded by a suit to attack the Will." But it is then urged that the exception referred to in cl. 4 of the Ordinance of 1896, making the times in the schedule subject to the provisions of secs. 5 to 25, enabled the Plaintiff to maintain the suit because sec. 10 provides that:—

"Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property shall be barred by any length of time."

The contention is that in this case the property was vested in trust for a specific purpose, because in the event of the sixteen 60ths being declared to have been gifts for a purpose that failed, they became vested in the trustees' hands in trust for the next of kin, and in support of that contention reference has been made to the old and well-known case of *Salter v. Cavanagh* (1), which has been subsequently followed, though with some hesitation, in other authorities. So far as that case is concerned, apart from an argument as to the meaning of cl. 22 of the Will, it affords him no assistance, for the principle that underlies that authority is this: that if property be set aside by a

(1) 1 Dru and Walsh 668.

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testator from the general body of his estate and vested in trustees upon certain trusts, which upon the face of them are inadequate to exhaust the whole of the property, there remains as to the balance a trust impressed upon the trustees in favour of the next of kin or the heir at law, a trust for the purpose of which you have to do no violence whatever to the language of the Will, for which it is unnecessary to disregard any intention or desire that the testator has expressed, for which it is only necessary to imply that when the testator knew, as he must have done, that the specific purpose to which the property had been devoted did not exhaust the whole trust estate, the balance would of necessity be held by the trustees for the heir at law or the next of kin.

In this case the only way in which the next of kin can, apart from cl. 22, assert their position is by defeating the provisions that the testator has made in his Will. It is only upon the hypothesis that those provisions are bad that his interest arises, and it is in the opinion of their Lordships impossible to say that in those circumstances the property was vested in trust for a specific purpose in which the next of kin was in any way interested. A specific purpose, within the meaning of sec. 10, must, in their Lordships' opinion, be a purpose that is either actually and specifically defined in the terms of the Will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed. The statement which was made on the authority of *Balwant Rao v. Puran Mal* (2) that the purpose of following the property in the hands of the trustees referred to at the end of sec. 10 must be the purpose of restoring it to the trust which is specified in the earlier part of the section is in their Lordships' opi-

nion a sound and critical test by which to consider whether or not any particular trust is within the provisions of the section. Their Lordships therefore think that so far as the general claim of the next of kin is concerned on the hypothesis that the gift is wholly void, the Statute of Limitations affords a complete and effectual bar, and this view appears to be in agreement with that of Sproule, J. But it was then urged that there was an alternative view which arises upon the face of the Will by which it may be said that the Plaintiff was in fact entitled under the benefit of the trust contained in cl. 22. This proposition was only raised at the end of the earlier argument, and certainly found no part in the original claim. There was therefore some technical difficulty in the way of the Respondent, but their Lordships were anxious that a matter which had come from such a distance and is of such importance to the parties should not be imperfectly considered, and therefore they heard all that could be urged upon this later branch of the case, but in truth when it is examined there is very little that can be said. Cl. 22 provides that at the expiration of sixteen years the shares "shall begin to be my sons and grandsons Kong Lin for yearly sacrifices as well as sacrifices in the spring and autumn." The copy of the Will before us has the words "or grandchildren" added after the "grandsons," but whether or no that was the real interpretation of the word it seems difficult to ascertain, because the word in the previous cl. 21, which has been the subject of interpretation and has been held to include grandchildren, has not necessarily the same meaning in cl. 22, and their Lordships think there is much weight in the statement made by Mr. Justice Ebdon, who must be much more familiar with the local circumstances than their Lordships

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can possibly be, when he pointed out that the sacrificial rites which are imposed upon the property and for which, under cl. 22, the beneficiaries there mentioned are to use the estate, are rites for which the daughter is a useless person. To use the language of the learned Judge, he says :—

“ ‘She is useless for the purpose of ancestor worship which requires male issue,’ and he says again that ‘the phrase itself which was assumed to mean grand-children, including daughters, might, on careful consideration, be shown only to mean sons and grand-sons for the reason that daughters have no place in Chinese succession.’ ”

This is a cogent argument to show that in cl. 22 there never was any intention that a grand-daughter should be included. If, however, the clause is capable of such a construction as the two other learned Judges in the Court of Appeal appear to hold, there still remains the difficulty that the gift is not to the class beneficially but to perform ceremonies which it is said render the gift void, so that even on this hypothesis the Respondent is not seeking to restore the property to the trust but to take it away, and consequently sec. 10 is inapplicable. It follows, therefore, that the Respondent is unable to escape from the general effect of the Statute of Limitations, and that this suit was instituted too late for it to be capable of being entertained by the Court before whom it was brought.

For these reasons their Lordships will humbly advise His Majesty that the suit should be dismissed, that this appeal should be allowed with costs, and that the decree of the 12th August 1919, except so far as it dealt with costs, should be set aside.

Solicitors : Messrs. Nisbet, Drew and Loughborough for the Appellants.

Solicitors : Messrs. Rowle Johnstone & Co. for the Respondent.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

* SUIT No. 284 OF 1921.

BUCKLAND, J. } REKHABCHAND DOOGAR
1922, } v.
23, February } J. R. D'CRUZ.

Calcutta Rent Act (III of 1920), sec. 11, Proviso, “bonâ fide” and “required,” meanings of—Sub-sec. (5) “pays rent to the fullest extent allowable by the Act,” when rent has not been standardized—Sub-sec. (4) “refused to accept the rent offered,” tenant if bound to offer and have a refusal every month, to be entitled to deposit rent with the Rent Controller.

The Defendant was a monthly tenant under the Plaintiff. The Plaintiff in 1919 wanted to let out the premises to a third party and gave Defendant notice to quit, to which the Defendant paid no attention. The Plaintiff subsequently wanted rent at the rate of Rs. 150 per mensem and the Defendant agreed to pay Rs. 110 per mensem, which the Plaintiff refused to accept and the Defendant deposited the rent with the Rent Controller. In November 1920, the Plaintiff gave the Defendant notice to quit as he required the premises for his own use and occupation and as he had made arrangements for letting out the residential house in which he had been then living. The Defendant did not quit and therefore the present suit was brought. In the suit the Plaintiff's evidence was that his wife having given birth to a child and suffered from malarial fever thereafter on account of the insanitary surroundings of their residential house, was advised by the doctor, who treated her, to remove to the house in suit. The doctor gave his evidence and substantially corroborated the Plaintiff.

Held—That the Plaintiff could not be said bonâ fide to require the house for his

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own use and occupation. The reason given in the notice of November 1920 was that he required the house in suit because of some arrangements he had made with some other tenants for letting out his present residential house and not that he required it on the ground of his wife's health. In the said notice no reference was given to the personal aspect of the matter, but it was based entirely upon the arrangements made with some other tenants.

To allow a landlord who has premises sufficient for his requirements to eject tenants because he chooses for his own convenience or profit to deprive himself of the use of the premises which he is occupying would be to defeat the objects of the Act.

It is not sufficient that a Plaintiff in order to defeat a plea under the Calcutta Rent Act should merely say that he desires the premises bonâ fide for his own occupation. The word in the Act is not "desire" but "require." This involves something more than a mere wish and involves an element of need to some extent at least.

It is not necessary for a tenant to offer rent to his landlord every month and obtain every month a refusal from him before he is entitled to pay to the Rent Controller. The tenant is justified in paying the rent to the Controller month by month once there has been a refusal by the landlord to accept it.

As the rent had not been standardized by the Rent Controller nor had there been any agreement between the parties to pay increased rent, the question as to whether the Defendant had paid rent to the fullest extent allowable by the Act did not arise.

The Defendant was therefore entitled to relief under the Calcutta Rent Act and not liable to be ejected.

The facts of the case will appear from the judgment.

Mr. B. K. Ghosh and Mr. N. K. Chatterjee, Counsels, appeared for the Plaintiff.

Mr. A. N. Chaudhuri and Mr. Surita, Counsels, appeared for the Defendant.

The JUDGMENT OF THE COURT was as follows :—

BUCKLAND, J.—This is a suit to eject the Defendant from certain rooms in the Plaintiff's house and premises No. 39 Lower Circular Road, and also for damages.

The Defendant was a monthly tenant under the Plaintiff, the rent alleged in the plaint as payable being Rs. 90 a month. On the 30th November 1920 the Plaintiff through his attorney gave the Defendant one month's notice to quit, that is to say, on the 31st December 1920. The Defendant did not quit the premises and the Plaintiff has therefore brought this suit.

This is one of four suits all standing on the same footing, in which the relations between the parties were the same, but the other three have failed because the parties have unsuccessfully pleaded the Rent Act, as they had not complied with the provisions with which they had to comply before they were entitled to the benefit of the Act. In this case also the Defendant has pleaded to be entitled to relief by reason of the Calcutta Rent Act, and the following issues were settled :

1. Does the Plaintiff *bonâ fide* require the premises for his own occupation?

2. Has the Defendant paid the rent due by him to the fullest extent allowable by the Calcutta Rent Act by the 15th day of the month next following that for which the rent was payable in accordance with the provisions of sec. 11, sub-sec. 5?

3. Has the Plaintiff refused to accept the rent offered, and has the Defendant

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duly deposited it with the Rent Controller under sec. 11, sub-sec. 4?

4. Is the Defendant entitled to relief under the Calcutta Rent Act?

The real controversy in this case has centred on the first issue, for, under the Calcutta Rent Act, assuming that a tenant complies with those provisions to which reference is made in the other issues, a tenant is not entitled to the benefit of the Act where the premises are *bonâ fide* required by the landlord either for purposes of building or re-building or for his own occupation. In this case the Plaintiff says that he requires the premises for his own occupation, and in order to support that he has made a statement in his notice to quit where he says through his attorney :

"My client requires the said premises No. 39 Lower Circular Road for his own use and occupation inasmuch as he has made arrangements for letting out his present residence No. 37 Canning Street and wants to remove to his said premises No. 39 Lower Circular Road in Calcutta on the 1st day of January 1921."

What is the Plaintiff's evidence as to this? He says that the Defendant has been in possession of the premises since June 1916, and in or about September 1919 he gave notice to all the tenants in the house because he says he wanted to let out the whole house on a lease to Macfarlane & Co. The tenants did not quit and his negotiations with Macfarlane & Co. fell through. After that he entered into negotiations with the Government of Bengal. He wanted to give the whole house to one man, and the Government wanted it for a Survey office and negotiations ensued. Thereupon he again gave notice to quit to the tenants but they paid no attention to that either. In the end in the month of August the arrangements with the Government had to be cancelled

as vacant possession could not be given. But meantime there had been friction between the landlord and his tenants in this house, which, I should explain, is divided into some six or seven flats, because he was trying to get rid of them and also because they made complaints with reference to the water supply. It appears that the friction reached such a stage that the parties found their way into the criminal Courts, but the proceedings were eventually dropped.

It is obvious that up to the beginning of August 1920 there was no question whatever of the Plaintiff desiring to eject the tenants because he required the house for his own occupation, and his evidence makes that clear beyond all doubt. Then he says that in the middle of September 1920 his wife gave birth to a child and that thereafter she suffered from fever for which she was attended by a Dr. Banerjee, who has been called as a witness in the case, and that owing to the insanitary conditions due to the presence of a hide godown at the back of the house in Canning Street where the Plaintiff resided, and smell, and the fact that the locality was ill-ventilated, the doctor advised him to go where they could get more light and air. The Plaintiff showed him the house in Circular Road of which the doctor approved. When exactly that took place is not clear. The doctor himself said he could not give the exact time but that it happened two or three months after the Plaintiff's child was born. The doctor says that the Plaintiff's wife suffered from malarial fever and uterine trouble, and that therefore he gave the advice that the Plaintiff should remove.

It has to be observed that that is not the reason alleged or even remotely suggested by the Plaintiff in his notice to quit given on the 30th November. The reason there given is that he required the

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house for his own use and occupation, inasmuch as he had made arrangement for letting out his then residence No. 37, Canning Street and therefore wished to remove. The evidence as to this is that on or about the 12th October 1920 the Plaintiff made an arrangement with Messrs. R. D. Cooper & Co., of which firm Mr. Cooper has been called, whereby the Plaintiff let out to Messrs. Cooper & Co., the whole of the first floor in No. 37, Canning Street at Rs. 1,250 per month. Possession was promised on the 1st January. But meanwhile the arrangement was that possession would be given of the front large hall and the adjoining rooms and the verandah as from the 15th October for which a charge of Rs. 650 per month would be made until the whole flat was available. At or about the same time the Plaintiff also let a portion of the premises to some other company which has been referred to as the Hume Pipe Company. So the position was that he was depriving himself of a considerable portion of the space in his own house in No. 37, Canning Street where he had lived for four years in order to make it over to these mercantile firms or companies.

These are the circumstances with which I have to deal. I find considerable difficulty in appreciating in the Plaintiff's favour the complete change of front from August to the time when the notice to quit was given. I cannot in my mind dissociate what occurred up to August when the Plaintiff wanted to let out the house in No. 39, Lower Circular Road to one tenant from what occurred later. When the notice to quit was given no reference was given to the personal aspect of the matter, but it was based entirely upon the arrangements made with these other tenants for No. 37, Canning Street. It seems to me that the Plaintiff has here made his requirement of the premises in

suit on the ground of his wife's health because he feels that the other grounds would not be sufficient to entitle him to say that he *bond fide* requires the house for his own occupation which it is necessary that I should find for him to obtain an order for possession. From this point of view I am not at all satisfied as to the *bond fides* of the Plaintiff. Without asserting that he is deliberately untruthful, he has to my mind strained the circumstances in his own favour to the utmost limit. I do not think it is enough that a Plaintiff in order to defeat a plea under the Calcutta Rent Act should merely say that he desires the premises *bond fide* for his own occupation. The word in the Act is not "desire" but "require." This in my opinion involves something more than a mere wish and it involves an element of need, to some extent at least. I am unable to see that there is any need on the part of the Plaintiff. He did not put his wife's health forward as a ground for his requirement until later, and so far as his requirements arose from other circumstances, he put himself in the position in which he found himself by letting out part of his residential house in No. 37, Canning Street to these mercantile firms and companies, as I believe, for the purpose of obtaining a substantial rental. I do not think that I should be right in holding that a landlord who has premises sufficient for his requirements should be allowed to eject tenants because he chooses for his own convenience or profit to deprive himself of the use of the premises which he is occupying, and then to say to his other tenants "having deprived myself of the use of the premises which I have hitherto occupied, I therefore require the house in which you live for my own occupation and I now propose to eject you." This, in my judgment, would be to defeat the objects of the Act and I do

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not think that in such circumstances a landlord can be said *bond fide* to require the premises for his own occupation. I therefore find that the Plaintiff does not *bond fide* require the premises for his own occupation.

With regard to the second issue—Has the Defendant paid the rent in accordance with the provisions of sec. 11 (5) of the Calcutta Rent Act, and did the Plaintiff refuse to accept it and was it duly deposited under sec. 11 (4)—the Defendant has said that for February, March, April and May 1920 he paid the Plaintiff by cheque, but that the rent was not accepted and thereupon it was paid to the Rent Controller. It has been argued that it is the duty of a tenant to offer rent to his landlord every month and obtain every month a refusal from him before he is entitled to pay to the Rent Controller. I cannot conceive that it was intended by the Act that such a farce should be gone through every month when the relations are such that the landlord refuses to accept the rent, and I think the tenant is justified in paying the rent to the Controller month by month once there has been a refusal by the landlord to accept it.

It is further submitted that the Defendant has not paid the full amount of the rent. In this connection it is right that I should refer to an application which was made at the very last possible stage, *i.e.*, immediately before learned Counsel for the Defendant was about to sum up. In the plaint it is alleged that the monthly rental was Rs. 90. In the written statement it is stated that in May 1920 the Plaintiff demanded rent at the increased rate of Rs. 150 a month. The Defendant refused to pay it and offered three month's rent at the rate of Rs. 110 a month, which he says was the standard rent. The rent in point of fact has not been

standardized and there had been no order by the Rent Controller fixing the standard rent. The Defendant also in the course of his evidence relating to the time when MacFarlane & Co. were on the scene, said that MacFarlane & Co. wanted Rs. 115 a month, and he offered to pay and actually did pay Rs. 115 in December 1919 and January 1920, after which the Plaintiff would not accept the rent. Upon these materials, and though the Plaintiff himself did not say anything about a variation of the agreement as regards the amount of rent, I was asked to allow the plaint to be amended. But the amendment asked for is not a purely formal matter as it was asked for in order to give a further ground to the Plaintiff to defeat the plea under the Rent Act. Learned Counsel for the Defendant was willing to concede it, had it been merely formal and only related to the question of amount, as the Defendant has in fact been paying Rs. 110 to the Rent Controller, but in the circumstances stated he objected to the figure being altered to Rs. 110; and having regard to the stage at which it was asked for, I refused to allow the amendment to be made. But even so, dealing with the facts as they are, I find no evidence of any agreement between the Plaintiff and the Defendant to pay more than Rs. 90 a month. I have referred to all the items of evidence and statements in the pleadings to which my attention was drawn by learned Counsel for the Plaintiff, and though in fact the Defendant did pay Rs. 110 a month to the Controller, I gather that he did so because he wished to put himself on the safe side having regard to the provisions of the Calcutta Rent Act as to the standard rent, but it does not appear that there was any agreement between the parties that the rent should be more at any time than Rs. 90 a month.

I find that the Plaintiff refused to

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accept the rent offered and that the Defendant has duly deposited it with the Rent Controller, under sec. 11 (4).

In these circumstances the second issue with reference to sec. 11 (5) of the Calcutta Rent Act does not arise.

The Defendant is entitled to relief under the Calcutta Rent Act, and the result therefore is that this suit will be dismissed with costs on Scale No. 2.

Though the evidence was recorded almost entirely in the suit against Mrs. Mendies (No. 274 of 1921), as directed at the conclusion of my judgment in that suit, it should be treated as having been taken in this suit and costs will be taxed accordingly.

Babu Hari Bhusan Dutt, Solicitor for the Plaintiff.

Mr. Gregory C. Moscs, Solicitor for the Defendant.

J. N. R. Suit dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 173 OF 1919.

**MOOKERJEE, J.
BUCKLAND, J.**

1921,
18, January.

**SAHAYRAM CHAKRA-
BARTY and ors.,**
Plaintiffs, Appellants,

v.

**KHAGENDRANANDA
ASRAM and ors.,** Defendants, Respondents.

*Civil Procedure Code (Act V of 1908), sec. 11—
Res judicata—Sec. 92, suit by public, if barred by
the decision in a previous suit between a Manager
appointed under the Religious Endowments Act and
some claimants as Mohants.*

A Manager was appointed under sec. 5 of the Religious Endowments Act of 1863 in respect of a temple, and thereupon a person claiming to be a Mohant or Dundee of the temple instituted a suit for establishment of his title. There were three Defendants in the suit, viz., the said Manager, his successor in office and

another rival claimant to the office of Dundee. The suit was decreed. During the pendency of the suit the public brought the present suit under sec. 92 of the Civil Procedure Code, but the District Judge dismissed the suit on the ground that the trial of the question raised in the present suit was barred by the result of the decision in the previous suit which was pending at the date of the institution of the present suit.

Held—That the decree in the earlier suit though operative against the Manager appointed under sec. 5 of the Religious Endowments Act as also against the rival claimants, could not possibly operate to defeat a suit by members of the public instituted under sec. 92, C. P. C. Sec. 92 contemplates the administration of a trust created for public purposes. Such administration may include the removal of an existing trustee, the appointment of a new trustee or both. In such a suit it may be held that the endowment was not of such a nature, as to attract the operation of the provisions of the Religious Endowments Act 1863, and that the appointment of the Manager under sec. 5 of the Act was without jurisdiction and so forth.

This was an appeal against the decree of G. N. Roy, Esq., District Judge of Zillah Hooghly, dated the 27th of May 1919.

The facts will fully appear from the judgment.

Mr. B. Chuckerbutty and *Mr. H. D. Bose* and *Babus Manmatha Nath Mukherjee*, *Santimoy Majumdar* and *Pramatha Nath Bandopadhyay* for the Appellants.

Babus Bepin Behari Ghose and *Mon-Mohon Bose* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Plaintiffs in a suit instituted by them under sec. 92 of

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the Code of Civil Procedure 1908 with regard to what is known as the Guptipara temple. The District Judge has dismissed the suit on the ground that the trial of the question raised herein is barred by the result of the decision in an earlier suit which was pending at the date of the institution of the present suit. It appears that a Manager was appointed in respect of this temple under sec. 5 of the Religious Endowment Act, 1863, and that thereupon the first Defendant who claims to be a Mohunt or Dundee of the temple instituted a suit for the establishment of his title. In that suit, there were three Defendants; namely, one Rajendra Nath Roy who had been appointed as Manager under sec. 5 and had been subsequently removed, Raghu Nath Banerjee, who was his successor in the office of Manager and Nil Gopal Chatterjee, who was added as a party on his own application inasmuch as he asserted that he was a rival claimant to the office of Dundee. The members of the public made an attempt to intervene in the suit but the attempt was unsuccessful. When the matter was brought up to this Court Mr. Justice Fletcher, who delivered judgment held that the members of the public were not entitled to intervene and that their remedy would be by way of a suit properly framed and instituted for the purpose. Thereupon the present suit was instituted on the 9th October 1917 with the consent in writing of the Advocate-General under sec. 92 C. P. C., of 1908. During the pendency of the present suit the previous suit instituted by the first Defendant under the provision of sec. 5 of Act XX of 1863 was decreed by the Subordinate Judge on the 19th February 1918. By that decree it was declared that the then Plaintiff was the duly constituted Mohunt of the temple and that he was entitled to the possession of the Maths, Thakurs and the properties moveable and

immoveable belonging thereto. That clearly is a decree which though operative against the Manager appointed under sec. 5 of Act XX of 1863 as also against the rival claimant who intervened of his own accord could not possibly operate to defeat a suit by members of the public instituted under sec. 92, C. P. C. Sec. 92 contemplates the administration of a trust express or constructive created for public purposes of a charitable or religious nature. Such administration may include, amongst other reliefs, the removal of an existing trustee, the appointment of a new trustee or both. In the case before us, there is apparently a controversy whether the endowment was of such a description as to attract the operation of the provisions of Act XX of 1863. If it were held that the endowment was not of such a description the appointment of a Manager under sec. 5 would be without jurisdiction, and the decision in a suit instituted under that section against the Manager could not possibly bind the members of the public who desired to have the character of the endowment investigated under sec. 92 of the Code. We may further point out that it would be open to the Court in a suit properly framed under sec. 92 to hold that the contesting Defendant was the Mohunt properly appointed and that there was no reason for his removal. On the other hand the Court might hold that he was not the properly constituted Mohunt and that he was not the proper person to be appointed for the benefit of the trust. We are of opinion that nothing has happened in the previous suit, which was decided by the Subordinate Judge on the 19th February 1918 which debars the investigation of the questions raised in the present suit.

The result, therefore, is that this appeal is allowed, the decree of the District Judge set aside and the case remitted to him to

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be tried on the merits. The Appellants are entitled to their costs of this appeal. The hearing fee is assessed at ten gold mohurs. The costs of the proceedings in the Court below will be in the discretion of the Court after the suit has been tried out. Until further orders of the District Judge the Defendant No. 1 will continue to act as Receiver. The Appellants undertake not to execute the decree for costs obtained by him, until the disposal of the suit.

J. N. R.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1863 OF 1919.

CHATTERJEA, J.
PANTON, J.
1921,
16, December.

SAIBESH CHANDRA
SARKAR, Defendant,
Appellant,
v.
SIR BEJOY CHAND
MAHATAP BAHADUR,
Plaintiff, Respondent.

Land Acquisition Act (I of 1894), sec. 11—Apportionment of compensation by Collector—Sec. 18 and proviso to sec. 31, cl. (2), maintainability of a separate suit by a person dissatisfied with the apportionment but who did not ask for reference to "Court."

Some lands were acquired for a Railway and the Collector, after serving notice under sec. 9 of the Land Acquisition Act, on the zamindar and the putnidar, apportioned the compensation half and half between them. Neither party applied for any reference to Court under sec. 18 of the Act, and the putnidar withdrew the amount awarded to him. The zamindar thereupon brought a suit for recovery of the amount withdrawn by the putnidar on the ground that under the putni kabuliyat, the putnidar was not entitled to any portion of the compensation money:

Held—That the zamindar having been served with notice under sec. 9 of the Act

was bound to apply for a reference under sec. 18 when he was dissatisfied with the award, and he cannot maintain a suit in the ordinary Civil Court to re-open the question. The Act creates a special jurisdiction and provides a special remedy. And ordinarily when jurisdiction has been conferred upon a special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive and the ordinary jurisdiction of the Civil Court is ousted.

BHANDI SINGH v. RAMADHIN ROY (1), STEVENS v. JEACOCKE (2), WEST v. DOWNMAN (3) and RAMA CHANDRA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (4) followed.

Under the third proviso to sec. 31, cl. (2), a person who was a party to the apportionment proceedings cannot re-open the question by a regular suit. The proviso must be given a limited application, and it applies only to cases where the person was under a disability or was not served with notice of the proceedings before the Collector.

RAJA NILMANI SINGH DEO BAHADUR v. RAM BANDHU RAI (5) discussed and followed.

PUNNABATI DAI v. RAJA PUDMANAND SINGH (6) discussed and dissented from.

HURMUT JAN BIBI v. PADMA LOCHAN (7) referred to.

This was an appeal against the decree of P. C. De, Esq., District Judge of Zillah Birbhum, dated the 16th of July 1919, affirming the decree of Babu Nagen-dra Nath Chatterjee, Subordinate Judge of

(1) 10 C. W. N. 991 (1905).

(2) 11 Q. B. 731 (1948).

(3) L. R. 14 Ch. Div. 111 (1890).

(4) T. L. R. 12 Mad. 105 (1869).

(5) I. L. R. 7 Cal. 888 (1881).

(6) 7 C. W. N. 535 (1908).

(7) I. L. R. 12 Cal. 83 (1895).

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that District, dated the 26th of November 1918.

The facts of the case will fully appear from the judgment.

Babus Jogesh Chandra Roy and Sambhu Nath Banerjee for the Appellant.

Babu Sarat K. Mitra for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for refund of money which had been allowed as compensation for certain lands acquired under the Land Acquisition Act and withdrawn by the Defendant.

It appears that the lands in question were acquired for a Railway. The Plaintiff (the zamindar) and the Defendant, (the *putnidar*) were served with notices under sec. 9 of the Land Acquisition Act. The Collector apportioned the compensation half and half between the zamindar and the *putnidar*. Neither party applied for any reference under sec. 18 of the Act and the *putnidar* withdrew the amount awarded to him by the Collector. The zamindar thereupon brought the suit out of which this appeal arises, for recovery of the amount which had been withdrawn by the Defendant, on the ground that under the *putni kabuliyat*, the *putnidar* was not entitled to any portion of the compensation money. The defence *inter alia* was that the Plaintiff ought to have applied for reference under sec. 18 of the Act and that no separate suit lies. The Courts below have overruled that contention and the Defendant has appealed to this Court.

Sec. 9 of the Land Acquisition Act (I of 1894) provides for notice being given by the Collector to all persons known or believed to be interested in the land acquired. Sec. 11 provides for inquiry by the Collector into the objections (if any)

which any person interested had stated pursuant to the notice given under sec. 9 to the measurements made under sec. 8, and into the value of the land, and into the respective interests of the persons claiming the compensation, and further provides for an award being made by him under his hand of—

- (i) the true area of the land;
- (ii) the compensation which in his opinion should be allowed for the land; and
- (iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him.

Sec. 12 lays down (1) that such award shall be filed in the Collector's office and shall, except as hereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested (2) that the Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made.

Under sec. 18 any person interested who has not accepted the award may, by written application to the Collector require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested. This application for reference is to be made within the time fixed by sub-sec. (2) of that section. Sec. 30 provides that if any dispute arises as to apportionment of the compensation or as to the

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persons among whom it is payable, the Collector may of his own motion refer such dispute to the decision of the Court. The "Court;" means the principal Civil Court of Original Jurisdiction unless the local Government has appointed a Special Judicial Officer to perform the functions of the Court under the Act, and the provisions of the Code of Civil Procedure are to apply to proceedings before the Court under the Act.

The Act creates a special jurisdiction and provides a special remedy. And ordinarily when jurisdiction has been conferred upon a special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive. [See *Bhandi Singh v. Ramadhin Roy* (1)].

It is an established principle that where by an Act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury if the mode of redressing the injury is pointed out by the Statute, the ordinary jurisdiction of Civil Court is ousted and in the case of injury the party cannot proceed by action [see *Stevens v. Jeacocke* (2), *West v. Downman* (3) and *Rama Chandra v. The Secretary of State for India in Council* (4)].

A difficulty, however, arises from the proviso to sec. 31, cl. (2) which lays down "provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto." There was a similar proviso to sec. 40 of Act X of 1870 and the proviso was considered by the the Judicial Committee in the case of *Raja*

Nilmani Singh Deo Bahadur v. Ram Bandhu Rai (5). In that case the Appellant Raja Nilmoni Singh was a party to the apportionment proceedings under sec. 38 of Act X of 1870 and it was held that he could not reopen the question by a regular suit. Their Lordships with reference to the proviso observed: "Such a proviso, which appears to have been but a repetition of a provision in a previous Act *in pari materia*, is necessary in this as in almost all acts of a similar character. It is necessary for the Government, or the persons or company entitled to take property compulsorily, to deal with those who are in possession, or ostensibly the owners; but it may happen, and frequently does happen, that the real owners, possibly being infants or persons under disability, do not appear, and are not dealt with in the first instance; and therefore a provision of this sort is necessary for the purpose of enabling the parties who have a real title to obtain the compensation money. Their Lordships went on to observe that the proviso applied only to persons whose rights had not been adjudicated upon in pursuance of the secs. (38 and 39). This is the passage on which reliance has been placed in *Punnabati Dai v. Pudmanand Singh* (6) in which it was held that as between the claimants *inter se* an award by a Collector under sec. 11 of the Land Acquisition Act does not amount to an adjudication of any question regarding the apportionment of compensation adjudged under the Land Acquisition Act, and that any such question can be determined only by the Civil Court.

In that case the learned Judges observed:—"Their Lordships decided the case of *Raja Nilmani Singh v. Ram Bandhu Rai* (5) under the old Act X of 1870, and the proviso that their Lordships

(1) 10 C. W. N. 991 (1905).

(2) 11 Q. B. 731 (1848).

(3) L. R. 14 Ch. Div. 111 (1880).

(4) L. R. 12 Mad. 105 (1888).

(5) I. L. R. 7 Cal. 388 (1881).

(6) 7 C. W. N. 528 (1908).

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had to construe is word for word the same as the last proviso to sub-sec. 2 of sec. 31 of the present Act, and their Lordships' referring to an adjudication in pursuance of secs. 38 and 39 go clearly to show that it is an adjudication of the Civil Court upon a reference by the Collector that their Lordships had in view."

It is to be observed, however, that the Collector under Act X of 1870 had no power to decide the question of apportionment in any case. Whenever there was any question of apportionment, he was bound to refer the matter to the Court, i.e., the Civil Court, and the Civil Court had to decide the matter under secs. 38 and 39 of the Act. This appears to be the reason why their Lordships in *Raja Nilmani Singh's* case (5) referred to the adjudication under secs. 38 and 39.

Under Act I of 1894, compulsory reference was abolished, and the Collector has full power to deal with the question of apportionment under sec. 11, and his award, subject to the other provisions of the Act, is final under sec. 12, no doubt, as between the Collector on the one hand and the persons interested on the other. The person aggrieved by the award whether his objection be to the measurement of the land, the amount of compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested may apply to the Collector for a reference to the Court. The "Court," by which is meant the principal Civil Court of Original Jurisdiction or a Judicial Officer specially empowered to perform the functions of the Court, under the Act has to decide the questions referred to the Court. That being so it is not reasonable to hold that the Act while creating a special Court to decide such questions intended an adjudi-

cation of any question relating to apportionment by the Ordinary Civil Courts. The proviso as it stands under the present Act, or as it stood under the old Act, is very general in its terms. Admittedly it cannot be given effect to in its entirety: it cannot be held that a suit lies notwithstanding a reference to the Court upon the application of a party under sec. 18 or by the Collector of his own motion under sec. 30. The proviso therefore must be given a limited application, and we think that it applies only to cases where the person is under a disability or is not served with notice of the proceedings before the Collector.

In the case of *Punnabati Dai v. Pudmanand Singh* (6), cited above the learned Judges, although they referred to the contention that there being a special remedy provided by the Act, the general remedy was not available, did not discuss the question, and the observations of the Judicial Committee in *Raja Nilmani Singh's* case (5) as to the persons to whom the proviso was applicable do not appear to have been considered by them. Then again, the contention raised in that case that a separate suit if allowed would enable a party to avoid the limitation prescribed by sec. 18, namely, six weeks from the date of the Collector's award where the party was present before the Collector, or six weeks of the receipt of the notice from the Collector, or six months from the date of the Collector's award, whichever period shall first expire, was disallowed on the ground that there is no limitation prescribed for a reference under sec. 30. Sec. 30, however, applies only to a reference made by the Collector of his own motion presumably before the final award is made; whereas sec. 18 deals with a reference upon an application made by

(5) I. L. R. 7 Cal. 335 (1881).

(6) I. L. R. 7 Cal. 335 (1881).

(6) 7 C. W. N. 523 (1908).

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a party. For the above reasons therefore and with all respect to the learned Judges we are unable to follow the decision in the case of *Punnabati Dai v. Pudmanand Singh* (8).

In the case of *Hurmut Jan Bibi v. Padma Lochan Das* (7), the Plaintiff who brought the suit was no party to the apportionment proceeding, and Wilson, J. pointed out that "apportionment of the compensation is intended to be a proceeding distinct from that of settling the amount of compensation under the previous provisions of the Act and any dispute as to the apportionment is only decided as between those persons who are actually before the Court. A separate notice therefore of the apportionment proceedings is requisite to bind any person by those proceedings and where such a notice has not been served, any person interested, although served with notice of the proceedings for settling the amount of compensation, cannot be considered a party to the proceedings for apportioning it." The decision was under the old Act (Act X of 1870), and apportionment proceedings under that Act were taken before the "Court" under secs. 38 and 39 of the Act.

We quite agree in holding that where a person has no notice of the apportionment proceedings, he cannot be bound by the award or by the decision.

In the case of *Bhandi Singh v. Ramadhin Roy* (1) certain persons who were parties to a land acquisition proceeding being dissatisfied with the apportionment of the compensation money made by the Collector obtained a reference to the Court under sec. 18 of the Land Acquisition Act; but as they did not appear at the hearing before the Court it was struck off. It was

held that the suit instituted by them in the Civil Court for the apportionment of the compensation money was barred under sec. 103, C. P. C., as the procedure to be observed by the Court is the same as that laid down in the Code of Civil Procedure. In that case Mookerjee, J., discussed the question whether, when special jurisdiction had been conferred, such jurisdiction was exclusive or not, and came to the conclusion that the jurisdiction of the Civil Court was exclusive. He, however, expressed an opinion, having regard to the provisions of sec. 31, cl. (2) and the decision in the case of *Raja Nilmani Singh Deo Bahadur v. Ram Bandhu Rai* (5) that a question as to the persons to whom compensation is payable or its apportionment among the persons interested may be determined either under a reference as contemplated by sec. 18 cl. (1) or by a suit at the instance of a person lawfully entitled to it as against another who has drawn the compensation money but that if a party has once availed himself of a reference to the Court under sec. 18 he cannot again ask for an injunction to litigate the same matter in the ordinary Civil Court. In that case as stated above, the Plaintiff had obtained a reference under sec. 18, which was dismissed for his non-appearance. Consequently no suit was maintainable. It was unnecessary therefore to consider whether the special Court under the Land Acquisition Act, and the ordinary Civil Court have or have not concurrent jurisdiction, and it is to be noticed that the observations of their Lordships in *Raja Nilmani Singh's* case (5) as to the persons to whom the proviso is applicable do not appear to have been considered by the learned Judges.

Although the Legislature has created a special Court (the principal Court of original jurisdiction or a Judicial Officer

(1) 10 C. W. N. 991 (1905).

(8) 7 C. W. N. 582 (1902).

(7) 1 L. R. 12 Cal. 33 (1905).

(5) 1 L. R. 7 Cal. 383 (1881).

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pecially empowered to perform the functions of a Court under the Act) to adjudicate all questions of apportionment upon a reference made within the period fixed by the Act, the effect of holding that such Court and the ordinary Civil Courts have concurrent jurisdiction will be that a party may institute a suit even in a Munsif's Court, (in cases where the amount in dispute does not exceed Rs. 1,000) and that long after the periods prescribed by sec. 18. The Act expressly provided that any party dissatisfied with the award of the Collector as regards apportionment, may apply to the Collector for a reference under sec. 18 and on such a reference he can get relief in the same way as he can do in the ordinary Civil Court as the procedure in the Court under the Act is the same as in ordinary Civil Courts with a right of appeal to the High Court. It would not be reasonable to hold that the Legislature having provided a special remedy in the Land Acquisition Court intended to make it optional with a party to apply for a reference under sec. 18 or to institute a suit in ordinary Civil Court. The scope of the proviso may be amply satisfied by holding that it applies only to particular persons. The Collector under sec. 9 has to serve notices upon the persons known or believed to be interested in the land. There may be persons who are not known to the Collector and who might not be in possession, and the interests of this class of persons are protected by the proviso to sec. 31, sub-séc. (2)

We are of opinion that the Plaintiff having been served with notice under sec. 9 of the Act was bound to apply for reference under sec. 18 when he was dissatisfied with the award, and he cannot maintain a suit in the ordinary Civil Court.

In this view it is unnecessary to consider the question whether the word *अपेक्षित*

in the *kabuliyat* includes land taken for the purpose of a Railway.

We accordingly set aside the decrees of the Courts below and dismiss the suit, but we direct each party to bear his own costs in all Courts.

J. N. R.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2547 OF 1917.

CHATTERJEA, J.

DUVAL, J.

1919,

Heard, 3, July.

Judgment,

4, July.

RAM LAL DAS,
Defendant, Appellant,

v.

BANDIRAM MUKHO-
PADHYA and ors.,
Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 169, cl. (c)—"Rent," whether includes interest—Period up to which the decree-holder is entitled to rent—Sec. 67, scope and effect of.

Certain putnidars obtained a decree for rent of a darputni, which they got sold in execution, and the sale was subsequently confirmed. After the rent decree was satisfied, the putnidars applied for payment to them (out of the surplus sale proceeds) of the rent which had fallen due between the institution of the suit and date of the confirmation of sale and claimed interest on the said rent:

Held—That the putnidar was entitled to rent only up to the date of sale.

BEJOY CHAND MAHATAP v. SHASHI BHUSAN BOSE (1) followed.

As soon as rent falls due and is not paid, it becomes an arrear under sec. 54 and carries interest under sec. 67. The money payable as interest, therefore, becomes part of the rent. The Legislature could never have intended in sec. 169, cl. (c) to exclude interest accruing upon the rent and to put the decree-holder under the necessity of bringing a fresh suit for the interest only.

(1) 18 C. W. N. 126 (1913).

RAM LAL DAS v. BANDIRAM MUKHOPADHYA.

**BIJOY CHAND MAHATAP v. S. C. MUKERJEE (2) and PROFULLA TAGORE v. MATAB-
UDDIN (4) followed.**

This was an appeal against a decree of G. B. Mumford, Esq., District Judge of Zillah Birbhum, dated the 11th June 1917, affirming a decree of Babu Dehabrata Mukerjee, Munsif of Suri, dated the 22nd July 1916.

The facts material to this report will appear from the judgment

Babu Anilendra N. Roy Choudhury for the Appellant.

Babu Uma Ch. Laha for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for recovery of Rs. 547 as. 5 principal and Rs. 33 as interest thereon under the following circumstances.

The Defendants Nos 1 to 6 were *putnidars* who obtained a decree for rent of a *durputni* against Defendants Nos. 7 and 8. The *taluk* was sold in execution of the decree on the 2nd July 1912 and the sale was confirmed on the 8th March 1913. After satisfying the rent decree, there remained in deposit in Court Rs. 2,506 as surplus sale proceeds. The *putnidars* applied for payment to them, (out of the surplus sale proceeds), of the rent which had fallen due in respect of the tenure between the institution of the suit and the date of the confirmation of sale, obtained an *ex parte* order and withdrew the sum of Rs. 547 as. 5 for arrears up to the date of the confirmation of sale.

The present suit was instituted by the Plaintiff on the allegation that the Defendant No. 8, one of the *durputnidars*, had mortgaged his *durputni* interest to the Plaintiff and the latter had obtained a

mortgage decree which was partially satisfied by the sale of other properties and that the mortgage lien over the property sold had been transferred to the surplus sale proceeds.

Two questions were in dispute in the Court below. The first is whether the Defendants were entitled to arrears only up to the date of sale and not up to the date of confirmation of sale, and the second whether they were entitled to any interest on the rent which fell due between the date of the institution of the suit and the date of sale.

The Court below has held that the *putnidar* was entitled to rent only up to the date of sale and having regard to the decision of this Court in the case of *Bijoy Chand Mahtap v. Shashi Bhusan Bose* (1) the learned Pleader for the Appellant could not press his objection on this point.

The only question which has been argued before us is whether under the provisions of sec 169, cl (c) of the Bengal Tenancy Act, the landlord is entitled to interest on the rent

Now, the word 'rent' is defined in sec. 3 of the Act as "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant," and sub-sec. (3) of sec. 54 of the Act lays down "any instalment or part of an instalment of rent not duly paid at or before the time when it falls due shall be deemed an arrear." Sec. 67 provides that "an arrear of rent shall bear simple interest at the rate of 12½ per cent. per annum from the expiration of that quarter of the agricultural year in which the instalment falls due to the date of payment or of the institution of the suit whichever date is earlier."

The question whether the word 'rent'

(3) 11 C. W. N. 1106 (1906).

(4) 22 C. W. N. 323 (1917).

(1) 18 C. W. N. 126 (1913).

RAM LAL DAS v. BANDIRAM MUKHOPADHYA.

in sec. 169 include interest has been considered in three cases in this Court. In the first case *Maharajadhiraj Bijoy Chand Mahtap Bahadur v. S. C. Mukherjee* (2) decided by Ghose and Caspersz, JJ., the former observed "speaking for myself I may say that the Legislature could never have intended when using the word 'rent' in sec. 169, cl. (c) to exclude the interest accruing thereupon and to put the decree-holder under the necessity of bringing a fresh suit for the interest only."

In the next case of *Manindra Ch. Nandy v. Asra Mahomed Mandul* (3), decided by Mr. Justice Brett, on the 29th April 1908, the learned Judge held a contrary view.

In the third case of *Profulla Nath Tagore v. Matabuddin Mandal* (4) Fletcher and Smither, JJ., following the case of *Bijoy Chand v. S. C. Mukherjee* (2) held that rent would include interest. It is true that the learned Judges treated the observation of Ghose, J., in the case of *Bijoy Chand Mahtap Bahadur v. S. C. Mukherjee* (2) as a decision of the Court and as clear authority in favour of the landlord. As a matter of fact, the case was decided upon an admission of the judgment-debtor that the claim of the landlord to the interest was a just one and Ghose, J., himself pointed out that upon the petition as presented by the judgment-debtor admitting the justice of the Plaintiff's demand, no question of the character that was raised by the Subordinate Judge, should have been raised and discussed. Then he made the observation which we have quoted above. It was, therefore, an *obiter* and Mr. Justice Brett in the unreported case we have referred to, also

pointed out that it was an *obiter* of Mr. Justice Ghose. But although that is so, we are inclined to accept the view taken by Ghose, J., in that case followed by Fletcher and Smither, JJ., in *Profulla Nath Tagore's* case (4).

We have been referred to sec. 161, cl. (c) which runs as follows: "The terms 'arrear' and 'arrear of rent' shall be deemed to include interest decreed under sec. 67 or damages awarded in lieu of interest under sub-sec. (1) of sec. 68." It is contended that had the word "rent" included interest thereupon, there would have been no necessity of adding cl. (c) to sec. 161. But as soon as rent falls due and is not paid, it becomes an arrear under sec. 54 and carries interest under sec. 67. The money payable as interest, therefore, becomes part of the rent. Cl. (c) was probably added to sec. 161 to make the point clear.

However that may be, we agree in the view taken by Ghose, J., that the Legislature could never have intended in sec. 169 to exclude the interest accruing upon the rent and to put the decree-holder under the necessity of bringing a fresh suit for the interest only.

For these reasons, we think that the decision of the Court below is wrong. The appeal is allowed. The Appellant will be entitled to full costs of this Court. There will be costs in proportion in the lower Court.

The cross-objection is not pressed and is dismissed.

J. N. R.

Appeal allowed.

(4) 22 C. W. N. 323 (1917).

(2) 11 C. W. N. 1106 (1906).

(3) S. A. No. 2260 of 1906, dated 29th April 1908, unreported; 12 C. W. N. cxliv (1908).

(4) 22 C. W. N. 323 (1917).

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.
LORD ATKINSON.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

1921,

Heard, 1 and
2, December.

Judgment,
2, December.

NATHU KHAN,
since deceased
(now represented
by Bibi Mahbu-
bannessa and ors.),
and ors., Appel-
lants,
v.
THAKUR BURTO-
NATH SINGH and
ors., Respondents.

Transfer of Property Act (IV of 1882), sec. 55 (1) (g), sub-sec. (2)—Sale free from incumbrances of property subject to mortgage charges—Incumbrances discharged by purchaser—Right of purchaser to be indemnified—Payment of incumbrances by purchaser, if voluntary—Indian Contract Act (IX of 1872), sec. 69—Arrangement by vendor with a third party to pay off incumbrances, if enforceable by purchaser, when no trust created.

Where a deed of sale of properties which in fact were subject to mortgage charges contained an express declaration that the property was sold free from incumbrances, the vendor was, under sec. 51 (1) (g), sub-sec. (2) of the Transfer of Property Act, liable to the purchaser for moneys paid by the purchaser either for redemption of the mortgages existing on the property purchased at the date of the purchase, or for purchase of the properties on sales under such mortgages or to prevent such sales.

Scintille :—It is difficult to accept the view that purchasers of a property are not compelled to pay off mortgagees who have obtained decrees for sale, even though a sale is not immediately threatened.

Where after the sale the vendor sold another item of property to a third person, and it was agreed between them that the latter should discharge the incumbrances on the property which the vendor had sold to the first purchaser free from incumbrances :

Held—That a suit by the first purchaser against the second purchaser for re-

covery of the amount of the incumbrances was misconceived, the former being no party to the latter's purchase deed and no trust having been thereby created in his favour.

This was an appeal from a decree of the High Court of Judicature at Fort William in Bengal (Chaudhuri and Newbould, JJ.), dated the 19th February 1919, which reversed a decree of the Subordinate Judge of Hazaribagh, dated the 19th March 1917.

The suit in which this appeal was preferred was brought by the Plaintiffs (Appellants) to recover the sum of Rs. 11,141 and for other relief.

The facts which are fully set out in their Lordships' judgment are shortly as follows :—

Lakhpatt Nath sold certain properties to Nathu Khan and others, free from incumbrances.

In fact these properties were encumbered, and in order to get the incumbrances discharged, the vendor sold other properties to Bindesri Charan who was to pay off the incumbrances on the first set of properties as a part of his purchase price. Bindesri failed to pay and Nathu Khan was forced to pay off the mortgages in order to save his property from being sold. He then instituted a suit against Lakhpatt Nath and Bindesri Charan.

The main questions that arose for determination were :—(1) Whether Nathu Khan was entitled to recover from Lakhpatt Nath the money so paid by him to avert the sale.

(2) And whether in the circumstances he was entitled to a charge on the second set of properties which had been recovered by Lakhpatt Nath from Bindesri Charan.

The Subordinate Judge held that Lakhpatt was liable to recoup the Plaintiff and ordered the sale of the properties that had been sold to Bindesri if the amount were not paid.

NATHU KHAN v. THAKUR BURTONIAH SINGH.

The High Court (A. Chaudhuri and Newbould, JJ) held that the payments had not been made under compulsion and that Nathu Khan was not entitled to any charge on the properties sold to Bindesri.

Mr Kenworthy Brown for the Appellants—Lakhpit Nath had covenanted to give a title free from incumbrances and became liable to Nathu Khan for the money expended by the latter in the discharge of the mortgages.

Bindesri Charan held the lands conveyed to him in trust to discharge the mortgages. On the cancellation of the conveyance the lands reverted to Lakhpit subject to the rights of the Appellant.

Reference was made to Sec 69, Indian Contract Act and secs 55, (1) (g) and (2) of the Transfer of Property Act.

The Respondents did not appear.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER. On the 6th September 1904, one Lakhpit Nath sold to Nathu Khan, Gurb Ali Khan, Badhan Khan and Rumzin Khan, three monzabs, situate in the zemindari of Bigda at the price of Rs 19,000. Nathu Khan is dead and his representatives together with the other purchasers are the present Appellants. The purchase price was to be discharged by the cancellation of certain debts due from the vendor to the purchasers and as to the balance in cash. The purchase deed contained the express declaration that the property was sold free from incumbrances and consequently by sec 55 (1) (g), sub-sec (2) of the Transfer of Property Act the vendor must have been deemed to contract with the buyers that he had power to transfer the property so sold, and consequently that the property was free from burdens. In truth there were existing upon the estate considerable charges and it appears that the

vendor recognising this fact and being anxious to secure their liquidation on 7th September 1904, entered into an arrangement with one Bindesri Charan. This took the form of a sale by the vendor to Bindesri Charan of another estate for a sum of Rs 82,200, the purchase price to be discharged by the payment of a considerable number of debts, which included among others those owing upon the property already sold to Nathu Khan and his co-purchasers. Had Bindesri carried out the terms of that arrangement no dispute would have arisen, but unfortunately he did not and as the mortgagees who held the prior charges upon the property sold to Nathu Khan and others proceeded to extremities and took steps to realise their securities by sale, Nathu Khan, apparently alone but probably on behalf of all the purchasers paid three separate sums of Rs 1,287 Rs 37,000 and Rs 1,616 in order to clear the property and no part of these moneys has been repaid to them. About these facts there appears to be no doubt, for although the High Court from where this appeal proceeds appears to have doubted whether the property was actually subject to in effectual order for sale, yet the fact that it was subject to the mortgages appears reasonably clear. After the payments had been made, Nathu and his co-purchasers instituted a suit against Bindesri, Lakhpit, who was Defendant No 2 to the proceedings, and others, asking for the recovery of the sums paid against the properties and persons of the Defendants. The plaint was a clumsy document, and the suit as against Bindesri was misconceived, for the Plaintiffs were no parties to the deed of 7th September 1904, and no trust was thereby created in their favour. The real case was a personal claim against Lakhpit, and this is in fact included in the general confusion of the suit. A subsequent suit was also

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brought by Lakhpat Nath against Bindesri Charan and Nathu Khan and his co-purchasers and others to obtain rescission of the sale of 7th September 1904, on the ground that Bindesri Charan had wholly failed to comply with the obligations that he undertook for Nathu Khan; the purchaser was made a party to this suit which was compromised before trial and the compromise became incorporated in a decree under the seal of the Court of the 20th July 1908. It is unfortunate that this decree is couched in language which renders it extremely difficult to give a fair grammatical construction to all its terms, but their Lordships think that none the less its purpose is clear and the obscurity is doubtless due to the fact that it represents the actual agreed terms of the parties which have not been put into plain legal phraseology. The decree provides for the return of the properties sold to Bindesri, subject to a condition expressed in the words :-

"That in case the Defendant No. 2 becomes liable to Nathu Khan and others (Plaintiffs in suit No. 122 of 1907), in the final decree in that suit, that sum will be payable by the Plaintiff to those Defendants, and the property which is the subject of this suit will remain charged with this debt payable to those Defendants."

The effect of this order was as follows : that if Lakhpat Nath, who, notwithstanding the fact that he was Plaintiff, because he was Defendant No. 2 in suit No. 122 of 1907, is referred to as the Defendant No. 2, becomes liable to Nathu Khan and others who are the Plaintiffs in the Suit No. 122 of 1907, in the final decree of that suit, that sum—that is the sum for which he is liable—will be payable by him Lakhpat Nath to Nathu Khan and others and the property the subject of the present suit will remain charged with the debt payable to those Defendants. The confusion in this decree is due to the fact that while

it refers to the suit instituted by Nathu Khan against Lakhpat Nath and others to obtain a declaration of liability, it introduces the description of the parties alternately by virtue of their capacity in that suit and their capacity in the suit which is being compromised, with the result that the same person becomes the Defendant and the Plaintiff in the same sentence. Their Lordships having carefully studied the language of the decree are satisfied that the interpretation that they have placed upon it is correct and indeed it is the only interpretation that could give reasonable effect to the claim that Nathu Khan possessed against Lakhpat Nath at the time when the suit was set on foot. The suit referred to as No. 122 of 1907 was the suit brought by Nathu Khan and others asking for relief against Lakhpat Nath in respect of payments to which reference has been made and it is the suit out of which this appeal has arisen. Lakhpat died before this suit came on for hearing, his heir was added in his place, and the learned Subordinate Judge held that as he derived benefit from the payments made by the Plaintiffs, it was equitable that the Plaintiffs must be recompensed, and he ordered sale of the properties that had been sold to Bindesri, if the amount were not paid.

Upon appeal the High Court held that the Plaintiffs were not compelled to make the payments to avert the sale and that they were not entitled to any relief.

Their Lordships find it difficult to accept the view that purchasers of a property are not compelled to pay off mortgagees who have obtained decrees for sale, even though a sale is not immediately threatened, but it appears there were questions about the nature of the sales not explained to their Lordships which may have caused misunderstanding on this head.

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The present Appellants are themselves responsible for what occurred, for there would have been no difficulty in obtaining relief had the section of the Transfer of Property Act to which attention has been called been placed before the Court. It is plain from that section that as Lakhpat Nath had bound himself to deliver the property free from incumbrances, and had only delivered it subject to the charges which Nathu paid, Lakhpat was therefore liable for the monies paid by the purchaser in order to clear his title. If that simple view had been presented to the Court of first instance and to the High Court, their Lordships see no reason to doubt that the matter need not have proceeded as far as this Board; but the Courts below appear to have been confused with the effect of what had taken place and they do not seem to have had their attention directed either to the statute or to the decree although the compromise was mentioned. It may be that as the decree was made after this suit was instituted, its execution might have been a difficult matter in the present proceedings, but with that their Lordships do not intend in any way to interfere. All that they think the Appellants here are entitled to is (a) a declaration that in the circumstances Lakhpat Nath did become liable to Nathu Khan for the monies paid by Nathu Khan either for redemption of the mortgages existing on the property purchased by him on the kobala of the 6th September 1901, at the date of such purchase, or for purchase of the properties on sales under such mortgages, or to prevent such sales; and (b) that the person mentioned in the decree of the 20th July, 1908, as the Defendant No. 2, was intended to be Lakhpat Nath. Their Lordships for these reasons will humbly advise His Majesty that the judgment appealed from should be set aside and the decree of the learned Judge

of first instance be modified by the introduction of the above declaration that Lakhpat was liable to the Plaintiffs in the suit for the monies paid under either of the above heads, and if any dispute exists as to such payments an enquiry must be directed to ascertain the facts. The Appellants will have their costs in the Courts below. There will be no costs of the appeal.

Solicitors: Messrs. Pugh & Co. for the Appellants.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 126 of 1920.

MOOKERJEE, J.

PANTON, J.

1921,

Heard, 13, 14, 16,

and 17, June.

Judgment,

18, August.

NIBARAN CHANDRA

MUKERJI and anr.,

Appellants,

v.

NIRUPAMA DEBI and

anr., Respondents.

Purdanashin lady, document executed by—Principles which should guide Court—Independent and competent advice, meaning of—Necessity of greater caution in cases where person benefited holds fiduciary position—Misrepresentation or fraud, proof of, not essential—Joint family—Sovereignty, if effected by deed of settlement by widow entrusting reversioner with management for a term—Limitation Act (IX of 1908), Art. 91, applicability of, when Plaintiffs seek possession on declaration that Defendants' document of title wholly void—Time from which limitation runs when deed voidable—Karta of joint Hindu family, nature and extent of his accountability.

On the death of a member of a Hindu joint family a deed of settlement was executed by the guardian of the widow who was at the time a minor, the effect of which was to place the properties of the minor inherited by her from her husband in charge of her husband's brother who was the reversioner on certain terms. After the widow had attained majority

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a deed of settlement for the life of the widow was executed by her in favour of the sons of her husband's brother who was now dead. The widow brought a suit for partition of the joint family properties and for other incidental reliefs on declaration that the last deed of settlement was void and inoperative:

Held—That it is well settled that the Court when called upon to deal with a deed executed by a purdanashin lady must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her with a full understanding of what she was about to do; secondly that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly that she had independent and disinterested advice in the matter.

In the class of cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character the Court will act with great caution and will presume confidence put and influence exerted, and in cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length the Court will require the confidence and influence to be proved intrinsically.

“The substance of the matter is that the fairness of the bargain is the crucial test.

In dealing with these cases, the Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself.

These, however, are only general principles and there is grave risk of failure of justice, if they are moulded into inelastic

formulas or crystallised into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

Independent and competent advice does not mean independent and competent approval but signifies at any rate advice removed entirely from the suspected atmosphere and conveyed in the clear language of an independent mind, free from taint of interests, to the party acting, regarding the precise nature and consequence of the transaction. In cases of this class, there need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of material fact, any failure to disclose material information or any just suspicion of artifice, the Court will interfere and pronounce the transaction void and restore the parties as far as possible to their original rights.

Held—That as the family was joint and there was a nucleus of joint property the burden was on the party setting up a case of separate estate to establish his allegation.

That the first deed of settlement was in essence a deed of management and did not cause a severance of the family, the title to the half-share inherited by the Plaintiff from her husband never having rested in her brother-in-law.

Held, upon the evidence—That the disputed deed of settlement was understood by the lady to be a deed for five years whereas in reality it was a deed operative for her life; that she had no independent advice; that the extent of the income and the value of all the joint properties, moveable and immoveable, were not disclosed to her, and that the effect of the deed on her rights was never brought home to her.

That the deed actually executed by the

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lady having been fundamentally different from the deed she intended to execute and thought she executed was void and inoperative and that being so no question of limitation arose.

Art. 91 of the schedule to the Indian Limitation Act has no application to a case of this description where a suit is brought for possession and partition upon declaration that an instrument under which the Defendant claims is void.

That, on the supposition that the deed needed being cancelled, the Defendants had failed to prove that the Plaintiff acquired full information of the true state of facts at a time too remote to allow her to maintain the suit.

In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the karta is liable for is as to the existing state of the property divisible, the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters. But the karta is the accountable party, and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property now consists of, not what the karta says it is.

This was an appeal from a decision of Babu Lal Behari Chatterjee, Subordinate Judge, Hooghly, dated 14th April 1920.

The facts of the case will appear from the judgment.

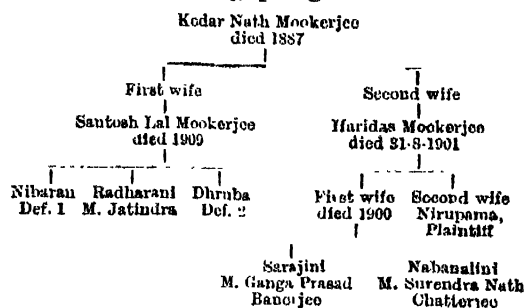
Dr. Dwarka Nath Mitra and Babu Hiralal Sanyal for the Appellants.

Babu Pyari Mohan Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The subject-matter of the litigation which has culminated in this appeal

is the estate left by one Haridas Mookerjee who died on the 31st August 1901. The relationship of the members of the family to which he belonged may be gathered from the following pedigree :—



Kedar Nath Mookerjee, the founder of the family, left two sons by two wives, namely, Santosh Lal Mookerjee and Haridas Mookerjee. Santosh Lal Mookerjee left two sons, Nibaran Chandra Mookerjee and Dhruva Pada Mookerjee, who are the Defendants in this suit. Haridas Mookerjee left a widow Nirupama who is the Plaintiff in this litigation, and two daughters Sarajini and Nabanalini by a predeceased wife, a cousin of Nirupama. At the time of the death of Haridas Mookerjee his second wife Nirupama had not yet attained majority. On the 5th May 1905, Tripura Charan Chatterji, her father, made an application to the District Judge under the Guardians and Wards Act, 1890, to have himself appointed as guardian of the person and properties of the minor. The order was made in due course on the 26th May 1905. The correspondence, which took place at that time between Tripura Charan Chatterjee and Santosh Lal Mookerjee and has been produced in this case, leaves no room for doubt that the application was encouraged by the brother-in-law of the lady who was also the immediate reversionary heir to the estate of her husband. The reason why he keenly interested himself in the matter of

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the guardianship application becomes manifest when we examine the events subsequent. On the 21st September 1905, the guardian applied to the District Judge for permission to lease out the property of his ward to the reversioner Santosh Lal Mookerjee. The District Judge asked for specific information as to the terms, the period of the proposed lease and the annual rent reserved thereunder. The information was not supplied and the petition was dismissed on the 7th November 1905. On the 15th November 1905, the District Judge recorded an order that as no property was to be leased out for more than five years, his sanction was not necessary, and the guardian was at liberty to make such arrangements for the maintenance of the minor and the management of her property as might be deemed to be for the benefit of the minor and her estate. Thereafter, an application appears to have been made to the District Judge for permission to make a settlement of the estate of the minor for her life; this was refused by the District Judge on the 8th February 1906. On the 1st May 1906, a document was executed by Tripura Charan Chatterjee in favour of Santosh Lal Mookerjee which has been described in these proceedings as a deed of settlement for a term of five years. The effect of this deed was to place the properties of the minor inherited by her from her husband in charge of the reversioner, who undertook to pay her a fixed allowance and to bear the expenses of the marriage of her second step-daughter. The deed was to continue in operation from 17th November 1905 to the 16th November 1910. On the expiry of the term of this deed, the parties apparently reverted to the previous state of things which continued for more than two years. On the 22nd June 1913, Nirupama, who had meanwhile attained her majority, executed a deed in favour

of Nibaran Chandra Mookerjee and Dhrubapada Mookerjee who had succeeded to the interest of their late father Santosh Lal Mookerjee in the family estate. This deed, which is described as a deed of settlement, was closely modelled on the deed of the 1st May 1916 with two fundamental differences, namely, first, that the settlement was not for a term of five years but for the life of the lady and, secondly, there was no provision for the marriage expenses of the step-daughter whose marriage had already taken place in the interval. On the 20th June 1918, Nirupama instituted the present suit for partition of the joint family properties, for accounts, and for incidental reliefs, on declaration that the deed of the 22nd June 1913 was void and inoperative in law and had in no way affected her interest in the family estate as heir-at-law to her husband. The Defendants repudiated the claim substantially on the ground that the Plaintiff was bound by her deed and could not claim joint possession or partition of what had in essence ceased to be joint family estate. On these pleadings twelve issues were raised by the trial Court; of these, reference need be made only to four:—

(1) Is the suit barred by limitation?
(2) Are the properties in suit the joint family properties of the parties or are any of these the self-acquired properties of the Defendants and their father?

(3) Is the settlement deed of the 22nd June 1913 tainted with fraud and undue influence?

(4) Are the Defendants liable to render accounts to the Plaintiff? If so, for what and up to what period?

The Subordinate Judge has held on the evidence that the deed was obtained from the Plaintiff under circumstances which did not make it binding upon her, a *parda-nashin* lady, and that in fact she was not

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aware of the contents of the document which she believed was a deed for five years, similar to the deed which had been previously executed by her father. The Subordinate Judge has also found that the properties in suit were joint properties of the two sons of Kedar Nath Mookerjee or were accretions thereto made by the use of the joint family funds. The Subordinate Judge has further held that the Defendants were bound to render accounts of the cloth and grocery shops which belonged to the family, such accounts to be rendered from the date of death of their father till the dates when the shops were closed. In this view, the Subordinate Judge has decreed the suit and directed the appointment of a Commissioner to make the partition and to take the accounts. On the present appeal, this decree has been assailed by the Defendants on the grounds, that the deed was fairly taken from the Plaintiff and was binding upon her, that the deed could not be set aside after the lapse of the period of limitation prescribed for the institution of a suit for that purpose, that the effect of the deeds of the 1st May 1906 and 22nd June 1913, was to cause a disruption of the joint family, so that the properties acquired after the date of the first deed could not be deemed to possess the character of joint family properties, and, finally, that the Defendants were not liable to render accounts.

The substantial point in controversy is, whether the deed of the 22nd June 1913 is a fair transaction which binds the Plaintiff as a *pardanashin* lady. Before we investigate the attendant circumstances, we may conveniently recall the cardinal tests which must be applied to determine the operative character of deeds taken from *pardanashin* ladies who are unable to protect themselves. It is well settled that the Court, when called upon

to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly, that she had independent and disinterested advice in the matter. The leading judicial decisions which recognise these principles are collected in the judgments of this Court in *Mariam Bibi v. Ibrahim* (1), *Krishna Kishore De v. Nagendra Bala Chaudhurani* (2) and *Satish Chandra Ghose v. Kalidasi Dasi* (3). On examination, these decisions will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. This is a fundamental distinction which does not appear to have been always kept in view, with the result that observations made in the one class of cases have been applied without scrutiny to the other class of cases. Illustrations of the confusion, which has resulted from this failure to discriminate between the two classes of cases, are furnished by the decisions

(1) 28 C. L. J. 306, 367 (1916).

(2) 25 C. W. N. 942 (1921).

(3) 26 C. W. N. 177 (1921).

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in *Rani Usmat Koowar v. Tayler* (4), *Soondur Kumari v. Kishori Lal* (5), *Ram Prosad v. Rance Phulpatee* (6), *Kanai Lal v. Kamini* (7), *Monohar v. Bhagabati* (8), *Asmatunnessa v. Alla Hafiz* (9), *Rup Narain v. Gangadhar* (10), *Pannatal v. Bama Sundari* (11), *Dooleechand v. Oomda Khanun* (12), *Bibi Rukhun v. Sheikh Ahmed* (13), *Khas Mehal v. Administrator-General* (14), *Nistarini v. Nandalal* (15), *Keshab Lall v. Radha Raman* (16), *Kamini v. Krishna Chandra* (17), *Badiatunnessa v. Ambika Charan* (18), *Bhuban Mohini v. Gajalakshmi* (19), *Behari Lal v. Habiba Bibi* (20), *Achhan Kuar v. Thakurdas* (21), *Hakim Md. Ikramuddin v. Najiban* (22), *Shamsuddin v. Abdul* (23), *Tamarasheri v. Maranat* (24), *Mahadeci v. Neelamani* (25), *Lalomy Umma v. Lewcock* (26), *Chillumul v. Garrow* (27), and *Narsammal v. Lutchmana* (28). Reference may also be made in this con-

nection to the two decisions of the Judicial Committee in *Bazlur Rahim v. Shamsunnessa* (29) and *Girish v. Bhuggobutty* (30). In the former case, where the transaction was between a husband and a wife, their Lordships observed that the burden of proving the reality and bona fides of the purchases pleaded by her husband was properly thrown on him. In the latter case, which was one of a death-bed gift in favour of the donor's brothers in their wives' names to the exclusion of her husband's adopted son, their Lordships pointed out that the Judicial Committee and the Courts in India had always been careful to see that deeds taken from *purda* women had been fairly taken and that the party executing them had been a free agent and duly informed of what she was about. The substance of the matter then is that the fairness of the bargain is the crucial test. This principle runs through the later decisions of the Judicial Committee, though the rule is more specially enforced in cases where a fiduciary relation involving trust and confidence is shown to exist. *Fazzul Hossain v. Amjud Ali* (31), *Ashgur v. Delroos* (32), *Azeemunnessa v. Baur Khan* (33), *Taccordin v. Syed Ali* (34), *Sudhistlal v. Sheorurat* (35), *Mahomed Gulsh Khan v. Hosseini Bibi* (36), *Lala Amarnath v. Achan Kuar* (37), *Deo Kuar v. Man Kuar* (29), 11 M. L. A. 551, 585; 8 W. R. P. C. 3 (1867). (30) 13 M. L. A. 419, 431; 14 W. R. P. C. 7 (1870). (31) 17 W. R. 523 (1872). (32) 15 B. L. R. 167; on P. C.: I. L. R. 3 Cal. 324 (1877). (33) 10 B. L. R. 205; 17 W. R. 393 (1872). (34) L. R. 1 I. A. 192; 13 B. L. R. 427 (1874). (35) L. R. 8 I. A. 39; s. c. I. L. R. 7 Cal. 245 (1881). (36) L. R. 15 I. A. 81; s. c. I. L. R. 15 Cal. 684 (1888). (37) L. R. 10 I. A. 196; s. c. I. L. R. 14 All. 420 (1892).

- (4) 2 W. R. 4 W. R. 80 (1865).
- (5) W. R. 1866.
- (6) W. R. 95 (1867).
- (7) 1 B. L. R. (O. C. J.) 31 (1867).
- (8) 1 B. L. R. (O. C. J.) 28 (1867).
- (9) 8 W. R. 468 (1867).
- (10) 9 W. R. 297 (1868).
- (11) 6 B. L. R. 722, 741 (1871).
- (12) 18 W. R. 238 (1872).
- (13) 22 W. R. 443 (1874).
- (14) 5 C. W. N. 505 (1901).
- (15) I. L. R. 26 Cal. 891, 918 (1899).
- (16) 17 C. W. N. 991 (1912).
- (17) I. L. R. 39 Cal. 933; s. c. 16 C. W. N. 649 (1912).
- (18) 18 C. W. N. 1133 (1914).
- (19) 19 C. W. N. 1230 (1915).
- (20) I. L. R. 8 All. 267 (1886).
- (21) I. L. R. 17 All. 125 (1895).
- (22) L. R. 25 I. A. 137; s. c. I. L. R. 20 All. 447; 2 C. W. N. 545 (1899).
- (23) I. L. R. 31 Bom. 165 (1906).
- (24) I. L. R. 3 Mad. 215 (1881).
- (25) I. L. R. 20 Mad. 269, 273 (1896).
- (26) 1 Strange N. C. 26, 30 (1800).
- (27) 2 Strange N. O. 1 (1812).
- (28) 1 Strange N. C. 312 (1809).

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(38), *Hakim Md. Ikramuddin v. Najiban* (39), *Annoda v. Bhuban* (40), *Shambati v. Jago* (41), *Ismail v. Hafiz* (42), *Kishori Lal v. Chuni Lal* (43), *Muhammud Kamil v. Imtaiz Fatima* (44), *Sajjad Husan v. Wazir Ali* (45), *Kali Baksh v. Ramgopal* (46), *Mahabir Prasad v. Taj Begum* (47), *Azima Bibi v. Shamalanand* (48), *Mahomed Ali v. Ramzan Ali* (49), *Sunitibala v. Dhara Sundari* (50) and *Matilal Das v. Eastern Mortgage & Agency Co.* (51). The essence of the matter was tersely put by Lord Buckmaster in *Sunitibala v. Dhara Sundari* (50), when he stated that the circumstances under which a *parda-nashin* woman agrees to transfer property in which she is interested, must be carefully examined, in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue in-

fluence or misrepresentation. The principle thus enunciated was adopted as the basis of the judgment pronounced by Sir John Edge in *Matilal Das v. Eastern mortgage and Agency Co.* (51). It will be observed that the Court must thus have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself. *Sunitibala v. Dhara Sundari* (50), *Matilal Das v. Eastern Mortgage and Agency Co.* (51), *Mahomed Ali v. Ramzan Ali* (49), *Kali Baksh v. Ramgopal* (46), *Sajjad Husan v. Wazir Ali* (45), *Mahomed Buksh v. Hossaini Bibi* (36), *Mahabir Prasad v. Taj Begum* (47), *Azima Bibi v. Shamalanand* (48), *Ismail v. Hafiz* (42), *Hodges v. Delhi and London Bank* (52), *Bindubashini v. Girdhari* (53), *Alikjan v. Rambaran* (54) and *Bhuban Mohini v. Gajalakshmi* (19). These, however, are only general principles, and it cannot be too strongly emphasised that there is a grave risk of failure of justice, if they are moulded into inelastic formulas or

(38) L. R. 21 I. A. 148; s. c. I. L. R. 17 All. 1 (1894).

(39) L. R. 25 I. A. 137; s. c. I. L. R. 20 All. 447; 2 C. W. N. 545 (1898).

(40) L. R. 28 I. A. 71; s. c. I. L. R. 28 Cal. 546; 5 C. W. N. 489 (1901).

(41) L. R. 29 I. A. 127; s. c. I. L. R. 29 Cal. 749; 6 C. W. N. 682 (1902).

(42) L. R. 33 I. A. 86; s. c. I. L. R. 33 Cal. 773; 10 C. W. N. 570 (1906).

(43) L. R. 36 I. A. 9; s. c. I. L. R. 31 All. 118; 18 C. W. N. 370 (1908).

(44) L. R. 36 I. A. 210; s. c. I. L. R. 31 All. 557; 14 C. W. N. 59 (1909).

(45) L. R. 39 I. A. 156; s. c. I. L. R. 34 All. 455; 16 C. W. N. 889 (1912).

(46) L. R. 41 I. A. 23; s. c. I. L. R. 36 All. 81; 18 C. W. N. 282 (1913).

(47) 19 C. W. N. 162 (P. C.) (1914).

(48) I. L. R. 40 Cal. 378; s. c. 17 C. W. N. 121 (P. C.) (1912).

(49) 24 C. W. N. 977 (P. C.) (1920).

(50) L. R. 46 I. A. 272; s. c. I. L. R. 47 Cal. 175; 24 C. W. N. 297 (1919).

(51) L. R. 47 I. A. 265; s. c. 25 C. W. N. 265 (1920).

(19) 19 C. W. N. 1330 (1915).

(36) L. R. 15 I. A. 81; s. c. I. L. R. 15 Cal. 644 (1888).

(42) L. R. 33 I. A. 86; s. c. I. L. R. 33 Cal. 773; 10 C. W. N. 570 (1906).

(45) L. R. 39 I. A. 156; s. c. I. L. R. 34 All. 455; 16 C. W. N. 889 (1912).

(46) L. R. 41 I. A. 23; s. c. I. L. R. 36 All. 81; 18 C. W. N. 282 (1913).

(47) 19 C. W. N. 162 (P. C.) (1914).

(48) I. L. R. 40 Cal. 378; s. c. 17 C. W. N. 121 (P. C.) (1912).

(49) 24 C. W. N. 977 (P. C.) (1920).

(50) L. R. 46 I. A. 272; s. c. I. L. R. 47 Cal. 175; 24 C. W. N. 297 (1919).

(51) L. R. 47 I. A. 265; s. c. 25 C. W. N. 265 (1920).

(52) L. R. 27 I. A. 168; s. c. I. L. R. 28 All. 137; 5 C. W. N. 1 (1900).

(53) 12 C. L. J. 116 (1909).

(54) 12 C. L. J. 357 (1910).

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crystallised into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

The case before us belongs to the first class mentioned above, where the persons who seek to hold the lady to the terms of her deed stand towards her in a relation of personal confidence. Santosh Lal Mookerjee, who had taken the first deed from her father, was the elder brother of her husband and the head of the joint family at the time. Nibaran Chandra Mookerjee and Dhrubapada Mookerjee, who took the second deed from her, were the sons of the step-brother of her husband, and the management of the family estate would devolve on them after the death of her brother-in-law. She was on the best of terms with them, and would, according to the normal structure of a joint Hindu family, look upon them as her natural protectors in whom she might repose confidence properly to safeguard her rights. In such circumstances, the elementary principle formulated in sec. 111 of the Indian Evidence Act would become applicable, namely, that where there is a question as to the good faith of a transaction between parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. Whenever a person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, over-reaching, undue influence, or unconscionable advantages. In the case before us, there is the significant fact that

the executant of the deed was a lady of weak intellect, the daughter of an insane mother, and at the time of the transaction was an illiterate girl-widow who had just come of age. In such circumstances, it would be the imperative duty of those who took the deed from her to keep her at arm's length and to take every possible precaution to make sure that she received independent advice, understood the relevant and important matters, and appreciated the true effect of the deed or her rights, and further that nothing was concealed from her, nothing was misrepresented to her, no undue influence was exerted on her. The Defendants asserted that these conditions were substantially fulfilled, because the lady herself offered to execute a deed of settlement for life and acted under the advice and guidance of her father. The lady, on the other hand, maintained that she understood that the deed was to be operative for five years only, like the deed previously executed by her father. The Subordinate Judge has accepted her version, and we see no reason to differ from his view on this point. The testimony of Jatinranath Banerjee, Nirmal Chandra Banerjee and Nibaran Chandra Mookerjee makes it abundantly clear that Tripura Charan Chatterjee, the father of the lady, obtained the signature of her daughter to the deed, but the document was not explained to her nor was she advised as to the effect of the disposition on her interest. The father was plainly not in a position to give independent advice to his daughter. He held an appointment at Krishnagar; his widowed daughter resided in the interior of the District of Hugli; thus his own vocations made it impossible for him to look after the estate of his daughter. He had, besides, through the good offices of Santosh Lal Mookerjee, acquired some properties at Howrah, the ancestral place of residence

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of the family of his deceased son-in-law. For the management of these properties, he had to rely in a large measure upon Santosh Lal Mookerjee and his sons, the present Defendants. He was thus under considerable obligation to them and could not afford, in his own interest, to lose their co-operation, much less to incur their displeasure. That he was in a situation of embarrassment is plainly indicated by the correspondence which passed between himself and the Defendants, who were by no means punctual in the discharge of their pecuniary obligations and preferred to retain in their hands, as long as they could, notwithstanding the insistent demands of Tripura Charan Chatterjee, money payable to him or to his daughter. We are of opinion that the surrounding circumstances unmistakably point to the conclusion that Tripura Charan Chatterjee was by no means free to act solely in the interest of his daughter, and the fact cannot be ignored that even after disputes had arisen and this litigation had commenced, he and his son have been on friendly terms with the Defendants. We cannot further overlook that, shortly after the death of his son-in-law, he had applied to be appointed guardian of the person and property of his daughter, not so much for her benefit as for the advantage of Santosh Lal Mookerjee who was anxious to have control over the share of his step-brother in the family estate. There is no room for doubt that the proceedings in Court on that occasion were engineered by Santosh Lal Mookerjee. If then we consider the conduct of Tripura Charan Chatterjee in connection with the guardianship proceedings, and the execution of the two deeds of settlement, there can be little doubt that his acts have not been guided solely by an anxious desire to protect the interest of his widowed daughter. In our opinion, the Subordinate Judge has

correctly held that the lady had not independent advice, as the interest of her father was bound up with that of the Defendants.

There is no room for controversy that this absence of independent advice has been detrimental to the interests of the Plaintiff. When the second deed of settlement was executed, its provisions and their true effect were not explained to her. What is of equal importance is that she was not apprised of the extent, value, and income of all the joint properties.

Neither the deed of the 1st May 1906 nor the deed of the 22nd June 1913 correctly enumerated and valued all the joint properties, moveable and immovable. This, indeed, is not a matter for surprise, because the Defendants have strenuously maintained that, if not all the properties acquired after the death of their uncle, at least those acquired after the execution of the first deed, did not form part of the joint estate. We hold accordingly that the disputed deed of settlement was understood by the lady to be a deed for five years whereas in reality it was a deed operative for her life, that she had no independent advice, that the extent, income and value of all the joint properties, moveable and immovable, were not disclosed to her, and that the effect of the deed on her rights was never brought home to her. It is consequently impossible to say that she had independent and competent advice, which, as observed by Fletcher Moulton, L. J., in *In re Coomber* (55) no doubt does not mean independent and competent approval, but signifies, at any rate, advice removed entirely from the suspected atmosphere and conveyed in the clear language of an independent mind, free from taint of interests, to the party acting, regarding the precise nature and consequence of the transaction. In cases

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of this class, there need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of material fact, any failure to disclose material information or any just suspicion of artifice, the Court will interpose and pronounce the transaction void, and will, as far as possible, restore the parties to their original rights, because equity demands in such circumstances the most abundant good faith in the transaction between the parties. We affirm without hesitation the conclusion of the Subordinate Judge that the disputed deed of settlement does not bind the Plaintiff. Clearly no question of estoppel, acquiescence and waiver arises. The Plaintiff no doubt received from time to time maintenance allowance from the Defendants. Such allowance, however, would be payable whether the deed was for five years as the Plaintiff supposed it to be, or for life as in fact it was. There is no indication that the Plaintiff ever accepted these sums with knowledge that the terms of the deed were in reality different from what she understood them to be.

We have next to consider whether all the properties in suit are joint properties. The Subordinate Judge has answered this question in favour of the Plaintiff. The properties which were inherited by Santosh Lal Mookerjee and Haridas Mookerjee, the two sons of Kedarnath Mookerjee, were indisputably joint. There is also no doubt that the two brothers lived as members of a joint Hindu family; the elder was manager of the zemindars at Bhastara and Naib of the Srimanis at Mandalghat; the younger lived at home, worked as *gomasta* in a neighbouring village and looked after the joint family business in grocery, cloth, iron, ploughs, spades, oilcake, money-lending and sale of stamps. The properties acquired during this time were *prima facie* joint properties of the

two brothers. The burden in such circumstances lies on the party setting up a case of separate estate to establish his allegation, as the family was joint and there was a nucleus of joint property. See the judgment of Lord Robertson in *Anand Rao v. Vasant Rao* (56), affirming the decision of Jenkins, C. J., in *Wasant Rao v. Anand Rao* (57). This also accords with the view indicated by Couch, C. J., in *Taruk Chandra v. Jogeshwar Chandra* (58) which was followed in *Gobind Chunder v. Doorgaprosad* (59) and *Sasimohan v. Akhil* (60), although the contrary opinion had been expressed in *Bholanath v. Ajodhya Persad* (61) and *Dinanath v. Hari Narayan* (62); see also *Bodh Singh v. Ganesh Chandra* (63), *Atar Singh v. Thakur Singh* (64) and *Ramanath v. Kusum Kamini* (65). The Defendants endeavoured to rebut this presumption by proof that some of the properties were acquired by Santosh, and others by Nibaran and Dhruba from their separate funds. Evidence was led by the Defendants to show that they and their father had separate debtors and that the properties were purchased in satisfaction of the debts due from such debtors as also from the sale proceeds of the paddy realised from them. This theory of separate debtors and separate accounts, however, completely broke down, when it transpired that the accounts of the money-lending business were mixed up with the accounts of the undoubtedly

(56) 11 C. W. N. 478; s. c. 5 C. L. J. 338; 9 Bom. L. R. 595 (P. C.) (1907).

(57) 6 Bom. L. R. 925 (1904).

(58) 19 W. R. 178; 11 B. L. R. 193 (1873).

(59) 22 W. R. 248; 14 B. L. R. 337 (1874).

(60) 25 W. R. 232 (1876).

(61) 20 W. R. 65; 12 B. L. R. 336 (1873).

(62) 12 B. L. R. 349 (1873).

(63) 19 W. R. 356; 12 B. L. R. 317 (P. C.) (1873).

(64) L. R. 25 I. A. 206; s. c. I. L. R. 35 Cal. 1039; 12 C. W. N. 1049 (1903).

(65) 4 C. L. J. 56 (1906).

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joint cloth and grocery shops. The Subordinate Judge has carefully scrutinised the account books, and has correctly summed up his conclusion in the finding that the story of separate money-lending business is a myth. It is, we think, fairly clear from the evidence that Santosh and Haridas had a joint money-lending business, though some of the transactions stood in the name of the former and others were in the name of the latter. After the death of Haridas the business was managed by Santosh and the present Defendants. The acquisitions made from this source were obviously impressed with the character of joint family properties. It was ingeniously argued, however, by Dr. Dwarka Nath Mitter that the first deed of settlement effected a disruption of the joint family and that whatever properties were acquired thereafter belonged to the elder branch of the family represented by Santosh Lal Mookerjee. This contention is fallacious; for the deed of settlement was in essence a deed of management and did not cause a severance of the family; the title to the half share inherited by the Plaintiff from her husband never vested in her brother-in-law. He became entitled only to hold possession for a term of five years and to apply the income in the prescribed manner. In such circumstances, the principle deducible from the decisions of the Judicial Committee in *Surajnarain v. Iqbul* (66), *Girija Bai v. Sadashiv Dhundiraj* (67) and *Kawal Nain v. Budh Singh* (68) can be of no assistance to the Defendants. We need not now examine whether the act of the guardian was really beneficial to his ward

or whether it was so detrimental to her interests as to amount to a fraud on her; *Hunooman Persaud v. Babooi Moonraj* (69) and *Lala Bunseedhar v. Bindesree* (70). This much is incontestable that what the grantee undertook to carry out in terms of the deed was the minimum he was under an obligation to perform as the head of the joint family, namely, to maintain the widow and to give in marriage the daughter of his deceased step-brother. The result of the transaction was to enable him to appropriate a considerable portion of the income of the joint family properties, much in excess of what would be his legitimate share on partition. It would be contrary to elementary notions of justice, equity and good conscience to hold that by an appeal to any supposed principles of Hindu jurisprudence the head of the family could, in such an event, treat the joint family as dissolved and the profits in his hands made available for his personal benefit, to be transferred "self-acquisitions." We hold accordingly that the Subordinate Judge has correctly held that all the properties in suit, whether acquired during the lifetime of the two sons of the founder or of the Defendants, are joint family properties and are liable to be partitioned as such.

On the facts found, no question of limitation obviously arises. If we adopt the view that the deed actually executed by the lady was so fundamentally different from the deed she intended to execute and thought she executed, it is void and inoperative. Art. 91 of the Schedule to the Indian Limitation Act has no application to a case of this description, where a suit is brought for possession and partition upon declaration that an instrument under which the Defendant claims is

(66) L. R. 40 I. A. 40; s. c. I. L. R. 36 All. 80; 17 C. W. N. 333; 17 C. L. J. 298 (1912).

(67) L. R. 43 I. A. 151; s. c. I. L. R. 43 Cal. 1031; 20 C. W. N. 1085 (1916).

(68) L. R. 44 I. A. 159; s. c. I. L. R. 39 All. 496; 21 C. W. N. 986 (1917).

(69) 6 M. I. A. 393 (1856).

(70) 10 M. I. A. 454, 471 (1866).

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void; *Baniku Behari v. Krishnā Gobinda* (71), *Sanni Bibi v. Siddik Husain* (72), *Oriental Bank Corporation v. Fleming* (73) and *Dagdu v. Bhana* (74). On the other hand, if we adopt the theory that the deed must be cancelled in a suit instituted within three years from the date when the facts entitling the Plaintiff to have the instrument cancelled became known to her, the burden lies heavily upon the Defendants, who obtained the deed by misrepresentation, to prove that the Plaintiff acquired full information of the true state of facts at a time too remote to allow her to maintain the suit; *Rahimbhoy v. Turner* (75). This they have failed to establish, and the allegation of the Plaintiff as to the date when she discovered the fraud committed upon her stands un rebutted.

Finally, objection has been taken to the direction given by the Subordinate Judge which calls upon the Defendants to render accounts of the cloth and grocery shops from the death of their father till the shops were closed in 1912 and 1913 respectively. Reliance has been placed upon the decision of the Judicial Committee in *Sookhomoy v. Monohurri* (76), where Sir Richard Couch referred to the earlier decision of the Judicial Committee in *Soorjeemoney v. Dinobundhoo* (77) and observed as follows with reference to an order for adjustment of accounts made by the Courts in India: "It is not intended that the different payments, by the mana-

ger, of moneys taken out by the members of the family, should be enquired into, but it is to ascertain what portion of the savings of the family or the accumulations which have been made, the Plaintiff would be entitled to." This is settled law, as is clear from the decisions in *Parmeshwar v. Gobind* (78), *Bhawani Prashad v. Juggerath Shaha* (79), *Haridas v. Narottam* (80) and *Balkrishna v. Muthusami* (81) and as we read the judgment of the Subordinate Judge, he did not intend to depart from such a well-recognised principle. In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the *karta* is liable for is as to the existing state of the property divisible; the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters. But the *karta* is the accountable party, and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property now consists of, not what the *karta* says it is.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs and hearing fee Rs. 300.

S. C. M.

(78) I. L. R. 43 Cal. 459 (1915).

(79) 9 C. L. J. 133 (1909).

(80) 14 Bom. L. R. 237.

(81) I. L. R. 32 Mad. 271 (1908).

(71) I. L. R. 30 Cal. 433 (1902).

(72) 23 C. W. N. 93: s. c. 29 C. L. J. 55 (1918).

(73) I. L. R. 3 Bom. 242 (1879).

(74) I. L. R. 28 Bom. 420 (1904).

(75) L. R. 20 I. A. 1: s. c. I. L. R. 17 Bom. 341 (1892).

(76) L. R. 12 I. A. 103: s. c. I. L. R. 11 Cal. 684 (1885).

(77) 9 M. I. A. 133 (1862).

[CIVIL APPELLATE JURISDICTION.]**APPEAL FROM APPELLATE DECREE**

No. 21 of 92.

MOOKERJEE, J.
PANTON, J.
 1921,
 17, August.

RAJ MO. SARA and
ors., Decree-holders,
Appellants,
v.
AJANMAI and ors.,
Judgment-debtors,
Respondents.

Civil Procedure Code (Act V of 1908), Or. 21, r. 2—Certification of payment out of Court to decree-holder—Limitation Act (IX of 1908), sec. 20 and Arts. 174 and 181—Period of limitation for certifying payment of money payable under a decree—Such certification if can be made in the application for execution.

In a mortgage suit the preliminary decree was made in May 1912, and the final decree in January 1916. In August 1919, the decree-holder applied for execution and sought to escape from the bar of limitation by reference to a payment alleged to have been made by the judgment-debtor in October 1917. The lower Courts dismissed the application for execution as the alleged payment had not been certified or recorded under Or. 21, r. 2 of the C. P. Code:

Held—That Art. 174 of the Limitation Act is applicable only to a case under sub-r. (2) of r. 2 of Or. 21, i.e., where the judgment-debtor moves the Court for recording a payment as certified. The only article applicable in the case of a decree-holder certifying a payment to Court is Art. 181. The Code does not prescribe that such application must be distinct from an application for execution of the decree and there is obviously no objection to a combined application embodying a two-fold prayer, namely, first that the alleged payment be recorded, and secondly, that the decree be executed for the balance of the judgment-debt. Therefore if the application for execution is made within three years from date of the said payment, it is not barred by limitation.

LAKHI NARAYN v. PHLAMONI (1), and KHATIBANNESSA BIBI v. SANTHIALAL NAHOTU (2) and other cases referred to and followed.

The decree-holder is not bound by the rule of limitation applicable to the judgment-debtor.

SHAIKH ELAHI BUKHSH v. NAWAB ALI (5) and MASILAMANI MUDALIAR v. SETHU SWAMI AYYAR (6) and other cases referred to.

BIRESWAR MOOKERJEE v. AMBICA CHARAN BHATTACHARJEE (8) and BAHU-BALLABH ROY v. JOGESH CHANDRA BANERJEE (9) discussed and distinguished.

This was an appeal preferred on the 17th January 1921 from a decision of G. Mumford, Esq., District Judge, Dinajpur, dated the 6th October 1920, affirming that of Babu Jagadish Chandra Sen, Munsif, Dinajpur, dated the 18th December 1919.

The facts of the case are briefly as follows:—In a certain mortgage suit the preliminary decree was made on 8th May 1912. This was followed by the final decree on the 15th January 1916. On the 11th August, i.e., more than three years after the date of the final decree the decree-holders applied for execution, and to escape the bar of limitation referred to a payment alleged to have been made by the judgment-debtor on the 25th October 1917. The Court of first instance held that the alleged payment which had not been certified or recorded under Or. 21, r. 2 of the Civil Procedure Code, could not be recognized and dismissed the application as barred by limitation. This decision was affirmed on appeal by the Dis-

(1) 20 C. L. J. 131 (1914)

(2) I. L. R. 43 Cal. 267; a. c. 20 C. W. N. 272 (1915).

(5) [1919] Pat. 280; 4 P. L. J. 159 (1919).

(6) I. L. R. 41 Mad. 251 (1918).

(8) I. L. R. 45 Cal. 630 (1917).

(9) 23 C. W. N. 320 (1918).

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strict Judge. Hence the present appeal to the High Court.

Babu Girijya Prosanna Sanyal for the Appellants.

Babu Jotindra Mohan Chaudhury (for *Babu Phanindra Lal Moitra*) for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the decree-holders from an order of dismissal made on application for execution of a mortgage-decree. The preliminary decree in the mortgage suit was made on the 8th May 1912. This was followed by the final decree on the 15th January 1916. On the 11th August 1919, the decree-holders applied for execution. This application was *prima facie* barred by limitation under Art. 182 of the schedule to the Indian Limitation Act. Consequently, the decree-holders sought to escape from the bar of limitation by reference to a payment alleged to have been made by the judgment-debtors on the 25th October 1917. The Court of first instance held that the alleged payment which had not been certified or recorded under Or. 21, r. 2 of the Code of Civil Procedure, could not be recognised and dismissed the application as barred by limitation. This decision of the primary Court has been affirmed by the District Judge. We are of opinion that the view taken by the Courts below cannot be supported.

Or. 21, r. 2 consists of three sub-rules. Sub-r. (1) deals with the case where the decree-holder seeks to certify a payment made to him out of Court by the judgment-debtor. The sub-rule provides that where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such

payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly. Sub-r. (2) deals with the case where the judgment-debtor seeks to inform the Court of a payment alleged to have been made by him out of Court to the decree-holder. In this event, the judgment-debtor may inform the Court of such payment and apply to the Court to issue a notice to the decree-holder to show cause on a day to be fixed by the Court why such payment or adjustment should not be recorded as certified, and if after service of such notice the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly. Sub-r. (3) finally provides that a payment or adjustment, which has not been certified or recorded as aforesaid, that is, at the instance of either the decree-holder or the judgment-debtor, shall not be recognised by any Court executing the decree. Let it be conceded that sub-r. (3) is expressed in wider terms than the corresponding provision of the Code of 1882, which laid down that a payment or adjustment not certified should not be recognised as payment or adjustment of the decree. But this does not solve the problem raised before us. The question is, whether the decree-holder can certify the alleged payment in the manner attempted in his application for execution. In this connection it is important to observe that Art. 174 of the Limitation Act is applicable only to a case under sub-r. (2) of r. 2. That article provides that an application for the issue of notice under the Civil Procedure Code to show cause why any payment made out of Court or any money payable under a decree or order should not be recorded as certified shall be made within 90 days from the date when the payment or adjustment

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made. This is clearly not applicable to a case under sub-r. (1). We must consequently consider whether there is a period of limitation for an application by a decree-holder, who has received payment from the judgment-debtor out of Court, to record the payment. Plainly, the only article applicable is Art. 181 which provides that an application for which no period of limitation is provided elsewhere in this schedule shall be made within three years from the time when the right to apply accrues. The right of the decree-holder to apply accrues as soon as he receives payment, because from that moment he is under an obligation to certify the payment to the Court whose duty it is to execute the decree. In the case before us, the alleged payment was made on the 25th October 1917. Consequently it was open to the decree-holder to apply to the execution Court within three years from that date to record the payment. The Code does not prescribe that such application must be distinct from an application for execution of the decree and there is obviously no objection to a combined application embodying a two-fold prayer, namely, first that the alleged payment be recorded, and secondly, that the decree be executed for the balance of the judgment-debt. This view has been adopted by this Court in the cases of *Lakhi Narain v. Felamoni* (1), *Khatibannessa Bibi v. Santhialal Nahotu* (2) and *Harendra Chandra Bhattacharjee v. Gagan Chandra Das* (3). That the decree-holder is not bound by the rule of limitation applicable to the judgment-debtor, has also been recognised in a series of decisions of this Court, namely, *Lakhi Narain v. Felamoni Dassi* (1), *Khaliban-*

nessa Bibi v. Santhialal Nahotu (2), *Harendra Chandra Bhattacharjee v. Gagan Chandra Das* (3) and *Jotindra Kumar Das v. Gagan Chandra Pal* (4). A similar view has been adopted by the Patna High Court in *Shaikh Elahi Bukhsh v. Nawab Lal* (5), by the Madras High Court in *Masilamani Mudaliar v. Sethu Swami Ayyar* (6), and by the Bombay High Court in *Pandurang v. Jagga* (7). Our attention has, however, been drawn to two decisions of this Court where an apparently different conclusion was reached. The first of these cases, *Bireswar Mookerjee v. Ambica Charan Bhattacharjee* (8) need not detain us, because the *ex parte* judgment in that case was recalled on an application for a re-hearing by the Opposite Party in the rule upon whom no notice had been served, and the case was subsequently decided on another ground. But we may point out that the facts of that case were of a very special character and even on the view which we take the result would not have been different. In that case, the decree was made on the 24th November 1909. The application for execution was presented on the 7th June 1916 and was *prima facie* barred by limitation. To escape from the bar of limitation, the decree-holder relied upon two payments alleged to have been made by the judgment-debtor on the 8th October 1912 and 9th June 1913. In respect of the first payment, dated the 8th October 1912, the prayer to have it recorded (as contained in the application, dated the 7th June 1916 for execution) was barred by limitation under Art. 181. In respect of the second

(2) I. L. R. 43 Cal. 207 : a. c. 20 C. W. N. 272 (1915).

(3) 22 C. W. N. 325 (1916).

(4) I. L. R. 46 Cal. 22 (1918).

(5) [1919] Pat. 260; 4 P. L. J. 159 (1919).

(6) I. L. R. 41 Mad. 251 (1917).

(7) I. L. R. 45 Bom. 91 (1920).

(8) I. L. R. 45 Cal. 630 (1917).

(1) 20 C. L. J. 131 (1914).

(2) I. L. R. 43 Cal. 207 : s. c. 20 C. W. N. 272 (1915).

(3) 22 C. W. N. 325 (1916).

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payment, dated 9th June 1913, the application was not so barred, but that payment, even if recorded, would clearly be of no avail by itself to save from the bar of limitation a decree, dated 24th November 1909. The second case brought to our notice is *Bahuballabh Roy v Jogish Chandra Banerjee* (9), where it was ruled that the decree holder can certify payment made at any time, subject to the ordinary rule of limitation that the certification must take place within such time as is required to save the application from being barred by limitation. It may be doubtful whether the application mentioned is the application for execution, or the application to have the payment recorded; the latter interpretation would be in harmony with the provision in Art 181 which prescribes the only restriction upon the right of the decree-holder to bring the payment to the notice of the Court. In these circumstances we must hold that the balance of judicial opinion is in favour of the view that the present application for execution is not barred by limitation.

The result is that this appeal is allowed, the order of the Court below set aside and the case remanded to the Court of first instance in order that the Court may investigate whether the alleged payment was in fact made and whether the requirements of sec 20 of the Indian Limitation Act have been fulfilled. The Appellants are entitled to their costs both here and before the District Judge. The costs of the Court of first instance will abide the result. We assess the hearing fee in this Court at one gold mohur.

Appeal allowed,

J. N. R.

Case remanded

(A. J. C. W. N. 320 (1918))

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM APPELLATE DECREE**

No. 2201 of 1919.

(HATTERJEA, J.

PANTON, J.

1921,

17, November

YSAF ALI, Defendant,
Appellant,

v.

KASIM ALI, Plaintiff,
Respondent.

Civil Procedure Code (Act I of 1908), Or. 34, r 3—Mortgagor's right to redeem by offering payment after the date fixed for the same, but before the final decree for foreclosure is passed.

A preliminary decree for foreclosure was passed on 5th October 1917, and six months' time was allowed i.e., up to 5th April 1918. On the 9th April 1918 the decree-holder applied to make the decree in the foreclosure suit final and notices were issued on the mortgagors fixing the 1st May 1918 as the date for passing the final decree. Before the final decree was passed, the mortgagors, on the 15th April made an application to the Court to pay off the decretal amount. On the 1st May 1918, the Court rejected this application and passed the final decree.

Held—That the mortgagors were entitled to redeem at any time before the final decree was passed. The right of the mortgagors to redeem was not extinguished until the final decree was passed.

PARLSE NATH MAJUMDAR & RAMJADU MAJUMDAR (1) and ALIMA CHOWDHURY v. ROSHUN ALI MAIBAR (2) followed.

This was an appeal preferred on the 10th November 1919 against a decree of the Additional District Judge of Zillah Chittagong (C. Cells. Esq.) dated the 28th June 1911, affirming a decree of the Munsif of Hathazari (Babu Gopal Das Ghosh) dated the 1st May 1918.

The facts will fully appear from the judgment.

(1) T. L. B. 16 Cal. 246 (1889)

(2) A. C. J. 533 (1905)

YASAR ALI v. KASIM ALI.

Babus Jogesh Ch. Ray and Chandra S. Sen for the Appellant.

Babu Narendra K. Dass for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for foreclosure of a mortgage by conditional sale. A preliminary decree for foreclosure was passed on the 5th October 1917 and six months' time was allowed, i.e., up to the 5th April 1918. Before the date fixed for payment, the mortgagor sold the property to one Lakhi Charan Shaha on the 19th March 1918. It is said that this Lakhi Charan attempted to deposit the decretal amount but that it was refused. On the 9th April 1918, the decree-holder applied to make the decree in the foreclosure suit final and notices were ordered to be issued on that day on the Defendants fixing the 1st May 1918 as the date for passing the final decree. Before the final decree was passed, the Defendants, mortgagors on the 15th April made an application to the Court to pay off the decretal amount and also asked for an extension of time for the money to be paid. On the 1st May 1918, the Court held that the Defendants could not get permission to deposit and that the time for payment could not be enlarged unless the Defendants proved their allegations in the petition and accordingly passed the final decree in the suit. That decree was affirmed on appeal by the learned District Judge, and the Defendants have appealed to this Court.

We think that the Defendants were entitled to redeem at any time before the final decree was passed. As stated above, although 5th April 1918 was fixed for payment under the preliminary decree, the right of mortgagors to redeem was not extinguished until the final decree was

passed. No doubt, if the mortgagors wanted an extension of time fixed for payment, it would have been necessary for them to show good cause for such extension. Where, as in the present case, notwithstanding the expiry of the time allowed by the preliminary decree for payment, the final decree had not been passed, we think that the mortgagors had a right to redeem before the passing of the final decree. [See *Parash Nath Majumdar v. Ramjadu Majumdar* (1) and *Alimea Chowdhury v. Roshun Ali Matbar* (2)]. The order under Or. 31, r. 3, cl. 2 was not made until the 1st May and the Defendants wanted to deposit the decretal amount on the 15th April. The final decree was not drawn up and signed till the 8th May 1918.

In these circumstances, we direct that the case be sent back to the Court of first instance in order that the Defendants may deposit the amount due under the decree, including all the costs incurred by the Plaintiffs in the Court of first instance, within one month of the arrival of the order in that Court; and upon that being done, the final decree for foreclosure will be set aside with costs of this Court and of the lower Appellate Court.

If the money is not deposited within the time specified, this appeal will stand dismissed with costs.

J. N. R.

Appeal allowed.

(1) I. L. R. 16 Cal. 246 (1889).

(2) 3 C. L. J. 533 (1905).

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM APPELLATE ORDER
No. 291 of 1920.

MADAN MOHAN

CHATTERJEE, J.
SUNRAWARDY, J.

1921,
18, March.

[BANIKYA, Judgment-
debtor, Appellant,
v.
[HARULAL KUNDU and
anr, Decree-holders,
Respondents.

Limitation Act (IX of 1908), sec. 20—Unsettled payment of an instalment decree, if saves limitation—Civil Procedure Code (Act V of 1908), Or. 21, s. 2—Certification of payment, if can be made at any time.

After the passing of an instalment decree, some instalments were paid within three years of the date of the decree. The payments were not certified to the Court before the application for execution but were certified by a petition presented after the application for execution was made and made a part of the said application. The said application for execution was made more than three years after the date of the decree, but within three years from the dates of the said payments.

Held That the payments, which were evidenced by letter written and signed by the judgment debtor having been made within three years of the decree and within three years of the present application for execution, and they having been certified by a petition which was made a part of the application for execution, the application for execution was not barred by limitation.

LAKHI v. FELAMONT (1) KHATIBANNESSA v. SANCHIA (2) and several other cases referred to

This was an appeal preferred on the 10th of August 1920, against the order of Babu B. Mukherjee, Additional Subordinate Judge of Zillah Faridpur, dated the

8th of May 1920, affirming the order of Babu Amulya Kumar Guha, Munsif, 2nd Court at Chikandi, dated the 19th of September 1919.

The material facts will appear from the judgment.

Babu Bhagirath Ch. Das for the Appellant.

Babu Asitranjan Ghose for the Respondents.

The JUDGMENT of the COURT was as follows:—

The question involved in this appeal is whether the application for execution of an instalment decree is barred by limitation. The decree was passed on the 21st of December 1914, and provided for the payment of Rs. 800 odd in six instalments, namely, Rs. 141 odd for each instalment, from 1322 B. S., the whole amount to be due with interest in default of payment of any instalment. The application for execution of the decree was made on the 1st April 1919, that is more than 3 years after the date of the decree. But the decree-holder relies upon three payments, namely, the instalments for 1322 and 1323 in full, and Rupees 100 (only) in respect of the instalment of 1324. The Court below held that the payments were proved, and that the application for execution was not barred by limitation. The judgment-debtor has appealed to this Court and the question to be determined is whether the payments, not having been certified to the Court before the application for execution was made, the application for execution was barred by limitation.

It has been held in a number of cases that payments may be certified in the application for execution of the decree. [See *Lakhi Narayan Ganguly v. Felamont Das* (1) *Khatibannessa Bibi v. Sanchia Lal Nahata* (2) *Bahuballabh Roy v.*

(1) 20 C. L. J. 131 (1914).

(2) I. L. R. 43 Cal. 207 s. c. 20 C. W. N. 372 (1915)

(1) 20 C. L. J. 131 (1914)

(2) I. L. R. 43 Cal. 207 s. c. 20 C. W. N. 372 (1915)

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Jogesh Chandra Bannerjee (3) and *Sheikh Elahie Bux v. Nawab Lal* (4)]. The part payments and the certification must however be made before the application for execution is barred. See the cases cited above, and *Jatindra Kumar Das v. Gagan Chandra Pal* (5) and *Harendra Chandra Bhattacharjee v. Gagan Chandra Das* (6). It was pointed out in the last case that although the decree-holder may either apply to certify payment before the execution or may do so in his application for execution of the decree, the provisions of sec. 20 are in no way affected. In some of the cases cited above the payments were made by way of interest, or if there was any part payment of the principal it appeared in the handwriting of the debtor, and it was held that the application was not barred.

In *Bahuballabh Roy v. Jogesh Chandra Bannerjee* (3) the application for execution was held to be barred by limitation. It does not appear that the payments were made within three years of the date of the decree and within three years before the application for execution. The learned Judges affirmed the principle that the decree-holder can certify payments at any time, but that the certification must take place within such time as is required to save the application from being barred by limitation. Fletcher, J., who was a party to the decision was also a party to the decision in the case of *Lakhi Narayan Ganguly v. Felamoni Dasi* (1) in which it was held that a part payment before the decree is barred, saves limitation.

In the case of *Bireswar Mookerjee v. Ambika Charan Bhattacharjee* (7) the

decree was made on the 24th of November 1909 and the application for execution of the same was presented on the 7th of June 1916. Two payments were alleged to have been made in 1912 and 1913 respectively, neither of which was certified to the Court. The learned Judges held that the payments or adjustments could not be recognised by the Court executing the decree. They pointed out that Or. XXI, r. 2, cl. (3) of the Code of 1908 is different in terms from sec. 258 of the Code of 1882, which provided, that a payment which had not been certified, could not be recognised as a payment or adjustment of the decree, while the present case provided that a payment which has not been duly certified shall not be taken into account by any Court executing the decree, and that this alternation in the language justifies the inference that an uncertified payment or adjustment cannot now operate to prolong the period of limitation for an application for execution of a decree under the Limitation Act.

There is no doubt that unless the payment is certified such payment cannot be taken into account by the Court executing the decree. The question, however whether the certification can be made, not only at the time the payment is made, but subsequently, that is, at any time before the application for execution is barred was not considered in that case. Moreover, in that case the judgment-debtors were infants, and the persons who were said to have made the payments were not the lawful guardians of the minors within the meaning of sec. 21 of the Limitation Act. That being so, they were really no payments which could save limitation.

In the present case, on the other hand, the payments are evidenced by letter written and signed by the judgment-debtor himself, they were made within three years of the decree and within three years of the present application for execution,

(1) 20 C. L. J. 131 (1914).

(3) 23 C. W. N. 320 (1918).

(4) [1910] Pat. 260; 4 P. L. J. 159 (1910).

(5) 1. L. R. 45 Cal. 22 (1918).

(6) 22 C. W. N. 425 (1918).

(7) 1. L. R. 45 Cal. 620 (1917).

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and the payments were certified by a petition presented on the 26th July 1919, which was made a part of the application for execution. Having regard to the facts of the present case and the weight of authority on the point, we think the application is not barred by limitation. The appeal must accordingly be dismissed, with costs, two gold mohurs.

J. N. R. *Appeal dismissed.*

[CRIMINAL REVISIONAL JURISDICTION]

REV. NO. 30 OF 1922.

WALMSLEY, J. AMINULLA and ors.,
SUHRAWARDY, J. Petitioners,
1922, v.
27, January. THE EMPEROR,
Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 147. out of six accused persons three found to have a common object different from that set out in the charge - Legality of conviction of any of the six accused - Court's duty in cases where near relatives want to compound cases

Six accused persons were convicted under sec. 147, Indian Penal Code and sentenced to 15 days' imprisonment. In the charge the common object was stated to be to assault the complainant. During the pendency of the case the complainant wanted to compound the case but the Magistrate did not allow him to do so. In his judgment he found that three of the accused assaulted the complainant and the other three accused went to snatch away the cattle of the complainant in common object with that of the other accused persons:

Held—That there being a difference between the common object found by the Magistrate in the case of three of the accused persons, there were not five persons that shared in the common object set out in the charge, and the ingredient of an offence under sec. 147, I. P. C. was wanting. Therefore the conviction under sec. 147 against all the accused must fail.

It is a great pity, when parties, who are apparently nearly related to one another, succeed in patching up their quarrels that the Magistrate should not do what he can to restore peace and good will.

This was a Rule granted on the 10th January 1922 against the decision of L. Barrows, Esq., Additional Magistrate of Chittagong, confirming that of Mouvi Sidiqie Ahmad, Sub-Deputy Magistrate of Chittagong, dated the 4th November 1921.

The facts will appear from the judgment.

Babu Ram Dayal De for the Petitioners.

The JUDGMENT OF THE COURT was as follows:—

The Petitioners have been convicted under sec. 147 of the Indian Penal Code and sentenced to fifteen days' rigorous imprisonment each. In addition, two of them Nur Ahamed and Aminulla have been convicted under sec. 323, I. P. C., and sentenced to fifteen days' rigorous imprisonment and Faizulla under sec. 324, I. P. C. and sentenced to one month's rigorous imprisonment. The rule was issued on three grounds. The first relates to the conviction under sec. 147, I. P. C. The learned Judge (?) drew up a charge in which the common object of the unlawful assembly was stated to be to assault Akamuddin and Mukhleswar Rahaman. In his judgment he finds that three of the accused persons did assault Akamuddin and Mukhleswar. As to the other three, that is, Manirulla, Mohabbat Ali and Kasim Ali, he says: "there is no positive evidence on the record that they took any serious part in the marauding or caused injury to any person, although I am perfectly satisfied that they went with the other three accused to snatch away the cattle of the complainant."

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common object with that of the other accused persons." Clearly, there is a difference between the common object mentioned and the common object he finds in the case of these three persons. If the common object of Faizulla, Nur Ahamed and Aminulla was to beat Akamuddin, then there were not five persons that shared in the common object and the ingredient of an offence under sec. 147, I. P. C. is wanting. It is a great pity that so many Magistrates when dealing with charges under sec. 147, I. P. C. are careless in setting out the common object and in directing their attention to whether that particular common object is proved or not. On this ground, the conviction under sec. 147, I. P. C. against all the Petitioners must fail.

The learned Magistrate concedes that the additional sentences passed under secs. 323 and 321, I. P. C., on three of the Petitioners cannot stand with the sentence under sec. 147, I. P. C. With the conviction and sentence under sec. 147, I. P. C. removed, it becomes a question whether on the third ground the conviction of hurt should be allowed to stand. I find that the complainant put in a petition on the 5th of August last saying that he did not wish to go on with the case. So far as the charge against Nur Ahamed and Aminulla is concerned, he had an absolute right to compromise the case on the charge of simple hurt. In the case of Faizulla, the complainant had no such absolute right: his power to compound was subject to the Magistrate's approval. But, in this case, the learned Magistrate did not say anything about whether he approved or not. He simply says that he heard the Court Inspector. It is a great pity when parties who are apparently nearly related to one another succeed in patching up their quarrels, that the Magistrate should not do what he can to

restore peace and good will. I think the Petitioners Nur Ahamed and Aminulla should be acquitted of the charge under sec. 323, I. P. C., on the ground that the complainant did not wish to proceed any further against them, and, so far as Faizulla is concerned, taking into consideration that he has already undergone some days' rigorous imprisonment and the complainant did not wish to proceed against him either, I think in his case too the conviction and sentence under sec. 324, I. P. C. should be set aside. The result is that the rule is made absolute and the convictions and sentences passed on the Petitioners are set aside.

J. N. R. *Rule made absolute.*

[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

MR. AMEER ALI.

1921,

Heard, 18 and

21, February.

Judgment, 5, July.

SRI VIDYA VARUTHI
THIRTHA SWAMIGAL,
Appellant,

v.

BALUSAMI AYYAR and
ors., Respondents.

Indian Limitation Act (IX of 1908), Arts. 134, 144, sec. 10—Permanent lease by Mohant of Mutt without necessity—Lessee if acquires title by adverse possession after twelve years—Shebait or mutwalli, if trustee—Legal powers of Mohant and sajjadanashin—Application of rules of English law by analogy in such cases condemned.

Neither under the Hindu law nor in the Mahomedan system is any property "conveyed" to a shebait or a mutwalli, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interest regulated by custom and usage. The shebait or the mutwalli is not a "trustee" as understood in the English system though in any specific

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property is specifically entrusted to such a person for specific purposes, he might be regarded as trustee with regard to that property.

Where the head of a Mutt gave a permanent lease of property which had been granted for the general purposes of the Mutt and no necessity for the alienation was established:

Held—That Art. 134 of the Limitation Act which is controlled by sec. 10 of the Act did not apply to the case as the property in question was not properly specifically “conveyed” to the Matathipathe “in trust.” Also, that the rent reserved in the lease was not “valuable consideration” within the meaning of the article.

Held, further—That as, according to the well-settled law of India, a Mohant is incompetent to create any interest in respect of Mutt property to endure beyond his life, the possession of the lessee did not become adverse within the meaning of Art. 114 of the Limitation Act until he died, and the acceptance of rent by his successor being properly referable only to a new tenancy created by himself, which it was within his power to continue during his life, the possession of the lessees did not become adverse again until his death.

The legal position of Mohants, shebaitis, sajjadanashins and mutwallis discussed.

Ordinarily speaking, the sajjadanashin has a larger right in the surplus income than a mutwalli, for so long as he does not spend it in wicked living or in objects wholly alien to his office he, like the Mohant of a Hindu Mutt, has full power of disposition over it.

This was an appeal from a judgment and decree, dated the 19th October 1916, which substantially reversed a judgment and decree, dated the 29th October 1914, of the temporary Subordinate Judge of Ramanad.

The sole question on the present appeal was whether the Plaintiff-Respondent, Balusami Ayyar, was entitled to a declaration that he was the permanent lessee of the agricultural land in dispute. The High Court answered it in the affirmative, and the Subordinate Judge in the negative.

The material facts which gave rise to the litigation were as follows:—By a deed, dated the 17th March 1891, Sri Vidya Srinivasatheertha Swamigal, who was the head of a Mutt called Sri Vyasaraya, and, as such, the predecessor-in-title of the Appellant, granted a permanent lease of the land in dispute at a fixed rent to Venkitaraya Chariar, Plaintiff No. 2. The land was the endowed property of the deity Sri Gopalakrishnaswami worshipped in the said Mutt. The lessor put the lessee in possession of the land in terms of the grant, and received the rent as agreed.

On the 27th September 1902, the lessee sub-let the land to Venkitasami Naicker, Defendant No. 1, for 10 years commencing from the 1st of October 1902, for the aggregate rent of Rs. 1,315 paid in cash. The sub-lessee, i.e., Defendant No. 1, was then let into possession of the land which he covenanted to restore to his lessor after the expiration of the term of the lease, i.e., the 30th September 1912. The sub-lessor was to pay the annual rent reserved by the permanent lease, and the sub-lessee was to pay the municipal tax and quit rent, etc. The sub-lease was in the name of the Defendant No. 1, but it was for the benefit of Defendant No. 2 as well.

By a sale-deed, dated the 21st February 1905, the original lessee Venkitaraya Chariar (Plaintiff No. 2) and his son Venkitanarayasimha Chariar, (Plaintiff No. 3) conveyed all their right and interest in the land in dispute to Balusami

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Ayyar (Plaintiff No. 1), for the sum of Rs. 4,475. The "title deeds, viz., one perpetual lease-deed executed on 17th March 1891, by the said Vidya Srinivasatheertha Swamigal, the receipts showing the payments of the amount of lease, one counter-part lease-deed obtained on 27th September 1902, executed by the lessee Venkitasami Naicker and one agreement obtained executed by the same person on the 29th idem," were duly delivered to the vendee.

The head of the said Mutt, Sri Vidya Srinivasatheertha Swamigal, died shortly after granting the permanent lease of 1891, and was succeeded by Vidya Samudra, who held the office for over 12 years. On the death of Vidya Samudra, Defendant No. 26, Srimath Sri Vidya Ratnakara Thirtha Swamigal, became head of Mutt in 1906. The endowed properties of the Mutt were actually managed by the Government of Mysore on behalf of, and as agent of, the head of the Mutt. The Mysore Government administered the trust estate by its Muzarai Department, which received the rent of the perpetual lease from Plaintiff No. 1 up to 1910.

The Mysore Government appointed one Raghavendra Rao to look after the land in dispute, and he for the first time put forward the plea that the land in dispute being endowed property, the head of the Mutt was not competent to grant a perpetual lease thereof without legal necessity which did not exist, and that the permanent lease was not binding on Vidya Ratnakara Thirtha Swamigal, Defendant No. 26, the head of the Mutt in 1910. In other words he refused to recognise the perpetual lease of 1891 in favour of the Plaintiffs, and actually executed a lease of the land in dispute on the 28th November 1911, in favour of Defendant No. 1, Venkitasami Naicker,

and Defendant No. 2, Sankaralingam Pillai, who were as already stated the sub-lessees of the Plaintiffs. It was a lease for 17 years from the 28th November 1911, till the 28th November 1928, at the rent of Rs. 130 per year. The sub-lease which the Defendants Nos. 1 and 2 had taken from the Plaintiffs was still running on the 28th November 1911.

The Plaintiff No. 1 complained and sent a registered letter to Defendant No. 1, who in his reply of the 28th January 1912, repudiated the Plaintiff's title to the land in dispute and contended that the perpetual lease of 1891 was invalid and inoperative, and that he was not the sub-tenant of the Plaintiff's but the lessee of the head of Mutt, i.e., Defendant No. 26, under the document of the 28th November 1911. The Plaintiffs thereupon instituted the present suit on the 5th March 1913. In their plaint the Plaintiffs set forth the facts mentioned above. The real claimant was Plaintiff No. 1, who claimed the right of a permanent lessee.

The principal Defendants were Nos. 1 and 2 and No. 26, those numbered 3 to 25 are covered by Defendants Nos. 1 and 2. Defendant No. 26 was the head of the Mutt and on his death the present Appellant had been substituted in his place. It was pleaded on his behalf that the permanent lease of the endowed land was invalid and was not binding on him; that each succeeding head of the Mutt was entitled to disregard the permanent lease and to deal with the land in dispute according to law, and that the Plaintiff No. 1 was not a permanent lessee by prescription or otherwise.

Defendants Nos. 1 and 2 were the sub-lessees of the Plaintiffs under the lease, dated the 27th September 1902, for 10 years, and they are also the lessees of Defendant No. 26 under the lease, dated the 28th November 1911, for 17 years. These

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two Defendants filed separate written statements denying the claim of the Plaintiffs. Defendant No. 1 also pleaded that the permanent lease of 1891 was invalid; that Plaintiff No. 1 was not a purchaser for value, and that the Plaintiff was neither entitled to possession of the land nor to a declaration that he was a permanent lessee thereof.

The following issues were framed on the pleadings :—

“(1) Whether the permanent lease of the suit property of 1891 by Sri Vidya Theertha Swamigal in favour of the second Plaintiff is valid and binding on the 26th Defendant?

(2) Whether the first Plaintiff has acquired by adverse possession a valid title to the suit property as against the 26th Defendant?

(3) Whether the first Plaintiff's purchase is *bona fide* and supported by consideration?

(4) Whether any and which of the Defendants is estopped from questioning the Plaintiffs' title?

(5) Whether the lease for 17 years of Defendant Nos. 1 and 2 from the 26th Defendant, is legal and valid and binding on the first Plaintiff?

(6) Whether the second Defendant had a joint interest with the first Defendant in the lease, dated the 27th September 1902?

(6A) Whether the Plaintiffs Nos. 2 and 3 are necessary parties, and the suit is not bad for mis-joinder of parties and causes of action?

(6B) Whether the first Plaintiff is entitled to the benefit of the agreement, dated 29th September 1902 between the second Plaintiff and the first Defendant and whether the agreement is enforceable in law?

(7) Whether the first Plaintiff is entitled to any and what damages claimed in

the plaint and from which of the Defendants?”

After recording and examining evidence, oral and documentary, the temporary Subordinate Judge of Ramnad delivered judgment on the 29th October 1914. He found the first, second, fourth, sixth and seventh (B) issues in the negative, and the third, fifth, and a part of the seventh issues in the affirmative. He held that the said permanent lease was invalid and not binding on the head of the Mutt, and that although Plaintiff No. 1 was a purchaser for value, he did not possess the right of a permanent lessee in the land by prescription or estoppel or in any other way. He concluded his finding thus :—

“Thus it is clear that while the head of the Mutt has absolute control over the income of the Mutt properties, he has no right to alienate any property of the Mutt so as to bind his successor. Then the permanent lease granted by Srinivasa Theertha under Ex. A to second Plaintiff could not be held to be binding on his successors. The 26th Defendant became head of the Mutt only in 1906 as admitted by Plaintiffs' witnesses. The so-called adverse possession by first Plaintiff must commence only from 1906 as against the present head. Admittedly, the first Plaintiff has had no possession at all, ever since he took Ex. E from second Plaintiff as first Defendant has been enjoying the plaint property under a lease from the second Defendant since date of Ex. D and D1. It is also clear from the evidence of the second Plaintiff as the Plaintiffs' first witness. It is thus clear that first Plaintiff has not perfected his title by adverse possession for over 12 years as against the present head of the Mutt, the 26th Defendant.”

The learned Subordinate Judge nevertheless held that Plaintiff No. 1 was entitled to recover the municipal tax and

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quit rent which he had paid on behalf of Defendant No. 1, as well as damages from Defendant No. 1 for not delivering cocoanut *keethu*, etc., in accordance with the terms of the sub-lease for six years from 1907 to 1912.

The result was that he made a decree "that the first Plaintiff do recover from the first Defendant Rs. 116-6-6 in respect of quit-rent, etc., and cocoanuts, etc., claimed in the plaint, and that the Plaintiffs' suit in all other respects be, and the same hereby is dismissed, and this Court doth further order and decree that the Plaintiffs do bear their costs and that the first Plaintiff do pay the Defendants' costs."

From the said decree the Plaintiffs appealed to the High Court of Judicature at Madras, and Defendant No. 1 filed cross-objections which were not pressed at the hearing of the appeal. The High Court delivered judgment on the 16th October 1916. It recorded that "the main contentions on behalf of first Plaintiff are (1) that the permanent lease was binding on the grantor and his successors, (2) that a valid title had been acquired under the provisions of the Limitation Act, and (3) that the Defendants were estopped from denying the first Plaintiff's title. The findings of the learned Subordinate Judge are against the Plaintiffs-Appellants on all three points."

The High Court rejected the first, and upheld the second contention of the Plaintiff. In the course of his judgment Mr. Justice Burn (Sadasiva Ayyar, J., concurring) said as follows:—

"In the present case I entertain no doubt that it was the intention of the grantor to create a permanent lease and that second Plaintiff intended to take and did take the lease as a permanent one. His subsequent dealings with the property support this view. The grantor died a few months after the execution of Ex. A.

During the 14 years that his successor held office the second Plaintiff continued to hold on the terms of the lease-deed. I would respectfully follow the view enunciated by Mookerjee, J., in the case referred to and hold that the second Plaintiff perfected his title to a permanent lease as more than 12 years elapsed since the grant. The lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate and all the requirements of Art. 134 of the Limitation Act, No. IX of 1908 have been complied with.

"The above finding is sufficient for disposal of the appeal, and it is therefore unnecessary to consider the question of estoppel, which is raised by the Appellants. . . .

"In the result, I think the appeal should be allowed and first Plaintiff given a decree for possession of the property and a declaration that he is a permanent lessee. He will also be entitled to mesne profits from first October 1912 till delivery. These profits will be recoverable from Defendants Nos. 1 and 2 and will be determined by the lower Court and embodied in a supplemental decree. Having regard to the uncertainty of the law in this Presidency prior to the judgment of the Privy Council, I think the parties should bear their own costs in both Courts."

The High Court made a decree accordingly, and from that decree the present Appellant alone has appealed to His Majesty in Council.

Mr. Clauson, K. C. (with *Mr. Kenworthy Brown*) for the Appellant.—Read Art. 134, Sch. I of Limitation Act of 1908; also Art. 144 and referred to *Ram Parkash v. Anand Das* (1) and *Kailasam Pillai v. Nataraja Thambiran* (4), a Full Bench case

(1) L. R. 43 I. A. 73; s. c. I. L. R. 43 Cal. 707; 20 O. W. N. 802 (1916).

(4) I. L. R. 33 Mad. 265 (F. B.) (1909).

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of the Madras High Court. A further stage in the same case came before the Madras High Court on 5th December 1916 [*vide* 32 Mad. L. J. 278] after it had been referred back to the Subordinate Judge for findings. It came on appeal before the Board which delivered judgment here on 7th June 1920 [*Nataraja Thambiran v. Kailasam Pillai* (24)]. The head of the Mutt was not a trustee of the endowment. *Ram Parkash Das v. Anand Das* (1).

Can property forming part of an endowment be said to be part of a trust? Art. 134 does not apply. *Kailasam v. Nataraja* (4), Full Bench deals exhaustively with the law on this subject.

[LORD DUNEDIN.—The question put there is “Is he a trustee or a life tenant?” And the answer of the Full Bench is that he is neither.]

Statute of Limitation does not apply. *Muthusamiar v. Sreemethanithi* (10) is a case which decides that alienation of head of Mutt is similar to that of a widow. Permanent lease is outside the powers of the head of a Mutt. He is not strictly a trustee.

Mr. L. DeGruyther, K. C. (with *Mr. Narasinhani*) for the Respondents.—The question is what is the nature of this particular grant. These are inams (free of revenue) lands given to the Mutt. The person is a trustee and there can be no doubt of this, when one looks at the settlement register. The trustee is a Mohant, and the grant was for certain specific purposes. Then does he fall under sec. 134? This article has been applied by every High Court and by this Board. See

Abhiram Goswami's case (7) and *Iswar Shyam Chand Jiu v. Ram Kant Ghosh* (25), also in *Dattagiri v. Dattatraya* (14) by Jenkins, C. J.

[LORD BUCKMASTER.—Is there any beneficiary who could challenge this within the period?]

Yes, under sec. 92 of the Civil Procedure Code, the Advocate-General or any two worshippers with his leave. Act XX of 1863.

The only difference between *Dattagiri v. Dattatraya* (14) and this case is in the nature of the alienation. *Nilmongy v. Jagabandhu* (19) and *Behari Lall v. Mahammad Muttaki* (17).

Inam Register in Inam Rules (Subdivisional Officer of Board of Revenue in 1889) r. 3, cl. 1. This inam was one for charitable or religious purposes.

[*Mr. Clauson.*—This body is situated in Mysore.]

But the property is in Madras.

[LORD SHAW.—You have to go, as it were, to the home of the trust. This is in Mysore.]

[LORD BUCKMASTER.—If a piece of English land is subject to a Scotch trust, a suit would lie here, but the law applicable would be Scotch law.]

Either limitation runs from the beginning or from the accession of the next trustee or the Statute of Limitation could never apply: *Prosunno Kumari v. Golab Chand* (20); *Kailasam Pillai v. Nataraja Thambiran* (4) was a reconsideration of *Vidyapurna Swami v. Vidyandhi*

(1) L. R. 43 I. A. 73 : s. c. I. L. R. 43 Cal. 707; 20 C. W. N. 802 (1916).

(4) I. L. R. 33 Mad. 265 (F. B.) (1909).

(10) I. L. R. 38 Mad. 356 (1913).

(24) I. L. R. 44 Mad. 283 : s. c. 25 C. W. N. 145 (P. C.) (1920).

(4) I. L. R. 33 Mad. 265 (F. B.) (1909).

(7) L. R. 36 I. A. 148 : s. c. I. L. R. 36 Cal. 1003; 14 C. W. N. 1 (1909).

(14) I. L. R. 27 Bom. 363 (1902).

(17) I. L. R. 20 All. 482 (1898).

(19) I. L. R. 23 Cal. 536 (1896).

(20) L. R. 2 I. A. 145 (1875).

(25) L. R. 38 I. A. 76 : s. c. I. L. R. 38 Cal. 526; 15 C. W. N. 417 (1911).

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Swami (3). In *Vidyapurna Swami v. Vidyavidhi Swami* (3), the question was whether a Mohant would cease to be a Mohant if he became a lunatic. *Kailasam Pillai v. Nataraja Thambiran* (4) lays down each Mutt must be considered on its own merits.

[LORD DUNEDIN.—Refers to *Nilmony Singh v. Jagabandhu Roy* (19) and *Kailasam Pillai v. Nataraja Thambiran* (1).]

Behari Lall v. Mahammad Mutaki (17).

Rameswar Malia v. Sri Sri Jiu Thakur (26). Art. 131 applies, if not, then Art. 144 applies.

Mr. Clauson, in reply.—First this is not a case where the property is vested on a strict trust. Subordinate Judge and High Court find this.

[LORD SHAW.—Still there was an accountability under the Act of 1863.]

The position is analogous to that of a corporation sale. Any alienation is good as against him if in excess of his powers but not against his successor. *Nataraja Thambiran v. Kailasam Pillai* (24).

In the case of properties like this no Statute of Limitations applies. Art. 131 does not apply as this does not fall under either of the categories in that section. There is no *cestui qui trust*. Adverse possession runs against each trustee in turn as he becomes the head of the Mutt, but the next one is not affected by this.

See sec. 28 of the Limitation Act. Adverse possession began to run against me only from the date when I became the head of the Mutt.

There is no adverse possession as each Mohant accepts the lease and gives a fresh

lease, as it were, although, each such lease is invalid. Each Mohant may be considered to give a fresh lease by continuing the tenant in possession, but the lease is good as against every Mohant who receives rent and allows him in possession. When you come to a limited owner like this, the lease may be good as against him but not against his successor. *Muthusamiar v. Sreemethanithi* (10). The head of a Mutt is not a trustee within Art. 131. This was decided in *Kailasam Pillai v. Nataraja Thambiran* (1) and affirmed here on appeal.

Narayan v. Shri Runchandra (16) went on the supposition that the original lessee was not a trustee (p. 376 bottom). *Dattagiri v. Dattatraya* (14) proceeded on the assumption that the property (367) was never trust property. "Shebait" is only an officer or manager.

See *Abhiram Goswami's* case (7), *Isvar Shyam Chand Jiu v. Ram Kant Ghosh* (25) and *Muthusamiar v. Sreemethanithi* (10) is exactly similar to the case of three tenants for life the first of whom grants a lease and the others accept it. Miller, J.'s judgment at 361.

This case proceeds on the analogy of a lease by a Hindu widow. The lease is voidable and not void.

Art. 134 does not apply because there is no special trust. *Kailasam Pillai v. Nataraja Thambiran* (1).

The endowment was made more than 200 years ago and there was no idea of creating a trust.

Adverse possession cannot be established

(3) I. L. R. 27 Mad. 435 (1904).

(4) I. L. R. 33 Mad. 265 at p. 284 (F. B.) (1909).

(17) I. L. R. 20 All. 482 (1898).

(19) I. L. R. 23 Cal. 536 (1896).

(24) I. L. R. 44 Mad. 283 : s. c. 25 C. W. N. 145 (P. C.) (1920).

(26) I. L. R. 43 Cal. 34 (1915).

(4) I. L. R. 33 Mad. 265 (F. B.) (1909).

(7) L. R. 36 I. A. 143 : s. c. I. L. R. 36 Cal. 1003 ; 14 C. W. N. 1 (1909).

(10) I. L. R. 38 Mad. 356 (1913).

(14) I. L. R. 27 Bom. 363 (1902).

(16) I. L. R. 27 Bom. 373 (1903).

(25) L. R. 38 I. A. 76 : s. c. I. L. R. 38 Cal. 526 ; 15 C. W. N. 417 (1911).

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and lessee does not claim that my client ever accepted him as the tenant.

Mr. DeGruyther.—Mitra's Limitation, Vol. I, pp. 160 and 161. States this as settled law in India: you can claim to be a permanent tenant and set up adverse possession as such.

[LORD SHAW.—I want to hear you on the two cases in 27 Bombay.]

Mr. DeGruyther.—Refers to *Narayan v. Shri Runchandra* (16). A permanent lease granted by a Mohant has always been treated as void and not as voidable except perhaps in *Muthusamiar v. Sreemethanithi* (10). In every single case, the Board has treated a permanent lease by a Mohant as void.

In both cases in 27 Bombay the property was given to the Mutt and in both cases the Mohant has been treated as a trustee. (See 27 Bombay, top of p. 367).

'Their LORDSHIPS' JUDGMENT was delivered by

MR. AMBER ALI.—The suit that has given rise to this appeal relates to certain lands lying in the town of Madura in the Madras Presidency which admittedly belong to an old Mutt (Math) situated within the Mysore State. The origin, development, and *raison d'être* of these Mutts have been discussed in a number of cases decided in the Madras High Court to some of which their Lordships propose to refer in the course of this judgment. In their general characteristics they are almost identical with similar institutions in Northern India and in the Bombay Presidency. The heads of these foundations bear different designations in respect of the rights and incidents attached to the office; the difference arises from the customs and usages of each institution. The superior of this particular Mutt has been

called in these proceedings Matathipathe and sometimes Pandara Sannadhi, which their Lordships understand connote the same idea of headship. At the time this action was brought, the 26th Defendant held the office of Matathipathe. He has since died and the present Appellant is the head of the institution. In 1891 one Srinivasa was the Matathipathe and he on the 17th March of that year granted to the 2nd Plaintiff, a near relative, a permanent lease of the lands in suit, on a small quit rent of Rs. 24 a year. Shortly after the grant of the lease Srinivasa died, and was succeeded by one Sannudra, who held the office until 1906. On his death the now deceased Defendant No. 26 became the head. In 1902 the 2nd Plaintiff sub-leased the lands to the 1st and 2nd Defendants for a period of ten years.

Since 1905 the Mutt has been under the management of the Mysore State under a power of attorney, executed at first by the Matathipathe Sannudra and afterwards by his successor; in favour of the Dewan and his successors in office. About the same time the 2nd Plaintiff conjointly with his son (the 3rd Plaintiff) assigned their right and interest in the lands in suit to the 1st Plaintiff. It is in evidence and, so far as appears from the judgments of the two Courts in India, does not appear to be contradicted, that it was only in 1908 that the representative of the Dewan acting under the power granted by the Matathipathe became aware of the transaction of 1891 under which the Plaintiffs claim title. The sub-lease created in 1902 by the 2nd Plaintiff in favour of the 1st and 2nd Defendants was to have expired in 1912. But before its expiry they obtained a lease for 17 years from the representative of the Dewan. They are now in possession of the lands in suit under this lease. The Plaintiffs are and were at the time they brought their suit on the 5th March 1913,

(10) I. L. R. 38 Mad. 355 (1913).

(16) I. L. R. 27 Bom. 373 (1903).

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in the Court of the Subordinate Judge of Madura, admittedly out of possession. The present action is for declaration of title and for ejectment and possession, principally directed against the Matathipathe as the head of the Mutt and the 1st and 2nd Defendants lessees holding possessions under him. The other Defendants have been joined as parties apparently in consequence of certain rights they possess or exercise under those Defendants.

The Plaintiffs base their title on two grounds: Firstly, that the permanent lease under which they claim was created under circumstances that would bind not only the grantor but all his successors; and secondly, that even if the lease was not valid they had acquired a title under the Statute of Limitation by adverse possession for over twelve years from the date of the grant.

Their case throughout has been that Srinivasa was a "trustee" and that all his successors are "trustees," that the lands were granted on a "specific" trust, and that consequently under Art. 134 of the 1st schedule of the Indian Limitation Act (IX of 1908) they have acquired a good title against the Mutt.

The Matathipathe controverted both allegations. He denied that the alienation by Srinivasa was of such a character as would bind the Mutt; he further denied that he and his predecessors were "trustees" of the Mutt or that the 2nd Plaintiff or his assignee had acquired any right to the Mutt lands by adverse possession. On these contentions, two points arose for determination which are embodied in the first two issues. The trial Judge after giving the substance of the 2nd Plaintiff's evidence and of the other witnesses, formulates the position which the pleader took up.

"He contends," says the learned Judge, "that the plaint property is trust property

set apart for the worship of the titular deity of the Mutt, that the head of the Mutt is a trustee merely, and that the permanent lease to 2nd Plaintiff is an alienation of Mutt property and that 26th Defendant at this distance of time could possibly have no right to such property. The alienation being *ab initio* void, the 26th Defendant had no right to plaint property as he succeeded only in 1906 and 1st Plaintiff had perfected his title by adverse possession for over twelve years."

The Subordinate Judge negatived this contention; he held upon the admissions of the 2nd Plaintiff that the property in suit was "ordinary Mutt property" and was not set apart on any specific trust; that the head of the Mutt was not a "bare trustee," as it was admitted that the income was at his absolute disposal and that "none had a right to question him about it."

He found also that the 2nd Plaintiff took the lease with full knowledge of the character of the endowment and had learnt on enquiry that "he could not safely purchase it."

With regard to the question of estoppel arising from the alleged acceptance of rent by the 26th Defendant as the Plaintiffs contended, the Subordinate Judge held:—

"In fact the 1st Plaintiff never paid money as rent and the 26th Defendant or his agent never accepted payment with knowledge that the payment was as rent for plaint property. In these circumstances, I find that these Defendants are not estopped from denying Plaintiff's title. I find this issue against Plaintiffs."

He accordingly dismissed the suit save and except in respect of a money claim against the 1st and 2nd Defendants.

The Plaintiffs appealed to the High Court of Madras, which reversed the trial Judge's order and decreed the claim. The learned Judges do not negative the finding of the first Court that the 2nd Plaintiff took the lease with notice. But

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they considered that the matter in dispute fell within Art. 134 referred to above. They summed up their conclusion in the following words: "that the lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of Art. 131 have been complied with."

The findings of the learned Judges on the issue relating to limitation and the acquisition of right by adverse possession require notice. They deal first with the question of justifiable necessity, which they decide against the Plaintiffs. They say, "there is no doubt that the head of a Mutt cannot in the absence of necessity bind his successors in office by a permanent lease at a fixed rent for all time." And then add: "There is no allegation, much less proof, of any such necessity. The first contention must be rejected."

They then proceed to discuss the nature of the endowment in question and the position of its head. Their finding on this point is important; they say as follows

"In connection with the second point a question arises as to the nature of the endowment and the position of the head of the Mutt in relation to it. The exact terms of the original grant are not in evidence. It was conceded in argument that the grant was made by one of the Naioken dynasty of Madura. The case for the Appellants is that the endowment was for a specific purpose, i.e., for the worship of Gopalakrishnaswami, who is described by Defendants' 1st witness as the 'titular deity of the Mutt.' The evidence does not support this contention and it has been found against in the Lower Court. A statement made by a local agent of the Mutt during the Inam Commission inquiries is relied upon for the Appellants. It was apparently unsupported by any documentary evidence. The description of the Inam as given at the close of the inquiry is that it was granted 'for the support of Vyasaraya Matam' (Ex. L). Compare also description in Ex.

F. The evidence for the Defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the Mutt. I think the grant must be held to have been made for the general purposes of the Mutt."

They thus concur with the first Court that there was no "specific trust" which was the foundation of the Plaintiff's case. But after examining some of the judgments of their own Court, they apparently felt constrained to hold that the decision of this Board in *Ram Parkash Das v. Anand Das* (1) had crystallised the law on the subject, and definitely declared the Mohant to be a "trustee." It is to be observed that in that case the decision related to the office of Mohant, but in the course of their judgment their Lordships conceived it desirable to indicate *inter alia* what upon the evidence of the usages and customs applicable to the institution with which they were dealing, and similar institutions, were the duties and obligations attached to the office of superior; and they used the term "trustee" in a general sense, as in previous decisions of the Board, by way of a compendious expression to convey a general conception of those obligations. They did not attempt to define the term or to hold that the word in its specific sense is applicable to the laws and usages of the country. As pointed out by their predecessors in *Greedhari Doss v. Nundhissore Doss* (2) "The only law as to these Mohants and their functions and duties is to be found in custom and practice, which is to be proved by testimony." Generally speaking, however, the duties and obligations resting on the superior indicated in *Ram Parkash Das v. Anand Das* (1) do not seem to vary. In this particular institution the position of the Matathipathe in relation to the Mutt was

(1) L. R. 43 I. A. 73; s. c. L. R. 43 Cal.

707; 30 C. W. N. 802 (1916)

(2) 11 M. L. A. 405 at p. 437 (1907).

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clearly established by testimony and concurrently found by both Courts. But the learned Judges misapprehended their Lordships' judgment and proceeded to hold that as Srinivasa who granted the permanent lease was a "trustee," his act fell under Art. 134. To this article their Lordships will presently refer. Before doing so, however, they consider it necessary to observe that there are two systems of law in force in India, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each there are well-recognised rules relating to their religious and charitable institutions. From the year 1774 the Legislature, British and Indian, has affirmed time after time the absolute enjoyment of their laws and customs so far as they are not in conflict with the statutory laws, by Hindus and Mahomedans. It would, in their Lordships' opinion, be a serious inroad into their rights if the rules of the Hindu and Mahomedan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, *in pari materia*. The vice of this method of construction by analogy is well illustrated in the case of *Vidyapurna Swami v. Vidyavidhi Swami* (3), where a Mohant's position was attempted to be explained by comparing it with that of a bishop and of a beneficed clergyman in England under the ecclesiastical law. It was criticised, and rightly, in their Lordships' opinion, in the subsequent case, which arose also in the Madras High Court, of *Kailasam Pillai v. Naturaja Thambiran* (4). To this judgment their Lordships will have to refer further later on.

It is also to be remembered that a "trust" in the sense in which the expres-

sion is used in English law, is unknown in the Hindu system, pure and simple. J. C. Ghose, "Hindu Law," p. 276. Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system; to Brahmins, *Goswamis*, *sanyasis*, etc.. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a "juristic entity," vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them *eo nomine*. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of Mutt were founded under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answer-

(3) I. L. R. 27 Mad. 425 (1904).

(4) I. L. R. 28 Mad 265 (F. B.) (1909).

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able as a trustee in the general sense for mal-administration.

The conception of a trust apart from a gift was introduced in India with the establishment of Moslem rule. And it is for this reason that in many documents of later times in parts of the country where Mahommedan influence has been predominant, such as Upper India and the Carnatic, the expression *wakf* is used to express dedication.

But the Mahommedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." When once it is declared that a particular property is *wakf*, or any such expression is used as implies *wakf*, or the tenor of the document shows, as in the case of *Jewan Doss Sahu v. Shah Kubeeruddin* (5), that a dedication to pious or charitable purposes is meant, the right of the *wakf* is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the *wakf* is the *Mutwalli*, the governor, superintendent, or curator. In *Jewan Doss Sahu's* case (5), the Judicial Committee call him "procurator." It related to a *Khānkāh*, a Mahommedan institution analogous in many respects to a Muti where Hindu religious instruction is dispensed. The head of these *Khānkāhs*, which exist in large numbers in India, is called a *sajjāda-nashīn*. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has in most cases a larger interest in the usufruct than an ordinary *Mutwalli*. But neither the *sajjāda-nashīn* nor the *Mutwalli* has any

right in the property belonging to the *wakf*; the property is not vested in him and he is not a "trustee" in the technical sense.

It was in view of this fundamental difference between the juridical conceptions on which the English law relating to trusts is based, and those which form the foundations of the Hindu and the Mahommedan systems that the Indian Legislature in enacting the Indian Trusts Act (II of 1882) deliberately exempted from its scope, the rules of law applicable to *wakf*, and Hindu religious endowments. Sec. 1 of that Act, after declaring when it was to come into force and the areas over which it should extend "in the first instance," lays down, "but nothing herein contained affects the rules of Mahommedan law as to *wakf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments" Sec. 3 of the Act gives a definition of the word "trust" in terms familiar to English lawyers. It says:—

"A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trust is called 'trust-property' or 'trust-money'; the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the 'instrument of trust.'"

In this connection it may be observed that in the case of *Muhammad Rustam Ali*

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v. *Mushtag Husain* (6), the dedication was of specific property created by an instrument called a "trustee-namah." Lord Buckmaster, delivering the judgment of the Board, dealt thus with the objection as to the validity of the document :—

"It is argued," said the noble lord, "that the 'trustee-namah' must have dealt with an interest in immoveable property, for otherwise the trustees could have no right to maintain the suit; and such an argument at first sight makes a strong appeal to those who are accustomed to administer the English law with regard to trustees. It needs, however, but a slight examination to show that the argument depends for its validity upon the assumption that the trustees of the *wakf-nama* in the present case stand in the same relation to the trust that trustees to whom property had been validly assigned would stand over here. Such is not the case. The *wakf-nama* itself does not purport to assign property to trustees."

In 1810 in the Bengal Presidency, and in 1817 in the Madras Presidency, the British Government had assumed control of all the public endowments and benefactions, Hindu and Mahomedan, and placed them under the charge of the respective Boards of Revenue. In 1863, under certain influences to which it is unnecessary to refer, the Government considered it expedient to divest itself of the charge and control of these institutions, and to place them under the management of their own respective creeds. With this object, Act XX of 1863 was enacted; a system of Committees was devised to whom were transferred the powers vested in Government for the appointment of "managers, trustees and superintendents"; rules were enacted to ensure proper management and to empower the superior Court in the District to take cognisance of allegations of misfeasance

against the managing authority. Their Lordships are not giving a summary of the Act, but indicating only its general features. The Act contains no definition of the word "trustee"; it uses indifferently and indiscriminately the terms "manager, trustee or superintendent," clearly showing that the expressions were used to connote one and the same idea of management. After the enactment of 1863, the Committees, to whom the endowments were transferred, were vested, generally speaking, with the same powers as the Government had possessed before in respect of the appointment of "managers, trustees or superintendents."

Art. 134 of the 1st Schedule to the Indian Limitation Act (IX of 1908) is in these terms :— "To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration," the period prescribed for the institution of the suit is twelve years "from the date of transfer." In the old Act XV of 1877 the words were "purchased from the trustee or mortgagee." The alteration was made with the object of including permanent leases in transactions of the character contemplated in the article.

Art. 134 is, as pointed out in *Abhiram Goswami's* case (7), controlled by sec. 10 of the Limitation Act, which runs thus :—

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

The language of sec. 10 gives the clue to the meaning and applicability of Art.

(6) L. R. 47 I. A. 224; s. c. 25 C. W. N. 122 (1930).

(7) L. R. 36 I. A. 148; s. c. I. L. R. 36 Cal. 1008; 14 C. W. N. 1 (1909).

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134. It clearly shows that the article refers to cases of specific trust, and relates to property "conveyed in trust." Neither under the Hindu law nor in the Mahomedan system is any property "conveyed" to a *shebait* or a *mutwalli*, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Mahomedan law, the moment a *wakf* is created all rights of property pass out of the *wakif*, and vest in God Almighty. The curator, whether called *mutwalli* or *Sajjudanashin*, or by any other name, is merely a manager. He is certainly not a "trustee" as understood in the English system.

In *Sammantha Pandana v. Sellappa Chetti* (8), the position of the superior in relation to the properties of the Mutt was laid down in terms which have an important bearing on the present case. The learned Judges say there:—

"The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution he may contract debts for purposes connected with his *mattam*, and debts so contracted might be recovered from the *mattam* property and would devolve as a liability on his successor to the extent of the assets received by him."

The origin and nature of these Mutts were again considered at great length in a case which arose in the same Court in 1886. In this case [*Gyana-Sambandha*

v. Kandasami (9)], the learned Judge pronounced that the head of the institution held the *mattam* under his charge, and its endowment in trust for the maintenance of the Mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection therewith according to usage. An almost identical question came up for consideration in 1904 in *Vidyapurna v. Vidyavidhi* (3) already referred to. In this case the learned Judges, after an elaborate examination of English institutions which they conceived to be analogous to Hindu Mutts, came to the conclusion that whilst a *dharma-karta* of a temple who has specific duties to perform might be regarded as a trustee, the superior of a Mutt is not a trustee but a "life-tenant."

The same question in another form came up again for consideration in 1909 before a Divisional Bench of the Madras High Court in the case of *Kulasam Pillai v. Nataraja Thambiran* (1). The learned Judges before whom the point arose considered that the view taken in *Vidyapurna v. Vidyavidhi* (3) was in conflict with that propounded in the two earlier cases [*Sammantha v. Sellappa* (8) and *Gyana-Sambandha v. Kandasami* (9)] and referred the question to a Full Bench. The reference was in these terms:—"Does the head of a Mutt hold the properties constituting its endowment as a life-tenant or as a trustee?"

The Officiating Chief Justice expressed his opinion in the following terms:—

"I think, then, that it cannot be predicated of the head of a Mutt, as such, that he holds the properties constituting its endowments as a life-tenant or as a trustee. The incidents attaching to the properties depend in each case upon the condi-

(8) I. L. R. 27 Mad. 435 (1904).

(4) I. L. R. 38 Mad. 265 (F. B.) (1909).

(5) I. L. R. 2 Mad. 176 (1879).

(6) I. L. R. 10 Mad. 875 (1887).

(8) I. L. R. 2 Mad. 176 (1879).

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tions on which they were given, or which may be inferred from the long-continued and well-established usage and custom of the institution in respect thereto.

Mr. Justice Wallis substantially agreed in this view.

Mr. Justice Sankaran Nair pointed out that in the case of these Muttis :—

"Any surplus that remains in the hands of the Pandara Sannadhi, he is expected to utilise for the spiritual advancement of himself, his disciples or of the people. But his discretion in this matter is unfettered. He is not accountable to anyone and he is not bound to utilise the surplus. He may leave it to accumulate."

And he further added, "It is also true in my opinion that he is under a legal obligation to maintain the Mutt, to support the disciples and to perform certain ceremonies which are indispensable. That will be only a charge on the income in his hands and does not show that the surplus is not at his disposal." In the result, he was of opinion "that in the absence of any evidence to the contrary, the Pandara Sannadhi (the superior) as such is not a trustee. He is not also a life-tenant for the reasons already stated." All three Judges agreed in thinking that if any specific property was specifically entrusted to the head for specific purposes he might be regarded a "trustee" with regard to that property; but that in the absence of any such evidence the superior was not a trustee in respect of any part of the endowment.

The point came up for discussion again in a concrete form in 1913 in *Muthusamiar v. Sreemethanithi* (10), where the exact point for decision was the question of limitation. The facts which gave rise to the litigation were almost identical with the present case before their Lordships, with this difference, that the suit there was brought by the head of the Mutt to

recover possession of the leased properties.

Mr. Justice Miller states thus the question for determination :—

"The principal question, a question which arises in both the appeals, is whether the suit is barred by limitation. It is conceded for the Appellants that the lease is in excess of the powers of the *matathipathe*, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death of Sukgnana Nidhi Swamiar in 1890."

The learned Judges held in substance that there was no specific trust, that the properties were given or endowed generally for the performance of the worship of the deities in the Mutt and other attendant duties and for the support of the superior and his disciples; that a lease granted by him was valid for his life, and if adopted by his successor would enure during his term of office; but neither the original alienation nor the subsequent adoption would create a bar by adverse possession.

These cases deal exclusively with the position of the superior of a Mutt in relation to its endowment. But there are some others respecting the powers of the managers of religious institutions generally. In *Mahomed v. Ganapati* (11) a lease was granted by the *dharmakarta* of a temple; and the suit to recover the leased lands was brought by his successor in office. The defence was limitation, running from the date of alienation. Mr. Justice Sheppard (Muthusami Ayyar, J. concurring) held as follows :—

"In the present case, though the Plaintiff may in point of time have succeeded the *dharmakarta* who made the alienation, he does not derive his title from that *dharmakarta* and is, therefore, not bound by his acts. Subject to the law of limitation, the successive holders of an office, enjoying for life the property attached to it,

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are at liberty to question the dispositions made by their predecessors [*Papaya v. Romana* (a), *Jamal Saheb v. Murjaya Swami* (b) and *Modho Koory v. Tekait Ram Chunder Singh* (c)] and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only the successor became entitled to possession. Accordingly Raman Pujari having died so recently as 1885, the Plaintiff's suit cannot be barred by limitation."

This was followed in *Sathianama Bharati v. Sarvanabagi Ammal* (12). In this case the superior is called the "manager."

In *Chockalingam Pillai v. Mayandi Chettiar* (13) it was conceded that "the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation." But from the long lapse of time between the alienation and the challenge of its validity, coupled with other circumstances, the learned Judges came to the conclusion that necessity may reasonably be presumed.

From the above review of the general law relating to Hindu and Mahommedan pious institutions it would *prima facie* follow that an alienation by a manager or superior by whatever name called cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law. Of course, a Hindu or a Mahommedan may "convey in trust" a specific property to a particular individual for a specific and definite purpose, and place himself expressly under the English law when the

person to whom the legal ownership is transferred would become a trustee in the specific sense of the term.

But the Respondents rely on three decisions of the Indian Courts in support of their contention that persons holding properties generally for Hindu and Mahommedan religious purposes are to be treated as "trustees." The first is a decision of the Bombay High Court in *Dattagiri v. Dattatraya* (14). The facts of that case were peculiar. The Mutt there was an old one and the dedication was recognised and confirmed by the Mahratta Government. The village was granted to a holy ascetic for the maintenance of a charity attached to the Mutt; the governance went by succession to the disciples of the *guru* (the spiritual preceptor or head). In 1871 the village was divided between two disciples, Shivgiri and Shankargiri, in equal moieties, and each held his half separately from the other. In the same year one of them, Shankargiri, sold the lands in dispute to the Defendant. In 1897 Shankargiri obtained a Sanad from Government under Act II of 1863 declaring him to be the absolute owner of his share. He died in August 1897, after appointing the Plaintiff as his successor, who in 1898 brought an action to recover possession of the alienated lands on the ground that Shankargiri had no power to alienate them as they were dedicated property. The defence was firstly that the Sanad had altered the character of the property, and secondly that the suit was barred. The lower Appellate Court found that the lands in suit were private alienable property and that consequently the action was barred. The first finding was strongly challenged by the Plaintiff's counsel on second appeal. He contended that as it was dedicated property its holders from time to time "could not allow the

(a) I. L. R. 7 Mad. 85 (1893).

(b) I. L. R. 10 Bom. 35 (1885).

(c) I. L. R. 9 Cal. 471 (1882).

(12) I. L. R. 18 Mad. 266 (1894).

(13) I. L. R. 19 Mad. 485 (1896).

(14) I. L. R. 27 Bom. 353 (1902).

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Government to treat it as private property." The learned Judges of the High Court refrained from deciding that point; and confined their attention solely to the question of limitation. They proceeded to deal with the case, as they expressly say, "on the hypothesis that the lands in suit were held by Shivgiri and Shankargiri as heads of the Mutt and as trustees therefor." On that hypothesis the conclusion at which they arrived was inevitable. The position of the head of the Mutt in relation to its property under the Hindu law, custom and practice, was not considered; he was simply assumed to be a trustee. The pith of the judgment consists in the following words:—"We have then here a suit to recover possession of immoveable property conveyed in trust and afterwards purchased from the trustee for a valuable consideration." "Conveyed in trust" is hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. The learned Judges relied on the two decisions of the Allahabad and Calcutta High Courts to which their Lordships will presently refer. The case, however, was practically decided on the exposition of the law in the case of *St. Mary Magdalen, Oxford v. The Attorney-General* (15). With respect to it they say as follows:—

"In further support of this conclusion we would also refer to the already cited case of *St. Mary Magdalen, Oxford v. The Attorney-General* (15) for though it is a decision on the English statute, still it contains many points of resemblance to the present, and furnishes us with the clearest exposition of the law applicable to cases of this class. We propose to refer to that case in some detail, as it probably is not within the reach of most mofussil Courts in this Presidency."

They set out the provisions of secs. 2,

(15) 6 H. L. C. 189 (1857).

24 and 25, of Will. IV c. 27, and then add "the section (sec. 25), it will be seen, corresponds more or less with our Arts. 184 and 144 and sec. 10 of the Limitation Act."

Speaking with respect, it seems to their Lordships that the distinction between a specific trust and a trust for general pious or religious purposes under the Hindu and Mahommedan law was overlooked, and the case was decided on analogies drawn from English law inapplicable in the main to Hindu and Mahommedan institutions. That case can hardly be treated as authority in the decision of the present controversy.

The case of *Narayan v. Shri Rumchandra* (16) only followed the view expressed in *Dattagiri v. Dattatraya* (14). But the facts, when examined, show a marked difference in the legal position of the parties in the two cases. The *mulgeni* lease under which the Defendant claimed title was granted in 1845, and the suit to set it aside was brought somewhere in 1899. Repeated attempts were made by successive managers of the temple to obtain enhancement of rent, but the suits were invariably withdrawn. There was thus clear acquiescence on the part of successive managers in the validity of the transaction. The case fell within the principle of *Chockahngam Pillai v. Mayandi Chettiar* (13) and might well have been decided without disturbance of Hindu law or usage.

The second decision relied upon in support of the Respondents' contention is the case of *Behari Lall v. Mahammad Muttaki* (17) which related to a Mahommedan "shrine." The origin and history of these "shrines" or *durgahs*, as they are

(13) I. L. R. 10 Mad. 495 (1896).

(14) I. L. R. 27 Bom. 243 (1902).

(16) I. L. R. 27 Bom. 378 (1903).

(17) I. L. R. 20 All. 482 (1898).

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called, is described compendiously in the judgment in *Piran Bibi v. Abdul Karim* (18):—

"The *sajjadanashin* has certain spiritual functions to perform. He is not only a *mutwalli* but also a spiritual preceptor. He is the curator of the *durgah* where his ancestor is buried, and in him is supposed to continue the spiritual line (*silsilla*). As is well known, these *durgahs* are the tombs of celebrated dervishes, who in their lifetime were regarded as saints. Some of these men had established *khankahs* where they lived and their disciples congregated. Many of them never rose to the importance of a *khankah*, and when they died their mausolea became shrines or *durgahs*. These dervishes professed esoteric doctrine and distinct systems of initiation. . . . The preceptor is called the *pir*, the disciple the *murid*. On the death of the *pir* his successor assumes the privilege of initiating the disciples into the mysteries of dervishism or sufism. This privilege of initiation, of making *murids*, of imparting to them spiritual knowledge, is one of the functions which the *sajjadanashin* performs or is supposed to perform. The endowment is maintained by grants of land to the shrines by pious Moslems. The head of the institution, like that of a *khankah*, is called a *sajjadanashin*. The governance (*touliat*) of the endowment is in his hands; he is a *mutwalli*, with the duty of imparting spiritual instruction to those who seek it. The property of the 'shrine' is *wakf* 'tried up in the ownership of God.'"

The appointment of the *sajjadanashin* is regulated by usage and practice. This is referred to in the same judgment:—

"Upon the death of the last incumbent, generally on the day of what is called the *sium* or *teja* ceremony (performed on the third day after his decease), the *fakirs* and *murids* of the *durgah* assisted by the heads of neighbouring *durgahs*, instal a competent person on the *guddi*; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the

nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent."

The duties in connection with the "shrine," apart from giving spiritual instruction, consist in the due observance of the annual ceremonies at the tomb of the Saint, the distribution of charity at fasts and festivals, the celebration of the birthday of the Prophet, and the performance of other rites and ceremonials prescribed either by the religious law or by usage and practice. Ordinarily speaking, the *sajjadanashin* has a larger right in the surplus income than a *mutwalli*, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the Mohant of a Hindu Mutt, has full power of disposition over it.

In *Behari Lall v. Mahammad Muttaki* (17), the Plaintiff as *sajjadanashin* sued to set aside certain mortgages executed by his predecessor in office, and dated his cause of action from the time he was appointed as *sajjadanashin*. The learned Judges, on a misconception of the rules of the Mahommedan law and of the judgment of their Lordships in *Jewan Doss Sahod v. Shah Kubeeruddeen* (5), held that the *sajjadanashin* was a "trustee." One Judge held that the suit was barred either under Art. 134 or Art. 144; the two others held that Art. 134 was applicable as the mortgages were created by a "trustee."

Their Lordships have to differ from this conclusion. In their opinion this case was not, in view of the considerations set forth above, correctly decided.

As regards the third case, *Nilmony Singh v. Jagabandhu Roy* (19), the suit

(5) 2 M. L. A. 390; 6 W. R. (P. O.) 6 (1840).

(17) I. L. R. 20 All. 432 (1898).

(19) I. L. R. 23 Cal. 536 (1898).

(18) I. L. R. 10 Cal. 203 (1891).

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was brought by the Plaintiff as the *shebait* of a Hindu idol to set aside a *dur-mokurrari pottah*, executed in respect of certain of the *debuttar* lands by two ladies who acted as *shebait*s during his minority. He alleged that he became entitled to sue for possession of the alienated lands on his appointment to the office of *shebait* by a decree of the Court. The material defence was that the claim was barred. It should be observed that the *dur-mokurrari* was created in 1857 and the suit was brought after 1888. In the judgment of the High Court the words *shebait* and *trustee* are used as synonymous and convertible terms; the expression is always "*shebait* or trustee." Probably the fact that the *shebait* has duties and obligations in connection with the dedication, influenced the employment of the word "*trustee*" in a general sense. Mr. Mayne uses the expression in the same general sense to connote the same idea. That the learned Judge did not regard the *shebait* as a trustee in the specific sense may be inferred from his indecisive conclusion as to the application of Art. 134 to the Plaintiff's claim. It is quite clear, however, that the legal position of a *shebait* is quite different from that of a trustee to whom specific property is "conveyed" on a specific trust. In *Prosunno Kumari Debya v. Golab Chand Baboo* (20), where the question for determination was whether a particular transaction challenged as invalid had been entered into for such necessity as would make it binding on the dedication, Sir Montague E. Smith, in delivering the judgment of the Board, scrupulously avoided the use of the confusing word "*trustee*." Dealing with the powers of the *shebait*, he said as follows:—

"But notwithstanding that property devoted to religious purposes is, as a rule, in-

(20) L. R. 2 I. A. 145 (1875).

alienable, it is in their Lordships' opinion competent for the *shebait* of property dedicated to the worship of an idol, in the capacity as *shebait* and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as defined in a judgment of this Committee delivered by Knight Bruce, L. J.

"It is only in an ideal sense that property can be said to belong to an idol, the possession and management of it must, in the nature of things, be entrusted to some person as *shebait* or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them."

The identical question relating to the powers and position of a *shebait* was again before the Board in the case of *Abhiram Goswami's* case (7) already referred to. With regard to the powers of the *shebait*, their Lordships say as follows:—

"The second question is whether, this being so, the Mohant had power to grant a *mokurrari pottah* of the Mouzah. It is well settled law that the power of the Mohant to alienate *debuttar* property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity: *Prosunno Kumari Debya v. Golab Chand* (20). In the case of *Konwur Dooryanañh Roy v. Ram Chunder Sen* (21) a *mokurrari pottah* of

(7) L. R. 36 I. A. 148; s. c. I. L. R. 36 Cal. 1003; 14 O. W. N. 1 (1909).

(20) L. R. 2 I. A. 145 (1875).

(21) L. R. 4 I. A. 12 (1876).

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debuttar lands was supported on 'the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Maharantee Shibessouree Debia v. Mothooranath Acharjo* (22), that apart from such necessity 'to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty' in the *Mohant*. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the *pottah* of 1860, which on the most favourable construction enured only for the lifetime of the grantor, Pranananda, who died in 1891, or of the *pottah* of 1896, which, at best, could only be deemed operative during the lifetime of Raghubananda, who died in 1900."

The question came up again for consideration by the Board in the case of *Palaniappa Chetty v. Deivasikanony Pandara* (23). The suit was instituted by the head of a Mutt to recover possession of certain land which formed part of the endowment of a Hindu temple attached to the Mutt, and had been granted by his predecessor to the Defendant by a perpetual rent-free lease in consideration of a small sum of money paid at the time. The contention in that case was that the alienation was for the benefit of the institution; that contention was overruled, and the decision proceeded on the basis that the *shebait* was only a manager. Lord Atkinson, delivering the judgment of the Board, further added :—

"Three authorities have been cited which establish that it is a breach of duty on the part of a *shebait*, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of *debuttar* lands at a fixed

rent, however adequate that rent may be at the time of granting, by reason of the fact that by this means the *debuttar* estate is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased."

In that case the leased lands were situated in the street of a village; here they are in the town of Madura,

Reverting then to the judgment in *Nilmony Singh v. Jagabandhu Roy* (19), their Lordships think that the expression "trustee" was loosely and, speaking with respect, wrongly applied to the *shebait* in order to bring the case under Art. 134. It is to be observed that in none of the three cases was there any examination of the laws and usages governing the respective institutions, or of the Madras decisions, in which the subject had been elaborately considered.

In the present case the character of the endowment in relation to the superior is proved beyond contradiction. It has been found concurrently by both the Courts in India that the endowment was held by the Defendant No. 26 for the general purposes of the institution. Considerable stress was laid on behalf of the Respondents on the entry in the Inam Register that the dedication was for a specific purpose, *viz.*, the worship of the idol. The Inam proceedings did not create any dedication. They were instituted simply with the object of investigating titles to hold lands revenue-free as belonging to valid endowments. The gifts were made long before the Inam proceedings by the Hindu kings or chiefs who then held the country. The purposes of the dedication must therefore be gathered from established usage and practice, and that has been found by the Courts in India. Again, "valuable consideration" forms the essence of both

(22) 13 M. J. A. 270 (1889).

(23) L. R. 44 I. A. 147, s. c. I L R. 40 Mad 709, 21 O. W. N. 729 (1917).

(19) I. L. R. 28 Cal. 586 (1896).

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sec. 10 of the Limitation Act and of Art. 134 of the 2nd Schedule. Even if this were a specific trust, which it is not, it would be ridiculous to hold that the rent reserved in the grant to the second Plaintiff was "valuable consideration."

In the Courts below the Plaintiffs rested their claim mainly, if not entirely, on Art. 134. Before the Board an alternative argument has been advanced. It is contended that the second Plaintiff acquired the title he is seeking to establish by twelve years' adverse possession under Art. 144. That article declares that for a suit "for possession of immovable property or any interest therein not hereby (i.e., by the schedule) otherwise specially provided for" the period of limitation is twelve years from the date when the possession of the Defendant became adverse to the Plaintiff. In view of the argument it is necessary to discover when, according to the Plaintiff, his adverse possession began. He was let into possession by Mohant No. 1 under a lease which purported to be a permanent lease, but which under the law could endure only for the grantor's life-time. According to the well settled law of India (apart from the question of necessity which does not here arise) a Mohant is incompetent to create any interest in respect of the Mutt property to endure beyond his life. With regard to Mohant No. 2, he was vested with a power similarly limited. He permitted the Plaintiff to continue in possession and received the rent during his life. Such receipt was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can therefore only be properly referable to a new tenancy created by himself. It was within his power to continue such tenancy during his life, and in these circumstances the proper inference is that it was so

continued, and consequently the possession never became adverse until his death.

There is one other point which deserves notice. The administration of the second Mohant lasted until 1906. In 1905, however, the Mutt went under the management of the Dewan of the Mysore State, under a power of attorney granted by the Mohant and his successor, who may conveniently be designated as Mohant No. 3. Certain persons to whom the second Plaintiff had sub-leased the lands for ten years thereupon obtained from the Dewan during the currency of their term a lease for seventeen years. It is a direct lease from the Dewan as holder of a power of attorney from Mohant No. 3. The lessees thereunder have been in possession for some years prior to this suit, and the object of the present action is not to keep the Plaintiff in possession, but to eject these possessors, who hold under a title proceeding from the Dewan and Mohant No. 3, and to upset the act of administration of Mohant No. 3, on the ground of rights acquired adversely to the Mutt by lapse of time during the incumbency of Mohant No. 2. For the foregoing reasons their Lordships are of opinion that neither Art. 134 nor Art. 144 applies to this case; that the Plaintiffs have acquired no title by adverse possession under either of those articles; that the judgment and decree of the High Court of Madras must therefore be reversed, and the order of the Subordinate Judge dismissing the suit restored with costs here and of the Appellate Court.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitor: *Mr. Henry S. L. Polak* for the Respondents.

R. M. P.

Appeal allowed.

[CRIMINAL APPELLATE JURISDICTION.]**GOVERNMENT APP. No. 2 OF 1921.**

NEWBOULD, J. **SUPERINTENDENT AND**
SUBRAWARDY, J. **REMEMBRANCE OF**
1921, **LEGAL AFFAIRS,**
Heard, 24 and **Appellant,**
29, June. **v.**
Judgment, 12, July. **SHYAM SUNDAR**
BHUMI and ors., Ac-
cused, Respondents.

Jury, misdirection to—Verdict when should be interfered with—Test whether misdirection occasioned failure of justice.

The accused were found not guilty by the unanimous verdict of the jury and acquitted by the Sessions Judge. On appeal by the Local Government against the acquittal on the ground of misdirection in the Judge's charge to the jury:

Held—That though there was misdirection this did not justify a reversal of the verdict of the jury unless the misdirection in fact occasioned a failure of justice.

The High Court not being prepared to hold that the jury's verdict was due to the misdirection in the charge and that apart from this they would not have come to the same conclusion, the acquittal was not disturbed.

This was an appeal preferred on the 18th August 1921 against an order of the Sessions Judge of Bankura, dated the 21st December 1920, acquitting the Respondents who were charged with offences under secs. 395 and 120, I. P. C.

The material portion of the heads of charge to the jury as stated by the Sessions Judge are as follows:—

“The accused have been charged with having conspired together on the 21st of August last to commit a dacoity in the house of one Abinash Pan of village Jarka, police station Taldangra within this district. The first ten have further been charged with having committed a dacoity in the house of that Abinash Pan on the

23rd of August last at about 2 A.M., in pursuance of that conspiracy.

The defence was that the accused were not aware of any dacoity in the house of Abinash Pan, that they did not conspire together to commit any dacoity and that they were not in any way concerned in the dacoity complained of.

You will have to decide if there was any dacoity or conspiracy as alleged and if so whether the present accused or any of them were or was concerned in the same.

Sec. 120 B, simply provides what punishment should be awarded if a man is found guilty of conspiring with others to commit an offence and if in pursuance of that conspiracy that offence is committed. In this case there is no serious dispute that a dacoity took place in the house of Abinash Pan on the date and at about the time mentioned by the prosecution. But as the existence of the dacoity was not admitted you will have to decide on the evidence before you if there was really such a dacoity. About the existence of the dacoity you have the evidence of the approver Bharat. I shall have occasion hereafter to refer to his reliability. In this connection you have also the depositions of some of the inmates of the house which is alleged to have been looted. They are Abinash Pan, his brother Joy and their wives. There are also the statements of two of the neighbours who as they say came to the scene of occurrence shortly after it had happened, who were told then about the occurrence and who saw the condition of the house. The investigating Sub-Inspector of Police also swears about what he saw when he visited the locality next night. The signs of injuries on the persons of Abinash and Joy were also shown just after the occurrence as some of the witnesses deposed and the injuries were medically examined. From these you will have to decide if there

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was the dacoity. If on this evidence you can reasonably conclude that there was a theft in the house of Abinash on that particular night, that the thieves numbered five or more and that the thieves for the purpose of the theft used force and violence to some of the inmates of the house, you can well find that as a matter of fact there was a dacoity in the house of Abinash on that date.

The most important thing for you to decide would be if the accused or any of them were or was concerned in the dacoity, if any.

By far, the most important piece of evidence in this connection is the deposition of the approver Bharat. He swears that all the accused excepting Kenaram took part in the said dacoity. A good deal of caution is necessary in weighing his evidence. Settled case law is that it is very unsafe to rely on an approver's statement without sufficient and material corroboration. Decision of cases on this point was based on sec. 114 of the Indian Evidence Act. The reasons for those decisions are not far to seek. These approvers are generally of dangerous character. It is natural to expect that their veracity would be doubtful. They come upon a promise of pardon. In coming to the conclusion as to if you should rely on him you should take into account the following among others. (Jury advised as to the approver's evidence).

I should tell you that if you convict the accused simply relying on the statement of the approver that would not be illegal but you should at the same time remember that eminent Judges have constantly cautioned you not to convict relying simply on the uncorroborated statement of the approver.

If you need any corroboration before relying on the approver that corroboration needs be about existence of the dacoity

and about the complicity of the present accused in the same.

I have said already that the existence of the dacoity was not seriously disputed before you and that the complainant, his brother Joy, their wives Damini and Naba Dasi, and Gati Pan swore to its existence and the Daroga who investigated into the case saw the condition of the house the next night.

The most important corroboration of the approver's story as to the complicity of the accused was furnished by the find of some articles said to have been found stolen in the houses of some of the accused.

By the searches nothing incriminating was found in the houses of the accused Meha Sardar, Bhumiij Gour Das Baisnab, Kenaram Das Baisnab and the approver Bharat.

The accused claimed the things found on their respective houses as their own. You should consider if the articles found by the searches have been proved to belong to the complainant Abinash and his brother Joy. The burden of proof about this point is clearly on the prosecution and the prosecution is bound to make out by satisfactory and reliable evidence that the articles belonged to the complainant before it can urge you to find that the searches made gave materials to corroborate the story of the approver, that these accused or some of the accused were concerned in that dacoity. First you should consider if the articles are identifiable things at all. Next thing you should consider if the evidence of identification is such as can reasonably be relied on. The things identified may be divided into two groups—one group, it is alleged, belonged to Abinash and the other group to Joy. Abinash and Joy identified all the articles of both the groups. Damini, wife of Abinash, identified most of them. Naba

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Dasi, wife of Joy, identified the articles which she said belonged to her. The father of Naba Dasi identified a *shari* and a red bordered dhuti which he said he made a gift of to his son-in-law. Abinash's father-in-law identified the *pandiba* which he said he made a gift of to his son-in-law. When these gifts were made and if it is likely that these father-in-laws would be able to identify the articles gifted away you should consider. One smith identified some toe-rings which he said he prepared for Naba Dasi at the instance of her. The evidence bearing on these points is pointed out and the attention of the Jury is drawn to the exhibits identified by each of the accused. In this connection you should bear in mind that two Deputy Magistrates held identification tests of Abinash and Joy. On the first day they did not or could not identify all the articles they identified the next day. The attention is drawn to the identification tests. It is the prosecution case that on the first day all the articles could not be identified as the test was held when there was not sufficient light. You should consider the plea. The officer who held first test says that identification by one of the brothers was finished before the evening and that there was sufficient light when the entire test was held. If you think that there is no sufficient or reliable evidence that the articles belonged to Abinash or that most of the articles identified are not sufficiently identifiable things, the evidence furnished by the searches would be of no avail to the prosecution. If you think that the identification is of doubtful character the result would be the same. If on the other hand you think that the things found have been sufficiently identified to belong to the complainant the evidence furnished by the search would be material corroboration of the approver's story as against those in

whose houses the identified articles were found.

You should specially examine for yourselves the black bordered dhuti found in the house of Gobinda and the red bordered dhuti found in the house of Bekoo. The currency notes and the money found with the wife of Syam and *batis* were exhibited in the case in order to see if they could be honestly identified. All things found were shown to the jury one by one. The second piece of evidence of corroboration produced by the prosecution is the evidence of association. It is said that all the accused met together on the 5th of Bhadra in the house of the accused Bekoo where some of them dined there at noon. Some Mandals and two other witnesses were brought in to prove that. They could not say what talk took place there. They only saw the assemblage. The disputed dacoity was on the 7th. You should consider if these witnesses should be believed at all and if they are believed how far these statements go. Some of these accused are related as gurus and sisyas. It is in evidence that these gurus often meet their sisyas. If really they met the meeting might well be an innocent one. Approver in one part of his deposition had to say that the Mandals did not go there so long as he was there though in another part he meant to say something else. In the statement by Sriram about which I would say something more hereafter, there is absolutely no reference to this meeting. The evidence bearing on the point including that of Sudarsan Panda is pointed out. Some of these witnesses say that they remembered the date as a particular man died that day. You should consider if the man died that day.

There is the statement of choutidar that Bharat and Guiram met on the 6th at the *hari* of Guiram where Bharat dined

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that day. You should consider if you should believe that choukidar on that point. Some evidence was adduced that some of the accused were not at home from 6th to 8th and that they were seen going out. You should consider that.

It is the prosecution case that Guiram and Bharat were seen by four sets of people when they were going from home to Jarka to join in the dacoity. We have the evidence of the four sets who it is alleged met and saw them. Their evidence is pointed out. You have seen Santal witnesses who, it is alleged, saw them to smoke shortly after the noon and who saw them just before dusk and some of whom could not give the month and the day in or on which they were deposing. You should specially consider if they would be able to identify the strangers whom they said they met. In this connection you have also the Logri set of whom one is Bhibhuti Chakravarti. He is a *Blukshyabhai* of the complainant and whose servant was first suspected and named. If you cannot believe them their evidence would not help the prosecution. If you believe them it would simply corroborate a part of the approver's story that these two, Bharat and Guiram went that day to the direction of the village Jarka where the dacoity was committed. These meetings would not implicate the other accused besides Guiram in the dacoity or in the attempt to commit it. The evidence bearing on these alleged meetings are pointed out.

It is said that Raicharan and Sriram were seen together begging rice and *muri* on the day of the dacoity in the morning in a village called Kesia. Dolgobinda and Jogendra swore to that. You should consider if you should believe them. Their evidence is pointed out. They said that they had seen Raicharan and Sriram on the date of the occurrence. In the morn-

ing of the dacoity it is said that Guiram and Raicharan purchased *chira* at Simla and in the afternoon Sriram is said to have purchased *muri* at Logri. The evidence on the point is shown to the jury. You should consider if you should believe the witnesses who swore to that begging and the purchase of *chira* and *muri*. In connection with the searches the circumstances under which the currency notes and monies were secured from Syam Sardar's wife, under which the saris were recovered from Nidhi, daughter of Nadiarchand and his baibahik Kailas and the circumstances under which two cloths were recovered from his son-in-law Chandra, the circumstances under which the *batis* were recovered from the son of Guiram and the circumstances under which the things were recovered from Sriram and Raicharan's *bari* and the *bari* of Haldhar should be carefully considered. The circumstances are pointed out to the jury.

Nidhi Dasi, daughter of Nadiarchand, accused and the son Gosta and wife of Guiram and Sibbu, brother of Sriram complained of ill-treatment by the Police in connection with searches in the houses of those accused. They were examined by the prosecution but are connected with those accused. Gosta showed marks of injuries on his person. It is an admitted fact that Guiram's wife fainted during the search at her house and the Police Officers and the search witnesses tended her. The Police tried to explain it away by saying that she had hysteria fits which her son denied. They made statements against some who are most near and dear to them. It was alleged that one Kisan Singh, Constable with scars of small pox on his face brutally maltreated these witnesses. He was the Constable-Orderly of the investigating Inspector of Police. He was not brought in to deny the charge.

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You should consider all these things in order to see if there was maltreatment and if on that account these witnesses deposed in a particular way. (Evidence against each accused summed up).

Besides these against each there is the statement of the approver Bharat. I have said that it would be very unsafe though not illegal to rely on him without material and independent evidence.

In the next place you have the retracted confession of Sriram who implicated all excepting Haldar. This statement has very little value as a piece of evidence as against the maker. It is practically of no weight as against the accused even if it is free and voluntary. But you may consider it along with other evidence.

If you think that the statements of the approver and of Sriram were not free and voluntary but the outcome of threat, inducement or undue influence by the Police, I would ask you not to attach any importance to them. In order to judge if the statements are free and voluntary you should consider under what circumstances the statements were made. Some three statements were taken by the Police. As soon as Guiram was taken out of the Police control, he denied that his statements before the Police was true. The second man Sriram retracted his statement before the lower Court and pleaded violence as being the cause of the former statement. The third man Bharat stuck to his statement up to the last. He has got the pardon. He is of dangerous character according to his own statement. He gives out under what circumstances he made the statement. He says he became penitent. You should consider if you should believe him there or if he has suppressed the real facts under which he made the statement. They were arrested and were kept in the thana for over 15

hours. Even after the statement there was some delay in sending these people up.

Sriram and Bharat accused are enemies. Sriram was excommunicated by Bharat and others. Gour Das ceased to be the Guru of Bharat as he dined at Sriram's *bari* cooking his food. They do not go to each other's *bari* for the last one year. You should consider if they joined together to commit the dacoity.

Guiram was at home before 8-30 or 9 A.M. of the 8th Bhadra if you believe the Sub-Inspector of Schools who visited Sriram's School on that day. According to the statements of the approver and Sriram he was at Sewalkanda Jhor up to 10 or 12 A.M. If the Sub-Inspector's evidence is believed their story that he was at the Jhor must fall to the ground.

Guiram's School-register shows, as the public prosecutor admitted, that he was present on the 6th and 7th in his School. If his register is believed the prosecution story at the least so far as he is concerned must fail.

You should consider if it has been attempted to prove too much in connection with the onward and backward journey of Guiram and Bharat. It is the defence that some statements were extorted by the Police from some and that the evidence has been fashioned on that. You should consider that aspect of the case.

Some inmates of the house, eye-witnesses to the occurrence, made some statements to the Police which would go to show that the dacoits were the complainant's neighbours and that some of them were recognised by some of the inmates. The defence pleader replied upon those statements to show that some innocent people have been sent up by the Police. You should seriously consider that argument.

The evidence against each accused should be separately considered by you.

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I have shown you what is the evidence against each. Simply from the fact that some of them are guilty it would not follow that they are all guilty.

You are the sole judges of facts. You should ignore my views on them if that does not accord with your views and if you think them unreasonable.

If you cannot believe the evidence you must acquit the accused. If on the evidence before you, you entertain reasonable doubt as to the guilt of the accused or some of them you should give that accused the benefit of that doubt. What is a reasonable doubt is explained to the jury and sec. 3 of the Evidence Act is referred to in this connection.

The statement of Sriram as placed before you by the Public Prosecutor—you should consider if that should displace in a manner the approver's story that he and Guiram went together afterwards on the 6th. The matter is a serious one. Utmost caution is necessary on your part to arrive at a true verdict.

In considering the evidence and the verdict you must take the law to be as explained by me. The attention of the jury is drawn to the questions of law involved in this case.

With these observations I would ask you to consider your verdict.

I have forgot to tell you one thing. Something was sought to be made out of finding of some notes and from the alleged attempt to cash some currency notes. The notes have not been identified to be stolen property. In the second place you should consider if the mistake of mismatching the half notes was detected, is it likely that the second attempt was made.

You should confine yourselves within the evidence adduced before you and should not be influenced by any outside considerations."

Mr. Orr and Babu Monindra Kumar Bose for the Appellant.

Babu Phanindra Nath Das for Respondents Nos. 1 to 5 and 8.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal on behalf of the Local Government against the acquittal of eleven persons of whom all were charged with having conspired to commit dacoity and all but one were charged with having committed a dacoity. The trial took place before the Sessions Judge of Bankura and a jury. The jury returned a unanimous verdict of acquittal with which the learned Judge agreed. We are asked to reverse this verdict and order a retrial on the ground that there has been serious misdirection by the learned Sessions Judge in his charge to the jury. We accept the contention on behalf of the Crown that the learned Judge was not as impartial as he should have been in those portions of the charge in which he discussed allegations made on behalf of the defence against the investigating police officers. He did not point out to the jury, as he should have done, that the witnesses who accused the police were on their own showing untruthful as they were contradicting their statements made on oath before the committing Magistrate or that they were contradicted by other witnesses for the prosecution whose evidence deserved some consideration. As regards the more serious charge made against the police, that of illtreating two women there was positive misdirection. During the search of the house of the accused Guiram, his wife fainted. She was not examined as a witness but her son Goshita was allowed to depose that she said next day that she fainted because the police used force to her. This was hearsay and there is no legal evidence that Guiram's wife was ill-treated, while

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there is evidence to the contrary. But in his charge to the jury the learned Sessions Judge refers to this episode as if there was evidence to support the case for the defence on this point. Then as regards the woman Nidhi Dasi, daughter of the accused Nadiarchand, she resiled from the evidence she had given before the committing Magistrate, saying that she gave false evidence because she was ill-treated by the Daroga. There is however no evidence to support the suggestion that she was detached from her relations and kept fasting in a strange place for a night. The serious defect in the charge where it refers to the conduct of the police is that no distinction has been made between the suggestions put in cross-examination that are supported by evidence and those that are not and also that the attention of the jury has not been drawn to the direct evidence rebutting these suggestions.

But though there was this misdirection this would not justify the reversal of the verdict of the jury unless this misdirection has in fact occasioned a failure of justice. We have therefore examined the evidence and our conclusion after doing so is that we ought not to order a retrial. The case for the prosecution depends on the direct evidence of an accomplice and other evidence corroborating his story. The confession of the accomplice was more probably due to a hope of escaping by turning King's evidence than police oppression but even there the accomplice's story that he confessed through repentance is false. There are some improbable details in his story, for instance, he does not explain how the dacoits happened to meet on the night of the dacoity though the arrangement had been to meet the previous night. His evidence is such that it would require very strong corroboration before it could be acted on; in fact, the corroborative evidence would have to be almost sufficient for a

conviction apart from the approver's evidence. This we do not find on the record. The most important evidence is as to the finding of certain property at the houses of various accused. But the effect of this evidence is seriously weakened by the unsatisfactory evidence of the identifying witnesses. They appear to have been ready to identify any article shown to them whether it was capable of identification or not. It is urged that there was misdirection in this respect as the jury were told that Abinash did not at the first test identification identify all the articles that he identified the second day. Though the written report of the Magistrate who held the second test identification shows that Abinash did not identify any article on the second day which he had not identified the first day, Abinash himself deposed that he and his brother Joy Ram identified some of the articles the first day and all on the second day. Whether this statement is true or false, it cannot be said that Abinash's identification is free from doubt. There is also evidence of association but this even if believed is not alone sufficient corroboration to support a conviction. One of the accused made a confession which he subsequently retracted. Though the learned Judge summed up for an acquittal he did not omit to tell the jury that they were judges of the facts and should form their own opinion. We are not prepared to hold that the jury's verdict was due to the misdirection in the charge and that apart from this they would not have come to the same conclusion.

We accordingly dismiss this appeal. The bail bonds of the accused are discharged.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

VISCOUNT CAVE. DULBIN LACBHAN-
 LORD SHAW. BATI KUMRI and ors.,
 MR. AMEER ALI. Appellants,
 1921, v.
 Heard, 9 and BODHNATH TIWARI,
 10, June. since deceased, and
 Judgment, 1, July. ors., Respondents.

Merger, doctrine of, if applied in mofussil before Transfer of Property Act—Merger, a question of intention—Acquisition of superior and inferior interests by joint Hindu family in the names of different individuals, to indicate intention to prevent merger.

Quære :—Whether prior to the Transfer of Property Act there was a law of merger applicable in the mofussil.

HIRENDRA NATH DUTT *v.* HARI MOHAN GHOSH (1) referred to.

Merger is not a thing which occurs ipso jure upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. The question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain?

CAPITAL AND COUNTIES BANK *v.* RHODES (2) and INGLE *v.* JENKINS (3) referred to.

The fact that acquisitions of the superior and inferior interests on behalf of a joint Hindu family have been made in the names of different members thereof may point to an intention to keep the two interests from merging.

This was an appeal from a judgment and decree, dated the 27th June 1916, of the High Court of Judicature at Patna, which affirmed a judgment and decree, dated the 20th August 1912, of the Subordinate Judge of Bhagalpur.

The litigation related to a *putni taluk*

(1) 18 C. W. N. 860 (1914).

(2) [1903] 1 Ch. D. 631.

(3) [1900] 2 Ch. D. 868

called Israin Kalan, situate in the District of Bhagalpur, bearing No. 174 on the Collector's Revenue Free Register C. The questions raised on the present appeal were (1) whether the Defendants-Respondents held a *mokurari* lease, dated the 14th June 1846, of one of the Pattis called Bhawani, *alias* Jadua Patti, in the said *Mauza* and (2) whether the Defendants-Respondents had any subsisting rights under that lease after having obtained a *putni* settlement of the said *Mauza* on the 31st August 1856.

The facts which have given rise to the appeal may be shortly stated as follows :—One Mathura Nath Ghosh, *alias* Sri Kanto Rai, was the owner of the said *Mauza* Israin Kalan, together with all its dependencies and Pattis, including Bhawani *alias* Jadua Patti. In consideration of Rs. 4,413 he granted a *putni kabuliya*t of the whole of the said village, including all its Pattis and dependencies, to the predecessors in title of the Defendants-Respondents, namely, Kalinath Tiwari and Tej-nath Tiwari, on the 31st August 1856. The terms of the *putni* were stated in the *patta* in the following words :—

“ I do declare and give out in writing that the aforementioned persons shall, generation after generation, remain in possession and occupation of the right and interest in the aforesaid *Mauza* from the beginning of 1264 F. and shall continue to pay to me, or my heirs and executors and legatees the annual rent amounting to Rs. 1,171 (one thousand four hundred and seventy-one rupees) as per *kistbandi* (instalments) given below, year after year and instalment by instalment. In case of non-payment of the aforesaid rent in due time, I, the Malik, shall be at liberty, under the provisions of Act VII of 1832 and Reg. VIII of 1819, etc., the laws which are in force with regard to *putni* settlements, or which may be enacted hereafter, to realize the money due together with interest at 1 per cent. per annum on the defaulted instalment, by auction sale and from the persons and properties of you, the *putnidars*, or your heirs, executors and

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legatees, and no objection of you, the *putnidars*, or your heirs, executors and legatees, with regard to the same shall be entertained. There shall never be any increase or decrease in the aforesaid fixed rent; and I, the Malik, or my heirs, have no right to do so."

The said Tej Nath Tiwari, who appears to have been only a *benami putnidar* surrendered his interest under the *putni* to the said Kalinath Tiwari, on the 19th December 1858. For nearly 34 years the *putnidar*, Kalinath Tiwari, held the lands covered by the *putni*. The *putni* was sold in execution of a decree for arrears of rent due in respect of the *putni* on the 13th February 1890, and it was purchased by one Anandi Prasad, *benami* for the said *putnidar*. The *putni* was sold for the second time in execution of another decree for rent on the 10th December 1890, and it was purchased by one Bishun Prasad. The *putni* was sold for the third time in execution of another decree for rent on the 20th July 1905, and it was purchased by one Gajadhar Prasad. The case of the Appellants was that the said Bishun Prasad and Gajadhar Prasad were *benamidars* for the Tiwari *putnidar*. The *putni* was sold for the fourth time in execution of another decree for rent on the 4th June 1907, and it was purchased by one Balajit Singh, on behalf of the Plaintiffs-Appellants. The sale was duly confirmed on the 5th July 1907, and a certificate of sale, dated the 3rd September 1907, specifying the following properties included in the *putni* was granted :

" 16 annas interest in the *lukheraj putni-mahal* Mauza Israin Kalan and *Putni* Lalgunj, Patti Anandi, Patti Janumannagar, Patti Bhawani, otherwise called Jadua Patti, and Patti Gopipur, original with dependencies, Pargana Dharmpur, District Bhagalpur, bearing No. 174 (B) in Register (B), within the

jurisdiction of Thana, Sub-Registry Office Madhepura, District Bhagalpur, together with all *putni* rights and interests including 4 Cutcha Catchery houses covered with straw, standing in Patti Bhawanipur, otherwise called Jadua Patti. Approximate value being Rs. 500."

The Plaintiffs-Appellants took out delivery of possession of the properties specified above on the 9th February 1908. There was then a dispute regarding the possession of Bhawani, *alias* Jadua Patti, which as already stated was one of the Pattis of the *putni taluk* Israin Kalan, between the present Plaintiffs and the Tiwari *putnidars*, who were all members of a Hindu joint family. The dispute led to a criminal proceeding under sec. 115 of the Code of Criminal Procedure, 1898. The Tiwari *putnidars* for the first time stated in the course of the said proceedings that they held possession of the Patti in question, under a *mokurari* lease, dated the 14th June 1846, and not under the *putni* lease, dated the 31st August 1856. The Criminal Court decided in favour of the Defendants on the ground of actual possession by a judgment, dated the 20th September 1909, and refused to deal with the validity and effect of the *mokurari* lease set up by the Defendants.

The Plaintiffs thereafter instituted the present suit (No. 525 of 1910) on the 26th September 1910, in the Court of the Subordinate Judge of Bhagalpur. In the plaint the facts set forth above were stated in detail. The Plaintiffs claimed the following reliefs: - (1) A declaration that Bhawani *alias* Jadua Patti was a part and parcel of the *putni* settlement of the 31st August 1856; (2) A declaration that the Defendants had no *mokurari* or any other permanent right to the Patti in question; (3) A decree for *khas* possession of the Patti in question with mesne profits and costs.

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The successors of the original *putnidar*, Kalinath Tiwari, were the principal Defendants to the suit. They filed written statements denying the claim of the Plaintiffs, and relying upon the *mokurari* lease of 1846. The following issue, amongst others, was framed for trial :—

Was the said *mokurari* interest merged in the *putni* interest of the Defendants 1st party and thereby extinguished?

After recording and examining evidence both oral and documentary produced by the parties, the said Subordinate Judge delivered judgment on the 20th August 1912. He held that the inferior *mokurari* interest created in 1846 had not merged in the superior *putni* tenure of 1856, although the Patti in question formed a part and parcel of the *putni*. He concluded his judgment on this point in the following words :—

“In my opinion there would be no merger according to the principles upon which the English law of merger is based, if a person purchases the two rights in the names of two persons, and if he lets the outside world to know that he intends to keep both the rights separate and alive.

“In this case the *putni* and the *mokurari* were acquired in the names of different persons and the *mokurari* was treated as a separate property from the *putni*. There could not, under the circumstances, be any merger of the *mokurari* right in the superior *putni* right.

“The learned Pleader for the Plaintiff referred to the cases of *Promotho Nath Mitter v. Kali Prosonno Chowdhury* (8), *Surja Narain Mandal v. Nanda Lal Sinha* (9), *Ulfat Hossain v. Gayani Dass* (10) and *Kishendutt Ram v. Mamta Ali Khan* (6). But in none of these cases the question of merger arose in the same circumstances as in the present case. This question was not dealt with in any of these cases, in the same

light as it has arisen in this case. The principle of the English law of merger seems to be that there should not be one ostensible owner of the two rights, although the beneficial owner may be one and the same person.

“I, therefore, hold that the *mokurari* right did not merge in the *putni* right, as the *putni* and *mokurari* rights were not acquired in the same names, and as the *mokurari* right was kept separate from the *putni* right, by keeping separate collection papers for the *mokurari* and by granting separate rent receipts to the tenants as *mokuraridars*.”

The result was that the said Subordinate Judge made a decree declaring the title of the Plaintiffs to the *putni*, but dismissing the claim of the Plaintiffs to declaration and possession in respect of Bhawani or Jadua Patti. The Plaintiffs appealed from the said decree of the Subordinate Judge to the High Court of Judicature at Fort William in Bengal, and the appeal was finally heard by the High Court of Judicature at Patna, which delivered judgment on the 27th June 1916. The learned Judges of the High Court substantially agreed with the findings of the Subordinate Judge. They concluded their judgment in terms following :—

“We agree with Teunon, J., in *Abdul Karim v. Ahammad Ali* (13) that prior to the year 1882, when the Transfer of Property Act was passed, there was no merger in the *mofussil*. The Act expressly left untouched the law of merger applicable to leases taken for agricultural purposes. Such leases were dealt with in the Bengal Tenancy Act of 1885. That Act left untouched *mokurari* rights. It dealt only with the merger of occupancy rights. If it be suggested that the Transfer of Property Act was an attempt to codify the law applicable to leases not for agricultural purposes, the terms of the present lease are relevant.

* * * * *

“As clearly as a document can be worded

(13) 23 Ind. Cas. 612 (1914).

(6) L. R. 6 I. A. 145 : s. c. [I. L. R. 5 Cal. 198 (1879).

(8) I. L. R. 28 Cal. 744 (1901).

(9) I. L. R. 33 Off. 1212 (1906).

(10) I. L. R. 36 Cal. 802 (1909).

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the lease to the Tiwaris was a lease for agricultural purpose. It is not affected by the attempt of 1882 to codify the case law relating to the transfer of property. If the Bengal Tenancy Act, sec. 22, 'could by any spurious argument be made applicable to the terms of the lease, it was not in force when the alleged merger arose. Ex. G shows clearly that Meghnath Tiwari was the head of the family in January, 1886. Ex. L shows that Chandan Nath Tiwari was the head of the family in 1883. The genealogical table indicates that neither Chandan Nath nor Meghnath could have been the head of the family while Kalit Nath was alive. Kalit Nath must have been dead in 1883, before the Bengal Tenancy Act was passed. We do not propose to consider whether a *mokurari* cultivating lease is covered by sec. 22 of the Bengal Tenancy Act. It is sufficient to say that that Act cannot operate upon a coalescence of superior and inferior rights prior to the passing of the Act."

The High Court accordingly made a decree dismissing the said appeal with costs, and from that decree the Plaintiffs appealed to His Majesty in Council.

Mr. L. DeGruyther, K. C. (with Mr. B. Dubé) for the Appellants.—The High Court was under the impression that the doctrine of merger does not apply in the *mofussil* in India, and so when the *putni* and the *mokurari* interests became vested in the same person the latter was not merged in the former.

[MR. AMEER ALI.—The question is one of intention.]

Reads judgment of the Subordinate Judge, where Woomesh Chandra Gooplo v. Raj Narain Roy (4), Lal Mahamed Narkar v. Jagir Sheikh (5) and Kishendutt Ram v. Mamta Ali Khan (6) are referred to and Jibanti Nath Khan v. Gokool Chunder Chowdhury (7), *Promotho*

Nath Mitter v. Kali Prosonno Chowdhury (8), *Surja Narain Mandal v. Nanda Lal Sinha* (9), *Ulfat Hossain v. Gayani Dass* (10) and *Kishendutt Ram v. Mamta Ali Khan* (6) are distinguished.

As regards intention to merge, the High Court deals with this point and refers to *Baring v. Alrigder* (11).

There was no merger in India before the Transfer of Property Act. This is clear. Also see sec. 111 of the Transfer of Property Act.

[LORD SHAW.—Will you please give me the exact date on which merger is alleged?]

That is the date on which the whole title is vested in this family.

[MR. AMEER ALI.—Refers to sec. 117 of the Transfer of Property Act in connection with sec. 111.]

I do not admit that this is an agricultural lease.

The next point I wish to put before your Lordships is this: In Bengal, the Bengal Tenancy Act, VIII of 1885, as amended by Act VII of 1886 governs agricultural leases. In other cases the Transfer of Property Act applies. Neither of these Acts would apply in a question like this where, the question of merger arises. Again, at the time of our lease neither of these Acts were in existence. Again in Rent Act the law steps in and says that no contract shall affect certain rights of the tenant such as to trees, etc. The question of merger is something on an entirely different footing.

[LORD CAVE.—The two questions in this case are: (1) Was there merger in the *mofussil* before the Acts? And if there

(6) L. R. 6 I. A. 145; s. c. I. L. R. 5 Cal., 198 (1879).

(8) I. L. R. 28 Cal. 744 (1901).

(9) I. L. R. 23 Cal. 1212 (1906).

(10) I. L. R. 36 Cal. 802 (1909).

(11) [1892] 2 Ch. 381.

(4) 10 W. R. 15 (1868).

(5) 12-O. W. N. 918 (1899).

(6) L. R. 6 I. A. 145; s. c. I. L. R. 5 Cal. 198 (1879).

(7) I. L. R. 10 Cal. 760 (1891).

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was, (2) Is not merger excluded by the evidence in this case?]

If there is no principle you should apply equity and good conscience. This has been held to be English law. In merger is there anything opposed to the principles of Hindu or Muhamadan law?

In *Woomesh Chandra Goopto v. Raj Narain Roy* (4) there was a sale of a *putni* tenure. The purchaser sued to recover properties alienated by the vendor. Question was, was the action barred as action was brought more than 12 years after sale. At top of p. 16, second column is what is important; and p. 17, column 2. *Thomas Savi r. Punchanon Ray* (12) does not bear on the present point. In *Jibanti Nath Khan v. Gokool Chunder Chowdhury* (7) the judgment is at p. 761. There is no reference here to the Transfer of Property Act, or Bengal Tenancy Act.

[LORD SHAW.—You are justified in saying this that the point has never come up for express decision.]

Promotho Nath Mitter v. Kali Prosunno Chowdhury (8) was on the Transfer of Property Act (at p. 746).

See also *Surja Narain Mandal v. Nanda Lal Sinha* (9) and *Uljat Hossain v. Gayani Dass* (10). Two cases from the C. W. N. are mentioned, *Lal Mahamed Sarkar v. Jagir Sheikh* (5), the passage from Sir Lawrence Jenkin's judgment; *Hirendra Nath Dutt v. Hari Mohan Ghosh* (1). See also *Abdul Karim v. Ahammad Ali* (13). "On the whole the view seems to have been that prior to the Transfer of

Property Act the doctrine of merger did not apply in Bengal" (Teunon, J.).

See *Prosunno Nath Ray v. Jagat Chunder Pundit* (14).

It is impossible to say that there is any judgment in Calcutta that the law of merger does not apply in the *mofussil* and if there is no law then it is equity and good conscience, i.e., English law that should be applied.

[LORD SHAW.—The moment you get it to that level the question of intention becomes important.]

From 1858 to 1887 they did nothing whatever. They did not pay rent. The *patwari* kept a separate account. This account must have been kept anyhow.

Mr. Kenworthy Brown for the Respondents.—It is clear that the Transfer of Property Act has nothing to do with this case.

The question is, did merger take place in 1856 when Kalit got possession or did merger take place on account of intention. In 1856 when *putni* was granted, it was not in favour of *mokuraidar*, but of a junior member of the family. Referred to *Woomesh Chandra Goopto v. Raj Narain Roy* (4), where Sir Barnes Peacock was of opinion that merger does not apply to India. Also per Jackson, J. in *Woomesh Chandra Goopto v. Raj Narain Roy* (4) and *Kishendutt v. Mamtaiz Ali Khan* (6). There is an analysis of this case in *Hirendra Nath Dutt v. Hari Mohan Ghosh* (1). *Prosunno Nath Ray v. Jagat Chunder Pundit* (14) also does not seem to involve the question of merger. The question was between the *putnidar* and his co-sharers in the zamindari.

(1) 18 C. W. N. 860 (1914).

(4) 10 W. R. 15 (1868).

(5) 13 C. W. N. 913 at p. 918 (1909).

(7) I. L. R. 19 Cal. 760 (1891).

(8) I. L. R. 28 Cal. 744 (1901).

(9) I. L. R. 33 Cal. 1212 (1906).

(10) I. L. R. 36 Cal. 802 (1909).

(12) 25 W. R. 503 (1876).

(13) 23 Ind. Cas. 612 (1914).

(1) 18 C. W. N. 860, 893 (1914).

(4) 10 W. R. 15 at p. 20 (1868).

(6) L. R. 6 I. A. 145, 146, 147, 148 (1879).

(14) 3 C. L. R. 159 (1876).

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Promotho Nath Mitter v. Kali Prosonno Chowdhury (8) is solely a case on the Transfer of Property Act. *Surja Narain Mandal v. Nanda Lal Sinha* (9) was a case where the contest was between mortgagor and mortgagee. It was not a question of superior and inferior rights. It was decided on sec. 70 of the Transfer of Property Act. *Ulfat Hossain v. Gayani Dass* (10) even if right was a decision on the Transfer of Property Act.

If the law of merger applied in India before 1882, then I say intention here was to keep titles separate. Cases dealing with mortgagor [in the *Surja Narain Mandal v. Nanda Lal Sinha* (9), also *Whiteley v. Delancy* (15)] are not applicable, having turned on equitable rights of parties to mortgages and not on merger.

Here the titles to the *mokurari* and the *putni* are not in the same person. The *mokurari* was recognised as a separate estate with a separate rent in the *hastabood*. Refers to other documents. There is a receipt under sec. 65, Bengal Tenancy Act specifying estate as well as village as required by law.

Mr. DeGruyther in reply.—No reason is given for the view expressed by Jackson, J., in *Woomesh Chandra Goopto v. Raj Narain Roy* (4) and it is contrary to *Kishen duft Ram v. Mamtaz Ali Khan* (6), also to *Mohesh Lal v. Mohunt Bawan Das* (16).

The references in the *hastabood* are to the *mokurari*, merely as a *name*, not as representing an estate.

“Estate” in sec. 65, Bengal Tenancy Act means place, not tenure.

Their LORDSHIPS’ JUDGMENT was delivered by

LORD SHAW.—This is an appeal against a decree of the High Court of Judicature at Patna, dated the 27th June 1916, affirming a decree of the Subordinate Judge of Bhagalpur, dated the 20th August 1912.

The purpose of the suit was for a declaration of the Plaintiffs’ title to a *Putni* Taluk called Israin Kalan, in the District of Bhagalpur, and for *khas* possession of certain lands which are in the hands of the Defendants. The Defendants resist this claim on the ground that they are the holders of a *mokurari* lease of a considerable portion of the *putni* called Jadua Patti.

There were many issues in the case, each party attacking the title of the other. *Inter alia*, a strongly contested issue was whether the *mokurari* lease set up by the Defendants was genuine. After a very full trial there is a concurrent finding by both Courts that it was.

The case was ably argued before the Board, and the point of contention may be said to have been that which was contained in the eighth issue tried before the Subordinate Judge. That issue was in these terms :—

“Was the said *mokurari* interest merged in the *putni* interest of the Defendants first party and thereby extinguished?”

If this merger took place, the defence fails. If it did not take place, the defence succeeds.

Reduced to the simplest elements, and confined to those which bear upon the issues so determined, the facts may be stated thus: One Mathura Nath Ghosh was proprietor of the *Manza* holding, under *Lakeraj* title prior to 1846. On the

(4) 10 W. R. 15 at p. 18 (1868).

(6) L. R. 6 I. A. 145 : s. c. I. L. R. 5 Cal. 198 (1879).

(8) I. L. R. 28 Cal. 744 (1901).

(9) I. L. R. 38 Cal. 1212 (1906).

(10) I. L. R. 36 Cal. 802 (1909).

(15) [1914] A. C. 132.

(16) L. R. 10 I. A. 62 : s. c. I. L. R. 9 Cal. 961 (1883).

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14th June of that year, he granted a *mokurari* lease respecting Jadua Patti in favour of Dhirnath Tiwari and Loke Nath Tiwari, the predecessors of the Tiwari Defendants, at a rental of Rs. 66-11-3. There can be no doubt that this was an agricultural lease binding the lessees "to cultivate the said land at ease of mind, etc. Under this agricultural lease the lessees would, according to practice, either farm the lands themselves, or let them to other cultivators, drawing rents therefor. During their possession the value of the lands thus let in *mokurari* appears to have greatly risen.

Ten years later, *viz.*, on the 31st August 1856, the owner of the Mauza, *viz.*, Mathura Nath Ghose, already mentioned, granted a *putni* lease of the whole Mauza in favour of two persons, Tej Narayan Tiwari and Kalit Nath Tiwari. More than two years afterwards Tej Narayan Tiwari sold his half-share of the *putni* to Kalit. The exact date of this transaction was the 19th December 1858.

The question as to whether these transactions were fundamentally joint family transactions and should be so treated for the purpose of the application of the doctrine of merger, is a question which will be afterwards referred to; but, in the meantime, it may be noted that *ex facie* of these two transactions, *viz.*, the *putni* lease and the *mokurari* lease, they are granted by the same grantor to grantees who are different persons. But for the introduction of this question of the joint family, the point of merger could not, in fact, arise, as there is no identity of person between the *mokuraridars* and the *putnidars*. This applies clearly to August 1856, when the *putni* lease was granted, but it also further applies to December 1858, when Tej Tiwari sold his half-share to Kalit Tiwari, because Kalit, although thereafter holding the *putni en bloc*, was

not himself a *mokuraridar* of Jadua Patti.

Accepting for the moment, however, as relevant, the fact that Kalit Tiwari, the *putnidar*, was of the same joint family as Dhir Tiwari and Loke Tiwari, the *mokuraridars* under the 1846 deed, and accepting also as relevant, for the moment, that when a joint family interest can be postulated, the doctrine of merger should be applied to it, their Lordships note that much authority was cited to the Board as it had been to the Courts below, on the proposition broadly maintained that, prior to the Transfer of Property Act, there was no law of merger in the *mofussil*. The various points of this argument, including the question of whether the case law, applicable to the situation of mortgagor and mortgagee, could be applied by accurate analogy to the case of *mokuraridar* and *putnidar*—these various points need not be entered upon at length in the present case, in view of the clear opinion which the Board has formed and which will be presently stated as to the true range of the doctrine of merger itself. It may, however, be mentioned incidentally that towards the close of the series of decisions referred to, there occurs the case of *Hirendra Nath Dutt v. Hari Mohan Ghosh* (1) and in the judgment of the Court, consisting of Fletcher and Chatterjee, JJ., and delivered by the latter, a valuable review occurs of the series of decisions upon this branch of Indian law.

Before leaving the list of Indian cases referred to, it may, however, be also observed that no light is thrown upon this case by the later half of them, which were ruled by the provisions of the Transfer of Property Act. This case is not so ruled, but depends upon general law.

But, if the doctrine of merger is appealed to, that doctrine must be taken as

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it stands. Merger is not a thing which occurs *ipso jure* upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons—conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others—in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain? This is in accord with settled law, of which two recent instances may be given, *viz.*, *Capital and Counties Bank v. Rhodes* (2) and especially the judgment of Farwell, J., in *Ingle v. Jenkins* (3).

The doctrine of merger being thus applied to the present case, it is found on an examination of the circumstances, that they show with great clearness that instead of the *mokurari* lease having been extinguished by merger, it was, on the contrary, kept up as upon the one hand the source of right to the cultivators proceeding from the *mokuridar*s, and upon the other hand, the separate grant of subsisting right to the *mokuridar*s by their lease in respect of which the payment into the *putni* exchequer of the specific Rs. 66, specified in the *mokurari* lease, continued to be made. The argument of Mr. Kenworthy Brown upon the documents made this clear. It is not, however, necessary to enter upon the details thereof, for both of the Courts in India, after full investigation, are satisfied in that particular. Had there been a true merger in fact, and in intention, the whole of such transactions

would, in all probability, have taken a different shape, and in particular no more would have been heard of the *mokurari* rent.

This raises the last question in the case, and it is one of some importance. It was strongly argued by the Appellants' Counsel that it was sufficient for his purpose to show that *mokuridar*s and *putnidar* were of the same joint family, and that the difference of name of the one set of persons from the other person was of no account.

Their Lordships are not of this opinion. The difference of name, it is not going too far to say, may be at least an element, and an important element, in the question as to whether merger was ever truly intended. There may under the law of England be complete fundamental identity of right between the holder under one title, and the holder under another, but a convenient method of indicating intention on the subject is to create, for the purpose of keeping up the separation of title, a trust by which merger in the legal sense is clearly avoided. In short, although the same person is truly and comprehensively the owner of all the rights which might have coalesced, the substance of separation is preserved by the form of title not having been allowed to merge into the one name.

To apply this doctrine to the Indian joint family, when a joint family interest might be said to cover rights acquired to property by several individuals belonging to the family, but when the rights which might otherwise be merged are conferred by titles taken in the names of different members of the family, and thereby the means of articulate differentiation is continued as effectively as by the artifice employed in England of the setting up of a trust *ad hoc*, then it appears to their Lordships that

(2) [1903] 1 Ch. D. 631.

(3) [1900] 2 Ch. D. 368.

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these circumstances are elements for consideration.

All the length that this judgment goes is that the fact that the two sets of title do not meet in identity of name, but are separately attached to separate members of the family, is a matter to be considered on the question of whether merger was ever intended. As already stated, however, in the present case, in addition to the title standing in the names of different members of the family, the transaction under which the *mokurari* lease and the rights consequent thereupon were kept alive, is quite plain upon the documents and accounts.

Their Lordships are of opinion that a sound view is taken of this case by both the Courts below, and that the appeal fails. They will humbly advise His Majesty accordingly, and at the Appellants should pay the costs.

Solicitors: Messrs. Barrow Rogers & Nevill for the Appellants.

Solicitors: Messrs. Watkins & Hunter for the Respondents.

R. M. P. Appeal dismissed.

(CIVIL REVISIONAL JURISDICTION.)
SMALL CAUSE COURT REFERENCE
No. 1 of 1920.

SANDERSON, C. J.
RICHARDSON, J.
1921,
Heard,
3, January.
Judgment,
31, January.

GOURI SANKAR AGAR-
WALLA, Plaintiff,
v.
H. P. MOITRA,
Defendant.

Indian Contract Act (IX of 1872), secs. 50, 9 and 20—A contract for "sale of certain goods on arrival," if enforceable when goods shipped from Germany were captured after the outbreak of war by a belligerent but after proceedings in a Prize Court arrived in a different ship two years after—Such arrival if comes within the meaning of

"arrival" contemplated by the contracting parties—Doctrine of frustration, applicability of.

Defendant contracted to supply Plaintiffs with five cases of white shawl cloth. The contract was made on 21st January 1914, and it was headed "contract shipment and arrival." The goods were to be shipped in July and August 1914. The Defendant had previously ordered 50 cases of white shawl cloth from sellers in London. In part fulfilment of the Defendant's order 20 cases were shipped in July 1914 by his sellers in a German ship SS. "Spitzfels," Hamburg to Calcutta. The German ship was captured by the British in the Mediterranean shortly after the outbreak of the war and was condemned as prize. Under Government orders the cargo was transhipped at Alexandria into a different ship, which arrived in Calcutta in June 1916, delivery to the consignees being made conditional upon payment of extra charges in the nature of transshipping and forwarding expenses. There was a provision in the contract that in case of loss of the ship the contract should stand cancelled. There was a further provision in the contract that if the goods did not arrive within the specified time, the sellers should notify their buyers, and the latter should declare whether they are prepared to grant an extension of time, otherwise the contract should be considered as cancelled. The Defendant did not inform the Plaintiff of the arrival of the cases in June 1916 and he similarly ignored his other buyers of 1914, and sold them to other dealers at a profit to himself, the market having risen. The Plaintiff in July 1917 in consequence of information which he had received, tendered the contract price to the Defendant and brought the present suit for non-delivery of the goods.

Held—That having regard to the capture of the ship and the transshipment, the Plaintiff was not entitled to the delivery

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of the goods on their arrival in June 1916 in the same manner as if there had been no interruption.

Per SANDERSON, C. J.—The arrival of the goods in June 1916, after the events which happened, was not such an arrival as was contemplated by the parties to the contract. The purpose of the contract and the intention of the parties to the contract were altogether upset by the capture of the ship, by the prolonged delay and by the other circumstances which were the result thereof. Consequently the Defendant was not bound to deliver the goods to the Plaintiff when they eventually did arrive in June 1916.

Per RICHARDSON, J.—Regard being had to the events which happened, the contract had ceased to be operative when the goods arrived in June 1916.

If the contract between the Defendant and his shippers became illegal owing to the outbreak of the war, it may be that the contract between the Plaintiff and the Defendant fell with it, but the question of illegality not having been raised, the conclusion that the events which happened dissolved the contract may be supported by recourse to the doctrine of frustration, according to which a subsequent event or contingency beyond the ken of the parties at the time of the transaction, for the occurrence of which neither of them is responsible and for which they have not provided, may operate to undermine and avoid the contract between them.

HORLOCK v. BEAL (1), TAMPLIN STEAMSHIP COMPANY v. ANGLO MEXICAN PETROLEUM PRODUCTS CO., LD. (4), METROPOLITAN WATER BOARD v. DICK KERR & CO. (5), BANK LINE v. CAPEL (6) and

BAILY v. DECRESPIGNY (7) referred to and followed.

Treating the question as one of construction, regard must be had to the nature and circumstances of the particular transaction.

The importance of delay in the regime of commerce is recognised.

METROPOLITAN WATER BOARD v. DICK KERR & CO. (5) and BENSAUDE v. THAMES AND MERSY INSURANCE CO. (8) referred to and approved.

The delay and the probability of delay were amply sufficient for the conclusion that the contract in a business sense perished with or after the capture, long before the goods arrived in Calcutta and it could not be revived without a new contract.

Semble :—The “loss” of a ship does not include capture.

HORLOCK v. BEAL (1) referred to.

This was a reference by Mr. Thornhill, Chief Judge, Calcutta Small Cause Court.

The facts of the case will fully appear from the judgment of Richardson, J.

Mr. Langford James for the Plaintiff.

Mr. H. D. Bose and Mr. F. R. Surita for the Defendant.

THE JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—I have read the judgment about to be delivered by my learned brother Mr. Justice Richardson.

In my judgment the events, which have been referred to in detail by my learned brother, were not in the contemplation of the parties to the contract, when the contract was made. It was made on the 21st January 1914 : it was headed ship-

(1) [1916] 1 A. C. 486.

(4) [1916] 2 A. C. 397.

(5) [1917] 2 K. B. 31; [1918] A. C. 119.

(6) [1919] A. C. 435.

(1) [1916] 1 A. C. 486.

(5) [1917] 2 K. B. 31; [1918] A. C. 119.

(7) L. R. 4 Q. B. 180 (1869).

(8) [1897] A. C. 609, 611.

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ment, and arrival: the goods were to be shipped in July and August 1914. In fact the goods in question were shipped on S. S. "Spitzfels," a German ship which sailed from Hamburg on the 19th of July 1914, but they did not arrive in Calcutta until June 1916, more than two years from the date of the contract. This was due to the outbreak of war in August 1914 and to the capture of the S. S. "Spitzfels." The goods were transhipped to S. S. "Alavi" under the circumstances detailed in my learned brother's judgment.

In my judgment the arrival of the goods in June 1916, after the events which happened, was not such an arrival as was contemplated by the parties to the contract.

In my judgment the purpose of the contract and the intention of the parties to the contract were altogether upset by the capture of the S. S. "Spitzfels," by the prolonged delay and by the circumstances which were the result thereof; consequently, in my judgment the Defendants were not bound to deliver the goods to the Plaintiff when they eventually did arrive in Calcutta in June 1916.

In my judgment the answer to the question which the learned Chief Judge of the Small Cause Court has referred to this Court should be in the negative.

The Plaintiff must pay the costs of the reference.

We think that there should be two Counsels' fees and two attorneys' fees, one for each hearing.

RICHARDSON, J.—This is a reference by Mr. Thornhill, the learned Chief Judge of the Calcutta Court of Small Causes, from whose order the facts about to be stated are taken. The facts are either undisputed or concluded by the Chief Judge's findings.

The Defendant in the writ contracted to

supply the Plaintiff with five cases of white shawl cloth, shipment July and August 1914. The contract is dated 21st January 1914.

The Defendant had previously ordered 50 cases of white shawl cloth from sellers in London. Of these 50 cases he sold 22 to buyers in Calcutta, including the five cases sold to the Plaintiff.

In part fulfilment of the Defendant's order, 20 cases were shipped in July 1914 by his sellers in the S. S. "Spitzfels," Hamburg to Calcutta, *c. i. f. c.* Calcutta, to the order and on account and risk of the Defendant. The "Spitzfels," a German ship, was captured by the British in the Mediterranean shortly after the outbreak of war and was condemned as prize. Under Government orders, the cargo, or portion of it, was transhipped at Alexandria into the S. S. "Alavi," which arrived in Calcutta in June 1916, that is, merely two years late—with 17 only out of the Defendant's 20 cases on board. The goods were cleared by the Defendant or his agents sometime about the 10th June 1916. The proceedings of the Prize Court are not in evidence and the Chief Judge states that there is nothing to show that any particular conditions attached to the goods by reason of those proceedings save that the delivery to the consignees was conditional upon payment of extra charges in the nature of transshipping and forwarding expenses, etc., which amounted to Rs. 3,038-11-0 for the 17 cases. The charges were paid by the Defendant.

The Defendant also paid the drafts for the whole 20 cases together with the interest which had accumulated thereon. He further paid deviation insurance and so forth. He sent in a claim for the three cases short delivered.

The contract between the parties to the suit is headed "Contract shipment and arrival." The first clause is introductory.

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The second clause is a long one. It lays down that the buyers shall take delivery of the goods within a fixed number of days from the respective dates of arrival and contains other provisions relating to delivery and payment.

(Cls. 3 and 4 are as follows :—

“3. Should the goods or any portion of same not have been shipped or not have arrived at the expiration of the time stipulated, the sellers, on the facts coming to their knowledge, shall immediately notify the buyers, and the buyers must within two days of their receipt of notice from sellers, declare whether they are prepared to grant an extension of time for shipment or arrival of the portion overdue, otherwise this portion of the contract shall be considered as cancelled, and the sellers shall not be responsible for any such non-fulfilment of contract. Should the goods or any portion of same not have been shipped owing to suppliers and to producers stopping payment, or being prevented by accidents to or the destruction of works from preparing same, the contract shall be rescinded for that portion not shipped.”

“4. Buyers will not have the right to cancel this contract or any portion thereof if the goods from any unavoidable cause, such as strikes of operatives, dock labourers, carriers, seamen, accidents to railways, or any other force of nature, are shipped later than the shipment dates contracted for, provided that such delay in shipment shall not exceed the period of one month.”

Under cl. 8 the argument is to be construed as a separate contract in respect of each instalment of goods.

Cl. 10 says :—“The entry of the vessel at the Custom House means arrival under this contract. Loss of the vessel cancels the portion of this contract shipped in the vessel lost.”

The Chief Judge has found “that the Defendant intended to perform his July part of the contracts with his buyers by allotting to them cases out of such consignment or consignments as might arrive in ordinary course by the S. S. “Spitzfels or any other ship.” It is further found that the Defendant did not inform the Plaintiff of the arrival of the 17 cases in June 1916. He similarly ignored his other buyers of 1914, and assuming complete dominion over the goods sold or resold them to other dealers at a profit to himself, the market having risen. Further when the Plaintiff in July 1917, in consequence of information which he had received, addressed an enquiry on the subject to the Defendant, the latter replied that the goods had never been shipped. The Plaintiff, however, was not deterred. He tendered the contract price for three cases on the footing that they represented the July shipment under his contract. He then brought the present suit to recover Rs. 1,987-8 annas damages for their non-delivery. At the time he was not aware of the extra charges paid by the Defendant, but during the hearing of the suit he expressed his willingness to pay those charges, the market being then favourable.

It may be added that the goods being of German origin, the Plaintiff made no claim in respect of his remaining two cases, on the footing that they might have been shipped in August and that the rule against trading with the enemy excused the Defendant from performing that part of his contract.

The suits came twice before the learned Chief Judge. On the first occasion he dismissed it, holding, as he says on the construction of the contract “that the contract was conditional on the arrival of the goods in Calcutta in the ordinary course of navigation.”

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During the temporary absence of Mr. Thornhill, the Full Bench of the Court of Small Causes set aside the dismissal and directed a retrial. Having retried it, the learned Judge has again dismissed the suit, this time subject to the opinion of the High Court on the substantial question of law arising, which he states as follows :-

"Whether having regard to the capture of the S. S. "Spitzfels" and transshipment to the S. S. "Alavi" the Plaintiff was entitled to the delivery of the goods on their arrival in Calcutta in June 1916, in the same manner as if there had been no interruption."

I agree with the Chief Judge that regard being had to the events which happened, the contract had ceased to be operative when the goods arrived in 1916, though it is open to question whether the contract was "conditional on the arrival of the goods in due course of navigation."

As to the heading "contract shipment and arrival" the goods were in fact shipped and did ultimately arrive. The contract appears to be silent as regards delay in arrival apart from delay in shipment and loss of the ship. It was not contended that loss of the ship includes capture. *Horlock v. Beal* (1). As the goods were shipped in time, the provision made for extending the time of shipment (with a corresponding or relative extension of time of arrival) does not assist the Plaintiff. The parties, therefore, would seem to have left the matter of delay after shipment unprovided for, though "delay even of considerable length and of wholly uncertain duration is an incident of maritime adventure." *Bank Line v. Capel* (2).

Such cases as that of *Idt v. Thornton* (3) which the Chief Judge cites, are of no

assistance. In that case, the parties expressly agreed that if the goods should not arrive before a named date, the bargain should be void. It was held that arrival within the date was a condition precedent.

There is no such express agreement in the present case, and I am not satisfied that a condition in the particular form suggested could be imported into the contract nor am I aware what its precise effect would be on the delay here (where the deviation was involuntary) or on delays of other descriptions. There may be delays of which the parties "took their chance."

If the contract of transshipment between the Defendant and his shippers, became illegal owing to the outbreak of war, it may be that the contract between the Plaintiff and the Defendant fell with it, but the question of illegality was not raised and in my opinion the conclusion that the events which happened dissolved the contract may be supported by recourse to the doctrine of frustration which the learned Judge also calls in aid.

According to that doctrine, a subsequent event or contingency, beyond the ken of parties at the time of the transaction, for the occurrence of which neither of them is responsible and for which they have not provided may sometimes operate to undermine and avoid the contract between them.

The doctrine is illustrated in a number of recent English cases, four of which in particular—now the principal cases on the topic—went to the House of Lords. [*Horlock v. Beal* (1)]; where the earlier cases are considered and classified; *Tamplin Steamship Company v. Anglo Mexican Petroleum Products Co., Ltd.* (4), *Metropolitan Water Board v. Dick Kerr & Co.* (5) and *Bank Line v. Capel* (6).] The

(1) [1916] 1 A. C. 486.

(2) [1916] A. C. 435, 458.

(3) 3 Camp. 274.

(1) [1916] 1 A. C. 486.

(4) [1918] 2 A. C. 537.

(5) [1917] 2 K. B. 31; [1918] A. C. 119.

(6) [1919] A. C. 435.

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doctrine may have its limitations. It may not be applicable in every case where the unexpected happens with serious consequences. It may apply only in exceptional cases. But in my opinion it is applicable to the facts of the present case.

In one of the earlier cases [*Bailey v. DeCrespigny* (7)], where land, the subject-matter of a covenant by the Plaintiff in favour of the Defendant, was compulsorily acquired and the Defendant was held discharged from the covenant, Hannen, J., in a passage often cited said :—

“There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.”

The learned Chief Judge cites the language of Lord Loreburn in the *Tampin's* case (1).

“A Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done

so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree.”

The principle so stated applies to all contracts. In commercial cases it is applied where the commercial object of the contract has been frustrated by the intrusion or occurrence of an unexpected event, creating a state of things in which the parties could not reasonably have intended that the contract, as they made it, should be operative. An exception or condition precedent to that effect may then be imported. The result does not depend merely or chiefly on calculations of profit and loss; and, as it has been more than once pointed out, the difficulty lies not so much in the statement of the principle as in its application. In some cases the facts seem to speak for themselves. In others, where the effect of the unexpected event has been more or less temporary, judges of the highest eminence have reached different conclusions.

Treating the question as one of construction, regard must be had to the nature and circumstances of the particular transaction; and the implied term, though it may be an addition to the contract, must be consistent with the express terms and with the intentions of the parties as gathered from those terms. “No Court has a power of absolution” and special care must be taken to avoid making a new contract for the parties.

Now, what are the facts here? The seller was not in default. The capture was an Act of State. The capture amount-

(4) [1916] 2 A. C. 397, 403.

(7) L. R. 4 Q. B. 180 (1869).

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ed to a seizure of the ship and at any rate a detention of the goods. The ship and no doubt the goods also became the subject of proceedings in prize. The goods did not cease to exist but there was a discontinuance of their availability to the parties and the delay which was likely to occur and did in fact occur was of long duration, the seller was deprived of his goods for the time being. The charges which he subsequently paid in order to recover them were in the nature of salvage. The event was entirely unforeseen. At the same time there is nothing in the contract or in the nature of the transaction inconsistent with a term which need not be larger than this, that should war supervene and the vessel or the goods be captured by a belligerent with resulting delay the contract should be at an end. With that condition implied the capture and the delay terminated the contract and the subsequent arrival of the goods in Calcutta would not revive it without a new agreement between the parties.

The authorities show that the subject-matter of the contract need not cease to exist or be permanently rendered unavailable to the parties. The importance of delay in the region of commerce is recognised. In the *Metropolitan Water Board's* case (5), Lord Dunedin said:—“An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted.” Lord Atkinson spoke of “an interruption so great and long as to make it unreasonable to require the parties to go on.” Lord Sumner in the *Bank Line* case (6) strikes a note of warning, “I agree,” he says (p. 454) “in the importance of this feature, though it may not be the main and certainly is not the only matter to be considered. The

probabilities as to the length of the deprivation and not the certainty arrived at after the event are also material. The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards, may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided. That fate is dissolution or continuance, and, if the contract ought to be held to be dissolved, it cannot be revived without a new contract. The parties are free.”

In the *Metropolitan Water Board's* case (5), Scrutton, L. J., in the Court of Appeal, expressed himself as follows:—“Strictly, in my opinion a party to a contract who claims that on a particular day the contract is abrogated takes the burden of proving that on that day the interruption is so serious as to avoid the contract. To use the words of Lord Halsbury in *Bensaude v. Thames and Mersey Insurance Co.* (8). ‘It would be only a question of evidence which one might ascertain at that time, or wait until the facts had proved it by the occurrence of those facts subsequently.’”

In the present case, the delay and the probability of delay were amply sufficient to justify the conclusion that the contract in a business sense perished with or after

(5) [1917] 2 K. B. 31; [1918] A. C. 119.

(6) [1919] A. C. 435.

(5) [1917] 2 K. B. 31; [1918] A. C. 119.

(8) [1897] A. C. 609, 611.

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the capture, long before the goods arrived in Calcutta.

The test may be applied which is suggested by the Chief Judge. What if the market had fallen? Could the Defendant have forced these goods on the Plaintiff, however, unwilling the Plaintiff might be to take them? Could the Plaintiff have been compelled to pay the Prize Court charges?

I may add that sec. 56 of the Contract Act only applies to physical impossibility and therefore does not cover every case of frustration [*Gokuldas v. Narsu* (9) and *Karl Ettlinger v. Changandas* (10)]. Sec. 9 of the Act, however, recognises that promises may be implied.

Sec. 20 of the Act deals with the case of a common mistake at the time of the transaction "as to a matter of fact essential to the agreement." Perhaps a general principle of frustration depending on construction might be so stated as to cover that.

The case of *Gokuldas v. Narsu* (9) is of interest. The Defendant had agreed to pay the Plaintiff an annual sum for permission to quarry stone on the Plaintiff's land. The Defendant possessed a municipal license to quarry by blasting. Though for no fault of the Defendant the license was withdrawn it was held that the withdrawal terminated the contract. In the course of the argument Sargent, C. J., said that sec. 56 of the Contract Act had nothing to do with the case and that it was purely a case of construction of the contract. I find that in a very recent case [*Kunjilal v. Durga Prosad* (11)] the principle has been applied by Rankin, J. That was a decision on a special case in which it had been found that the parties contracted on the assumption that the

Government control over Railway waggons would be removed and on the authority of *The Moorcock* (12) and other cases it was held that a condition to that effect should be implied.

It was assumed in the argument that the Defendant was entitled to two or three cases out of the original 20 cases shipped. As only 17 cases arrived, it was suggested that the Plaintiff had no more right to any of these cases than to the three missing cases, but the suggestion was not pressed, possibly because it was thought that the claim would cover a claim for compensation in respect of the missing cases.

In the result, I would answer the question referred to us in the negative.

Messrs. Fox and Moudal, Solicitors for the Plaintiff.

Messrs. Leslie and Hinds, Solicitors for the Defendant.

J. N. R. *Reference accepted.*

[CIVIL REVISIONAL JURISDICTION.]

REFS. NOS. 6 AND 14 OF 1921.

SANDERSON, C. J.]

WOODROFFE, J.

MOOKERJEE, J.

1922,

6, January.

In the matter of
TARINI MOHAN BARARI
and ors., Pleaders.

Legal Practitioners Act (XVIII of 1879), sec. 1:—Pleader refusing to appear in Court in pursuance of a resolution of the Bar Association to boycott that Court, propriety of—Duties and obligations of pleaders—Proper course for pleaders when ill-treated by any Court.

Some pleaders refused to appear in a certain Court in pursuance of a resolution of the Bar Association to boycott that Court as a protest against its ill-treatment of pleaders. Proceedings under sec. 14 of the Legal Practitioners Act were drawn up against several pleaders for failure to appear in Court in matters which had been entrusted to them by their clients. The

(9) I. L. R. 13 Bom. 630 (1889).

(10) I. L. R. 40 Bom. 301 (1915).

(11) 24 C. W. N. 703 (1919).

(12) L. R. 14 P. D. 68 (1889).

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pleaders concerned having intimated their unqualified regret to the High Court for the course adopted by them :

Held—That having regard to their unqualified expression of regret the proceedings should be dropped.

That the Court regarded the action of the pleaders as a very serious matter. The pleaders deliberately abstained from attending the Court and took part in a concerted movement to boycott the Court, a course of conduct which was not justified. The pleaders had duties and obligations to their clients in respect of suits and matters entrusted to them which were pending in the said Court. There was a further and equally important duty and obligation upon them, viz., to co-operate with the Court in the orderly and pure administration of justice. By the course which they adopted, the pleaders violated and neglected their duties and obligations in both these respects. If the pleaders thought they had a just cause of complaint, they had two courses open to them : to make a representation to the District Judge or to the High Court. They took neither of these alternatives, but they adopted the high-handed and unjustifiable course of boycotting the Court.

These were references under sec. 14 of the Legal Practitioners Act by the District Judge of Dacca in the matter of certain Pleadings practising at Dacca in the Court of the District Judge and connected Rules arising therein.

The facts will fully appear from the judgment of Sanderson, C. J.

Mr. B. Chuckerbutty, Counsel and Babu Ram Chandra Mazumdar and Dr. Dwarkanath Mitter and Dr. Sarat Chandra Basak and Babus Gunada Charan Sen, Sarat Chandra Roy Choudhury, Upendra Lal Roy, Bipin Chandra Bose, Prokash Chandra Pakrasi, Jitendra Nath Sen Gupta,

Krishna Kissors Basak, Akshoy Kumar Banerjee, Bhupendra Chandra Guha, Suresh Chandra Talukdar, Rajendra Chandra Guha and Radhikaranjan Guha for the Pleadings.

Mr. B. L. Mitter, the Standing Counsel and Babus D. N. Chuckerbutty and Surendra Nath Guha for the Government.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This was a reference by the learned District Judge of Dacca, dated the 15th August 1921, with which he forwarded a report by the learned Subordinate Judge of the 4th Court of proceedings taken by him under sec. 14 of Legal Practitioners Act, 1879, against one Tarini Mohan Barari, a pleader of that Court. The report of the learned District Judge in material parts was as follows :

“The circumstances that have given rise to these proceedings are similar to those that were the occasion of proceedings against ten other pleaders, regarding whom I have, this day, made a report, and I need not re-state them. It is sufficient to say that Tarini Mohan Barari has complied with the resolution passed by the Dacca Bar Association on the 17th June last, asking its members not to appear as pleaders before Babu Pasupati Bosa.

The Defendant pleader had presented a plaint in the Court of the Subordinate Judge which was found to be defective. The pleader was called to explain the circumstances, but he refused to appear before the Court. The Subordinate Judge accordingly ordered the plaint to be returned. The pleader sent a telegram to his client to inform him of the order, and the latter, having come to Dacca, instructed him to make a petition to the Court for a reconsideration of the order. The pleader, however, refused to do so, and the Plaintiff was compelled to appear in Court

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himself, and later on by a Mukhtear. The Plaintiff was called as a witness in the present proceeding, and his evidence has been discussed by the Subordinate Judge. It appears that he endeavoured to screen the pleader and go back on the first statement he made to the Subordinate Judge; but there can be no doubt that his first statement was the true one. That his interests were prejudiced by the pleader's refusal to appear on his behalf is evident from the fact that the plaint was ordered to be returned and he had to appear on his own behalf before the Subordinate Judge and, later on, by a Mukhtear.

I am of opinion, therefore, that the Subordinate Judge is right in his view that the pleader has been guilty of professional misconduct and should be punished with suspension."

The Plaintiff's statement referred to in the report is as follows:—

"I have come to Dacca on receipt of a telegram from my pleader Tarini Mohan Barari. I had seen him on arrival. He told me that the Court passed an order on my plaint directing its return. I asked him to appear before the Court and move for a reconsideration of the order. He told me that as other pleaders have not been appearing, he would not. I, therefore, throw myself entirely at the mercy of the Court. I asked him why he did not explain before the Court the state of things why the suit was triable before the Court. He answered that he and other pleaders were determined not to appear in this Court. I have been put to severe loss for his conduct."

The notice which was served on the pleader was as follows: "Whereas it appears that you filed a plaint registered as No. 40 of 1921 in a form that it was not entertainable by this Court, that you did not wilfully appear before the Court though repeatedly called, to explain the

circumstances under which it was filed and might be entertainable in this Court, that you did not wilfully appear to take back the plaint though directed to do so or sign the order as required, that you would not wilfully appear before this Court on the request of the Plaintiff for moving the Court for a reconsideration of the order of return passed on account of your neglect of duty and whereas your above conduct amounts to grossly improper conduct in the discharge of your professional duty as contemplated by the Legal Practitioners Act, sec. 14, you are hereby charged as follows:—

1. That the attitude taken up by you towards the Court is insulting and highly improper.

2. That you did not wilfully and without lawful excuse appear before this Court on behalf of the Plaintiff in Suit No. 40 and thus put him wrongfully to considerable difficulties and exposed him to serious harm.

3. That you are guilty of grossly improper conduct in the discharge of your professional duty as contemplated in sec. 14 of the Legal Practitioners Act.

You are hereby given notice that the above charges will be taken into consideration on 16th July next."

The pleader filed a statement containing many contentions. The only paragraph to which, in my judgment, it is necessary for me to refer under the circumstances, which have happened since the hearing of this reference was begun is No. 17 which is to this effect:—

"That this objector believes that the institution of this proceeding against him is the result of an after-thought and is part of a series of proceedings instituted against him and certain other members of the Bar with a view to put them into difficulties and put pressure on those members who are not inclined to appear in

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this Court from a sense of self-respect and out of apprehension of being insulted in Court in consequence of this Court's uniform ill-treatment of the members of the Bar and particularly the gross insult offered to Babu Rabindra Nath Chatterjee, a pleader, by the Court on the 15th June last and as such those proceedings are not *bonâ fide*."

It appears that on the 15th June 1921, an incident had occurred in the Court of the Subordinate Judge in which a pleader, Rabindra Nath Chatterjee, was concerned.

It is not necessary for me to enter into the details of that incident at the present moment: it is sufficient to say that it was contended on the one side that the learned Subordinate Judge had behaved rudely towards the pleader, while on the other side it was said that the pleader would not abide by the order which the learned Judge had made and that he persistently and improperly interrupted and disturbed the learned Judge while he was engaged in hearing arguments in another case. I do not intend to express any opinion as to the merits of this incident, and I have purposely abstained from describing the details thereof.

It appears that on the 17th June 1921, a resolution was passed by the Bar Association, which was as follows:—

"Considering the fact that the insult inflicted by Babu Pasupati Bose, fourth Subordinate Judge, on Babu Rabindra Nath Chatterjee is really an insult to the whole Bar, it is resolved that (A) Criminal case and (B) Civil suit claiming damages not exceeding Rs. 10,000 be instituted against the Subordinate Judge and the whole expense be borne by the Bar Association and that members be individually requested not to appear before him any more."

There is no doubt that it was in consequence of this resolution that the pleader, who is mentioned in the reference, and

other pleaders refused to appear before the learned Subordinate Judge.

After the learned Standing Counsel had opened the facts of the reference and the hearing had proceeded for sometime, the Court intimated to the learned Vakil for the pleaders that, even assuming that the learned Subordinate Judge was in the wrong with reference to the above-mentioned incident, as to which the Court expressed no opinion, that could not be any justification for the conduct of the pleaders. The result was that the hearing of the reference was adjourned for a week in order that the learned Vakil appearing for the pleaders concerned in this and the other references might consult their clients, many of whom were not then present in Court. At the adjourned hearing the learned Vakil appearing on behalf of the pleader in this reference expressed his client's regret for the course which he had adopted, stating that he recognised that if there was a cause of complaint against the learned Subordinate Judge, a representation should have been made to the High Court. At the same time the learned Vakil asked that an enquiry should be held by this Court into the matter. It was pointed out that this was a matter for the Chief Justice and the Judges of the Court and not for the Bench sitting to hear the reference, and that as far as this Bench was concerned, the expression of regret could not be accepted, unless it was unconditional and unqualified. The learned Vakil then intimated that his expression of regret on behalf of his client was intended to be complete and unconditional.

The learned Vakil appearing for the other pleaders, concerned in this reference No. 6 of 1921, which involved the miscellaneous cases Nos. 23, 26, 41 45, 46, 29, 37, 22, 31, 25 and 27 of 1921, and the learned Counsel appearing for the pleaders in reference No. 14 of 1921 associated them-

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selves with the expressions of regret which had been made by the learned Vakil. We then intimated that in view of these expressions of regret, we did not think it necessary to proceed further with the hearing of the references and our judgment was reserved.

Having regard to the unqualified expression of regret which have been made to the Court on behalf of the pleaders in question, we do not consider it necessary to take any steps upon the reference.

This however must not be misunderstood. It must not be assumed that the Court regards the action of the pleaders as a matter of little importance.

On the contrary we regard it as a very serious matter. The pleader deliberately abstained from attending the Subordinate Judge's Court and took part in a concerted movement to boycott the learned Judge's Court, a course of conduct which cannot be justified or tolerated.

The pleaders had duties and obligations to their clients in respect of the suits and matters entrusted to them, which were pending in the Court of the learned Subordinate Judge.

There was a further and equally important duty and obligation upon them, *viz.*, to co-operate with the Court in the orderly and pure administration of justice. By the course which they adopted, the pleaders violated and neglected their duties and obligations in both these respects.

We desire to make it clear that such conduct cannot and will not be tolerated. In this case if the pleaders thought they had a just cause of complaint, they had two courses open to them: to make a representation to the learned District Judge or to the High Court. They took neither of these alternatives, but they adopted the high-handed and unjustifiable course of boycotting the learned Subordinate Judge's Court.

We have decided to take no further action on these references in the hope and belief that the warning, which we now give, will be sufficient to prevent any recurrence of conduct of a similar nature.

At the same time we desire to make it clear that if our warning does not have the desired effect, and if such conduct, as I have referred to, is repeated, the consequences may be of a serious nature to those concerned.

The request for an enquiry, which has been made, will be laid in due course before the Court. In this connection it is desirable to add that the learned District Judge did hold an enquiry on his own initiative, the result of which he reported to the High Court, and it is sincerely to be regretted that the efforts, which he made in the interests of the administration of justice to bring about an amicable settlement of the matter, did not meet with success.

The Rules, which are now pending before this Court, will follow the event of the Rule, which we have already disposed of, and will be discharged.

We suggest that the proceedings, which are pending in the lower Court in connection with these matters, should be dropped provided that an expression of regret is made by the parties concerned.

It is of course a condition of the course taken by this Court in these proceedings that the pleaders, if they desire to continue practising in their profession, will forthwith resume work in the Court of the learned Subordinate Judge.

WOODRÖFFE, J.—I agree.

MOOKERJEE, J.—I agree.

J. N. R.

Rules discharged.

[CIVIL REVISIONAL JURISDICTION.]

REF. No. 13 of 1921.

WOODROFFE, J.	} BIDHU RANJAN MOJUM-
GREAVES, J.	
B. B. GHOSE, J.	
1922,	
17, January.	DAR
	v.
	MANGAN SARKAR.

Indian Stamp Act (II of 1899), sec. 2, sub-sec. 5, cl. (6)—Attestation, what is—A document written by person other than executant, if “attested” by the writer, who did not sign as attesting witness.

The attestation referred to in sec. 2, sub-sec. (5), cl. (6) of the Indian Stamp Act means attestation on the face of the instrument.

REFERENCE UNDER STAMP ACT (1) and JAGANNATH KHAN v. BAJRANGI DAS AGARWALLA (2) referred to.

This was a reference under sec. 60 of the Indian Stamp Act made by the Officiating Subordinate Judge of Pabna (Mr. Satis Chandra Basu), dated the 15th September 1921.

The facts of the case will appear fully from the judgment of the Officiating Subordinate Judge, which was as follows:—

“As I feel some doubt as to the amount of duty to be paid in respect of an instrument, I have the honour to refer it under sec. 60 of the Indian Stamp Act for the decision of the Hon’ble High Court.

The instrument purports to be a promissory note for a loan of Rs. 71 repayable on demand to the creditor, without the addition of the words ‘or order,’ or ‘or bearer,’ and is attested by the writer (a person other than the executant), but it has been stamped with an adhesive stamp of one anna only. It is dated 26th Shaban 1325 B. S.

It has been proved before me that the said writer was actually present at the time of the execution of the document and saw the execution. Thus according to the rulings of the High Court, *Raj Narain*

in v. Abdur Rahimi (3), and *Jagannath Khan v. Bajrang Das Agarwalla* (2), this writer is to be regarded as an attesting witness although he did not describe himself as such, but described himself as the writer.

Under sec. 2, sub-sec. (5), cl. (6) of the Indian Stamp Act ‘any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another’ is a bond. According to this definition the instrument in question would be a bond and ought to have been stamped as such. This has been so held in the cases among others, in *Reference under sec. 46, Stamp Act* (4), *Reference under Stamp Act, sec. 49* (5) and *Venku v. Sitaram* (6).

But what raises the doubt in my mind is the recent amendment of the Negotiable Instruments Act (XXVI of 1881) by Act VIII of 1919. By sec. 3 of the latter Act, the definition of a Negotiable Instrument as given in the former Act is slightly altered, and explanations are added, of which Explanation (i) runs thus:—

‘A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.’

Thus it would appear that a promissory note expressed to be payable to a particular person, without the addition of any other words of restriction or generalisation, should be regarded as a promissory note payable to that person or to his order. If this view be accepted then the instrument now in question is by implication a promissory note payable to order, and its

(2) I. L. R. 48 Cal. 61 (1920).

(3) 5 C. W. N. 454 (1901).

(4) I. L. R. 8 Mad. 87 (F. B.) (1884).

(5) I. L. R. 10 Mad. 158 (F. B.) (1887).

(6) I. L. R. 29 Bom. 82 (1904).

(1) I. L. R. 17 All. 211 (F. B.) (1895).

(2) I. L. R. 48 Cal. 61 (1920).

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attestation by a witness would not change its character or make it a bond, in *Reference under sec. 46, Stamp Act* (4). It is to be noted that by sec. 2 (22) of the Indian Stamp Act, a promissory note under that Act means a promissory note as defined in the Negotiable Instruments Act and includes some other things. But it is also to be noted that the above explanation given in the Amending Act VIII of 1919 is appended to the definition of a negotiable instrument, and not to the definition of promissory note given in sec. 4 of the Negotiable Instruments Act. So I entertain some doubt as to whether the above amendment of the Negotiable Instruments Act is applicable to cases under the Stamp Act.

I also entertain some doubt as to whether the above amendment is applicable to instruments executed before this Amending Act (VIII of 1919) was passed. The instrument in the present case was executed on 26th Sraban 1325 corresponding to 11th August 1918, while Act VIII of 1919 received the assent of the Governor-General on the 19th March 1919.

As fiscal enactments are to be liberally construed in favour of the subject, I am inclined to think that the Plaintiff producing and relying on the instrument in question should be allowed to take advantage of the amendment made in the Negotiable Instruments Act, and that this instrument should not be treated as a bond. As however I entertain doubts on the point, and the matter is of general importance and frequently comes before Courts, I beg to refer the following points for the decision of the Hon'ble High Court :—

“(1) Whether an instrument attested by a witness containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to a person, with-

out the addition of the words ‘or order,’ or ‘or bearer,’ and without any words prohibiting its transfer, comes within the definition of a bond as given in the Indian Stamp Act, after the amendment of sec. 13 of the Negotiable Instruments Act (XXVI of 1881) and addition of the Explanation (i), by sec. 3 of Act VIII of 1919.

(2) If the above question be answered in the negative, whether the answer will be applicable to an instrument executed before Act VIII of 1919 came into operation, i.e., before 19th March 1919?

I beg to add that pending the decision on this reference the Plaintiff in this suit has preferred to pay the stamp duty and penalty as on a bond and get the instrument admitted in evidence, expecting to get a refund of the same from the Collector if the question be decided in his favour.”

Babus Dwarka Nath Chakravartty and Surendra Nath Guha for the Government.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—This is a Reference under sec. 60 of the Indian Stamp Act. No appearance has been made by the person liable to pay the stamp. The learned Government Pleader has rightly pointed out to us that as the penalty has already been levied, it may be a question whether the learned Judge was right in making this reference; but seeing that the learned Judge states in his reference that “pending the decision on this reference the Plaintiff in this suit has preferred to pay the stamp duty and penalty,” I think that the inference is that before the penalty was levied, the learned Judge had determined to make this reference; and all that happened was that the reference was actually framed later on. Upon the facts submitted to us I think that the attestation referred to in sec. 2, sub-sec. (5), cl. (6) of the Indian Stamp Act means

BIDHU RANJAN MOJUMDAR v. MANGAN SARKAR.

attestation on the face of the instrument. In this connection may refer to *Reference under Stamp Act* (1). The decision in the case of *Jagannath Khan v. Bajrang Das Agarwalla* (2) to which the learned Judge has referred, is not, I think, in point. It does not hold that the person who signs as writer of an instrument must be regarded as an attesting witness, but that a person who is present and witnesses execution of a mortgage bond and whose name appears in the document though he is therein described merely as a writer of the deed is a competent witness to prove the execution of the mortgage bond. Inasmuch as the words "attested by the witness" refer to attestation on the face of the instrument the findings on the evidence are in my opinion irrelevant for the purpose of determining the stamp payable. On this view of the case it is unnecessary to decide any other question to which the learned Judge has referred and I would answer the reference by saying that the stamp payable on the document in question was one anna and therefore the document was properly stamped.

(GRIEVES, J.—I agree.

GHOSE, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 778 of 1920.

HARISH CHANDRA SAHA,

Defendant No. 1,

Appellant,

v.

PRAN NATH CHAKRA-

BARTY and ors.,

Respondents.

PANTON, J.
1921,
15, July.

Suit for declaration of public right of way, if can succeed without proof of special damage—Advocate-General's permission under sec. 92, C. P.

(1) 1 L. R. 17 All. 211 (F. R.) (1895).

(2) 1 L. R. 48 Cal. 61 (1920).

Code, if necessary, where permission of Court is taken under Or. I, r. 8—Limitation Act (IX of 1908), sec. 23, Arts. 120 and 144, applicability of, in such suit.

Plaintiff sued for declaration that a village path was a public way and sought relief for himself and his fellow villagers. The permission of the Court was taken under Or. I, r. 8, of the C. P. Code. The suit was decreed and the decree confirmed on appeal. The Appellate Court found that the Plaintiff suffered special damage, and the finding was challenged in second appeal:

Held—That the question of whether the Plaintiff suffered special damage or not did not arise, because a suit for a declaration that a pathway is a village pathway can succeed without proof of special damage.

HARISH DAS v. CHANDRA KUMAR GUHA (1) followed.

The suit was one to which Or. I, r. 8, C. P. Code was appropriate and the Court's permission having been obtained under that rule, recourse to the Advocate-General was not necessary.

Art 144, and not 120 of the Limitation Act, applied to the suit. And in either case the Plaintiff could have recourse to sec. 23 of the Limitation Act.

This was an appeal against the decree of Babu Mati Lal Roy, Subordinate Judge, 3rd Court of Zillah Tipperah, dated the 8th of December 1919, affirming the decree of Babu Gobinda Chandra Chakrabarty, Munsif, 1st Court at Comilla, dated the 30th of September 1918.

The facts will appear from the judgment.

Dr. Sarat Chandra Basak and Babu Bhagirath Ch. Das for the Appellant.

Babu Gopal Chandra Das for the Respondents.

(1) 23 C. W. N. 91 (1918).

HARISH CHANDRA SAHA v. PRAN NATH CHAKRABARTY.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by a Defendant against the judgment and decree of the Subordinate Judge of Tipperah affirming in appeal those of the Munsif of Comilla. The suit was one for the declaration of a right of way and for a mandatory injunction on the present Appellant to remove certain obstructions on the pathway in question. The suit has been decreed in the Plaintiffs' favour.

It is argued in the first place that the learned Subordinate Judge is wrong in his finding that the Plaintiffs have suffered special damage. The plaint sets out that the way is a public way and Plaintiff seeks relief for himself and his fellow villagers of Bakrabad. The trial in the Court of first instance was on the footing that the right of way claimed was a public one and not one peculiar to the Plaintiffs. The learned Munsif observes : " The point for trial would therefore be whether the portion of the suit land covered by stations 66-19 to 18-25 is the public *gopath* or not," and he decides that " it is no doubt a *gopath* used by the men of the locality and they have the right to pass with plough " This finding was affirmed in appeal, the judgment of the learned Subordinate Judge being " that the Plaintiffs have succeeded in proving the existence of the public way over the disputed land." On these findings the question of whether the Plaintiffs have or have not suffered special damage does not arise. I may mention that it has been held by this Court in *Harihar Das v. Chandra Kumar Guha* (1) that a suit for a declaration that a pathway is a village pathway and for an injunction of the kind now sought can succeed without proof of special damage.

The second point urged before me is

that there was in fact no permission under Or. I, r. 8. Now the finding of the Munsif, whose permission it was which was necessary under this rule, is " the Plaintiffs have taken permission of the Court to sue for the public." That finding was not attacked in the Court of appeal below. The learned Subordinate Judge sets out clearly what the points were which were urged before him and this is not one of them. It is plain moreover, from his judgment that the correctness of this particular finding was never challenged and I must now take it as a fact that the Munsif did give the permission referred to in Or. I, r. 8. It has been suggested in this connection that the suit should fail in the absence of the consent of the Advocate-General given under sec. 92 of the Code of Civil Procedure. But the suit is in my judgment one to which Or. I, r. 8 is appropriate and the Court's permission having been obtained under that rule, recourse to the Advocate-General was unnecessary.

In the third place it is argued that the suit was barred by limitation since it was not instituted until some seven years after the creation of the obstruction complained of. It is said that the suit is governed by Art. 120. Both Courts have held that the period applicable is 12 years, presumably under Art. 144. This is, in my view, the article which applies to the suit. But in either case the Plaintiffs could, in the particular circumstances, have recourse to sec. 23 of the Limitation Act, with the result that the suit would be within time.

Fourthly it was argued that the report of the jury appointed under sec. 133 of the Code of Criminal Procedure was wrongly received in evidence. There is no substance in this contention, it being Appellant himself who adduced this particular document in evidence.

Finally it is contended that the learned

(1) 23 C. W. N. 91 (1918).

HARISH CHANDRA SAHA v. PRAN NATH CHAKRABARTY.

Munsif was wrong in saying that the Defendants admitted the existence of a public pathway at the place in question. It is no doubt correct to say that there was no admission of the existence of a pathway of the kind claimed by the Plaintiffs. That the admission was a qualified one and that the learned Munsif took it so to be is plain from his observation that the admission was :—"Subject only to the dispute of the right of passage of men with ploughs, etc., and the bari of the Defendant No. 1 and the other Defendants." The contesting Defendant did not renege from this admission in the Court of the Subordinate Judge who defines the position clearly in his judgment where he says : "That there was a village path there is not disputed. In fact it was admitted by the present Appellant in the case under sec. 133 Cr. P. Code. What he then contended and now contends is that it was a path some three cubits used for only passage of men of the village." There is no ground for the interference of this Court in second appeal in this part of the case. The learned Vakil for the Appellant has connected with this part of his appeal a contention founded on a sentence in the judgment of the Court of appeal below which runs :—"It is very probable that only when the *gopath*" (that, is to say, a pathway other than the pathway in suit) "became impassable for the greater part of the year, the public began to use the *gopath* now in suit." The argument is that if this be so the right of way over the path in suit existed only for such time as the other path was impassable. But the observations of the learned Subordinate Judge refer, as the context shows, to events long since past, and in no sense amount to a finding as to the existing state of affairs.

The appeal fails and is dismissed with costs.

J. N. R.

Appeal dismissed.

(CIVIL REVISIONAL JURISDICTION.)

REF. NOS. 4, 7, 8 AND 9 OF 1921.

SANDERSON, C. J.

WOODROFFE, J.

MOOKERJEE, J.

1922,

6, February.

In the matter of
EMPEROR, Petitioner,
v.
RAJANI KANTA BOSE
and ors., Pleaders,
Opposite Party.

Legal Practitioners Act (XVIII of 1879), sec. 13, cls. (b) and (f), 14—Vakalatnama, acceptance of, effect of—Pleader if bound to attend to case at every stage—Special contract, proof of—Onus—Fees, non-payment of, if ground for Pleader discharging himself—Justifying reasons for non-attendance—Proper procedure for Pleader discharging himself—Reasonable notice to client and permission of Court, if necessary—Civil Procedure Code (Act V of 1908), Or. III, rr. (1) and (4), cls. (1) and (2)—Pleader declining to attend Court in deference to a resolution passed at a public meeting to cease all public work to express dissatisfaction with public administration—Duty towards client and to Court—Pleader's position and functions, nature of—Evidence Act (I of 1872), sec. 157—Petition of client if admissible to prove charge against Pleader, of professional misconduct—Warning to Pleader, for first offence.

In May 1921, there was considerable excitement in the town of Noakhali due to sympathy for some tea garden coolies stranded at a neighbouring place called Chandpur. At a public meeting a resolution was passed that a complete hartal, i.e., cessation of public activity of every description, should be observed as an expression of the indignation of the community. At a second public meeting it was resolved that those who would not follow the previous resolution should be punished with social boycott or in some equally deterrent manner. Subsequently an informal meeting was held in the Bar Library and the opinion was expressed by the majority that it was not safe to disregard the public feeling which ran very high. The Pleaders, with the exception of two, accordingly ceased to attend Courts during the period of the hartal from the 23rd

IN THE MATTER OF EMPEROR P. RAJANI KANTA BOSE.

May to 3rd June. The consequence was that cases, when they were taken up for disposal, had either to be postponed, or decided *ex parte* or dismissed for default. Proceedings were then drawn up against several Pleaders who had filed vakalatnamas in those cases, for grossly improper conduct under sec. 13 cl. (b) of the Legal Practitioners Act. The Pleaders filed written explanations and the clients were examined as witnesses. In one case, a petition filed in the suit by the client on the date on which his pleader failed to appear, in which he stated that the Pleader had declined to attend Court on account of the hartal was admitted in evidence. The Pleaders stated *inter alia* that they were afraid to go against public opinion and preferred to bow down to the popular will, that they had not been paid fees for the dates on which they did not appear and that they had not agreed nor were bound to appear in Court on all the dates fixed for the hearing of the suits:

Held, *per* SANDERSON, C. J.—That a vakalatnama was much more than a mere authority to act, and it was the duty of a Pleader who had accepted a vakalatnama and had been asked to go to Court to do so to protect his clients' interests, unless it was proved that his obligations towards his client, entailed by the acceptance of the vakalatnama, were limited by a special arrangement, accompanying the acceptance of the vakalatnama; but no such special arrangements were proved by the Pleaders, upon whom the onus of proving it lay.

Quære:—Whether a Pleader can direct himself of his duty arising from the acceptance of the vakalatnama without the leave of the Court:

Held—That, in any case, the Pleaders were bound to give the clients reasonable

notice so as to afford the clients reasonable opportunity of obtaining other legal assistance.

In the absence of any proof that any fee was asked or that there was any arrangement that a fee should be paid before the Pleaders would attend Court, the mere fact that no fees were tendered or paid was no justification for a Pleader's refusal to attend to his client's further interests.

Pleaders have a duty not only towards their clients but also towards the Court and it was clearly their duty to co-operate with the Court in the orderly and pure administration of justice. They would not be justified in allowing their fear of humiliation and inconvenience to override their duty to their client and to the Court and that was no adequate reason for abstention from Court:

Held, however, on the facts—That the Pleaders willingly acquiesced in the boycott of the Courts and thereby lent support to the movement, which was calculated to paralyse the administration of justice.

Therefore the Pleaders are guilty of grossly improper conduct within the meaning of cl. (b) of sec. 13 of the Legal Practitioners Act, and of such misconduct as would bring their case within cl. (f) of the section.

The contents of the petition in the suit filed by the client were admissible in evidence under sec. 157 of the Evidence Act in corroboration of the evidence which he had already given at the time when his attention was directed to the contents of the petition and when he said the contents were true to his knowledge.

Per WOODROFFE, J.—That it was open to any practitioner for reasons personal to himself to refuse to practise in a particular Court or before a particular Judge. But he can adopt this course either by refusing

IN THE MATTER OF EMPEROR T. RAJANI KANTA BOSE.

briefs in such Court, or before such Judge or, if he has accepted a brief or vakalatnama, by first properly discharging himself on due notice to the client and in the latter case to the Court. But concerted action by a whole body of legal practitioners to boycott a Judge or Court in protest against an alleged wrong of one of its members or in respect of its conduct in the administration of justice generally is not permissible because the Bar cannot constitute itself an authority to adjudicate on such grievance and its duty is not to impede the administration of justice by collective abstention from Court, but to seek relief by representation to the High Court.

It would not be possible to charge a legal practitioner with grossly improper conduct, whatever his liability to his client might be, if he omitted to carry out his duty to his client by reason of his genuine fear of any real and substantial injury, physical or otherwise, to himself or family. Nor would it make any difference if such fear were, in fact, unfounded if, in fact, it was sincerely entertained. But in these cases such risk or fear was not the operative cause on the minds of the Pleaders in inducing them not to attend. They bowed to the popular will not because they were afraid of it but because they approved of it.

That these proceedings were quasi-criminal proceedings in the sense that they might result in penalties, and not in the sense that all rules of procedure applicable in criminal trials are necessarily in force in a quasi-criminal proceeding. It was open to the Pleader to say nothing or to give no explanation, but if the Pleader did offer an explanation the court might take it into account in ascertaining whether the charge was made out. The onus undoubtedly was on the party making the charge.

That the previous petition of the client was evidence of a step taken in the proceeding and would be corroborative to the extent that there was evidence on the record which it might corroborate.

If a Pleader has accepted a vakalatnama in general and common form, the onus of proving any special contract accompanying the acceptance of the vakalatnama is on the Pleader. If again, it is alleged that the Pleader has discharged himself, he must show that he has properly done so with sufficient notice to his client and with intimation to Court.

If a Pleader stipulates for payment of fees before he does any work, he is not bound to do such work without such payment. If, however, he accepts a vakalatnama without such stipulation, he must proceed to represent him even though unpaid his fees until either his client discharges him or he properly discharges himself.

Per WOODROFFE and MOOKERJEE, JJ.—That the cases fall under both cls. (b) and (f) of sec. 13 of the Legal Practitioners Act, i.e., under cl. (b) in so far as they involved neglect of duty towards the client in accepting vakalatnama and without excuse not fulfilling the duties involved in such acceptance; and under cl. (f), in so far as the practitioners' conduct was directed against the Court by abstention from attendance on account of the hartal.

Per MOOKERJEE, J.—In view of the definite provisions for appointment and discharge of Pleaders [Vide Or. III, rr. 1 and 4 (1) and 4 (2), C. P. C.] a Pleader who has accepted a vakalatnama and filed it in Court is ordinarily bound to appear and conduct his case, in the absence of an agreement to the contrary. It is conceivable that the vakalatnama may not set out explicitly all the terms of the engagement between the Pleader and his client, and amongst these there may be implied terms

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sanctioned by well-known and well-established usage of the profession.

Re, GOPINATH MUDDUCK (1) and RAM KOER v. PUNA KOER (2) referred to.

The acceptance of a vakalatnama with the usual terms, which is filed by the Pleader in Court, prima facie places him under an obligation to appear and act on behalf of his client, and if he fails to do so, he must be ready to justify his conduct by proof that the client had failed to fulfil an implied term of the engagement.

MUNI v. VENKATA (3), KAILY v. CARAPIET (4), Re, A SOLICITOR (5) and SATISH v. SARADA (6) and several other cases referred to.

When a Pleader has accepted a vakalatnama with or without implied conditions, his liability continues, till he has discharged himself by recourse to the appropriate procedure. But this is not a matter solely between the Pleader and his client. The appointment of a Pleader when filed in Court with his acceptance continues in force until determined with the leave of the Court by a writing signed by the client or the Pleader as the case may be.

ATUL v. LAKSHAN (13) and PRABHULAL v. KUMAR KRISHNA (14) and several other cases referred to.

It is further well-settled that a legal practitioner must always give a reasonable notice of his withdrawal from the case to his clients.

The failure of a Pleader to appear to conduct the case before he has discharged himself in the manner provided by law, unless such failure can be justified, renders him liable to disciplinary action by the Court. Overriding pressure of circumstances beyond the control of the Pleader may be a reason justifying a failure to attend to a case, but to avail himself of it, it is essential that the Pleader should in full appreciation of his duty as the representative of his client and as an officer of the Court, have been sincerely anxious to protect the former and assist the latter.

The relation of Pleader and client involves the highest personal trust and confidence, so much so that it cannot be delegated without consent. A Pleader is more than a mere agent or servant of his client. He is also an officer of the Court and as such owes the duty of good faith and honourable dealing to the Court before which he practises his profession.

MURAGA v. RAMASAMI (22) referred to.

The practice of the law is in the nature of a franchise from the State conferred only for merit and may be revoked whenever misconduct renders the Pleader holding the license unfit to be entrusted with the powers and duties of his office.

Any attempt on the part of a Pleader to boycott the Courts or to obstruct the administration of justice by a resort to any form of device constitutes ground for disbarment or suspension.

Proceedings under sec. 14, Legal Practitioners Act, are not of a criminal nature. They are undoubtedly a judicial proceeding. They are neither civil suits nor criminal prosecutions, but special proceedings resulting from the inherent power of the Courts over their officers.

(1) 14 W. R. 7 (1870).

(2) 3 Shome 75 (1880).

(3) 1 L. R. 37 Mad. 238; s. c. 23 M. L. J. 477 (F. B.) (1912).

(4) 2 Shome 124 (1878).

(5) 4 B. L. R. 29 (P. C.) (1870).

(6) 18 C. L. J. 432 (1891).

(13) 1 L. R. 86 Cal. 609 (1909).

(14) 20 C. W. N. 437; s. c. 23 C. L. J. 326 (1916).

(22) 22 Mad. L. J. 284 (1912).

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The form of the proceeding, however, is not of controlling importance, so long as the essentials of fair notice and opportunity to be heard are present. The essence of the matter is that the Pleader must be allowed an opportunity of making his defence. It is not obligatory on the Pleader to submit a written defence or to be present at all.

But if he submits a written statement in answer to the charge, the Court is bound to take it into consideration and may draw such inference as may legitimately arise from its contents. In such a case it is not obligatory on the Court to rule out all conceivable hypothetical grounds which could have but have not been set up in answer to the charge.

GOVERNMENT PLEADER *v.* BHAGUBAI (26) and other cases referred to.

These were references under sec. 14 of the Legal Practitioners Act (XVIII of 1879) made by the District Judge of Noakhali, S. C. Ghosh, Esq., dated the 3rd August 1921.

The facts will fully appear from the judgments.

Dr. S. C. Bysak, Babus Bepin Chandra Bose and Radhika Ranjan Guha for the Pleaders in Reference No. 4.

Dr. S. C. Bysak, Babus Bepin Chandra Bose, Radhika Ranjan Guha and Subodh Chandra Roy Choudhury for the Pleaders in Reference No. 7.

Babus Monmotha Nath Mukerjee, Bepin Chandra Bose and Radhika Ranjan Guha for the Pleaders in Reference No. 8.

Babus Amarendra Nath Bose, Bepin Chandra Bose and Radhika Ranjan Guha for the Pleaders in Reference No. 9.

Mr. B. L. Mitter, Standing Counsel and Babus D. N. Chakraborty and Surendra Nath Guha, Government Pleaders for the Government.

The JUDGMENT OF THE COURT was as follows :—

Reference No. 4.

SANDERSON, C. J.—In this reference it appears that the Pleader D. P. Chakraborty was retained to make an application on one day only, (in the absence of the Pleader who filed the appeal).

This duty he duly performed and his retainer was discharged.

He was not further retained in the case, and consequently in our opinion there was no professional misconduct on his part.

In the case of D. P. Chakraborty therefore, the reference is discharged.

The case of R. K. Bose is different.

He was the Pleader for the Appellant whose appeal was fixed for hearing on the 2nd June 1921. The Pleader did not appear. Notice under the Legal Practitioners Act was served upon him, but he did not appear to show cause.

He apparently was present at the public meeting where the *hartal* was declared and took part in moving some resolution.

The resolution involved a boycott of the Courts by the Pleaders.

In his case there can be no doubt that he deliberately took part in the '*hartal*' of the Pleaders. We have however been informed that R. K. Bose has ceased to practise as a Pleader and has not taken out a certificate this year.

Consequently, in our judgment, it is not necessary for us at present to enquire further into the case of R. K. Bose, or to take any steps in connection with this reference.

Reference No. 7.

SANDERSON, C. J.—This is a reference by the learned District Judge of Noakhali forwarding a report made by the Officiating Subordinate Judge under the Legal Practitioners Act 1879 with respect to two Pleaders of that Court, Rajani Kanta Nag and Preo Nath Roy Chowdhuri.

IN THE MATTER OF EMPEROR v. RAJANI KANTA BOSE.

The Subordinate Judge reported that the Pleaders committed grossly improper conduct in the discharge of their professional duty by not attending Court on the date in question and neglecting to do the necessary work on behalf of their client in the suit mentioned in the report on the 25th May 1921 though asked by their client : he further reported that they were guilty of misconduct within the meaning of sec. 13 (f) of the Legal Practitioners Act. The learned District Judge confirmed the report of the learned Subordinate Judge.

The charges against the Pleaders were in similar terms and the charge against Rajani Kanta Nag may be taken for the purpose of ascertaining the terms thereof : That charge is as follows :—"Whereas you being a Pleader of this Court joined the *hartal* and Non-co-operation movement and did not attend the Court along with other members of the local Bar in furtherance of the common object of the said movement and the boycott of Courts from 23rd May 1921 to 3rd June 1921 and whereas you were engaged as a Pleader for the Defendant in the marginally noted

suit pending in this Court that was fixed for hearing on the date mentioned against it and whereas you wilfully neglected your client's work and acted to the prejudice of his interest by absenting your-

self from the Court on that date you thereby committed grossly improper conduct in the discharge of your professional duty by neglecting your client's work and acting to the prejudice of his interest [sec. 13 (b)] and you have further been guilty of misconduct by joining the said movement started to boycott Courts and paralyse the work of the Courts and absenting yourself from the Court on those dates (23-5-21 to 3-6-21) without any lawful excuse."

On the hearing of the charge the Pleaders filed written explanations. Rajani Kanta Nag, among other allegations, said that he was only instructed to file the written statement along with several other Pleaders for the Defendant No. 2, on the 17th February 1921, and that since the filing of the written statement the said Defendant neither consulted him on any date about his case nor made any *tadbir* for him. Further allegations are contained in paras. 3, 6, 9, 10 and 13, which are as follows :—

"(3) That on 25th May 1921 the said Defendant No. 2 did neither pay me any fees nor did he even come to me to ask for any legal advice, nor did he instruct or ask me to make any *tadbir* in the case nor did the Defendant No. 2 even inform me that his case was fixed for hearing on 25th May 1921 and that I did not know what *tadbir* he actually made on that date. This Defendant No. 2 did not enter his case in my Sherista, he himself took all the previous dates and looked after the case."

"6. That in the matter of not attending Courts during *hartal* there was no combination or common object amongst the members of the Bar, that I did not, with a view to the furtherance of the alleged common object of the *hartal* or Non-co-operation movement, absent myself from Court from 23rd May 1921 to 3rd June 1921. No such *hartal* or Non-co-operation movement was started by me or the Local Bar : Non-co-operation movement was started long before the period in question and it has no connection with my absence from Court."

"9. That consequent upon the cooly affairs at Chandpur public feeling in this town ran so very high that the people, in one voice, resolved in sympathy for them to suspend all works for a time and desired the Pleaders, the Mukhtears, Merchants, Ghariwallas and others to follow their decision under threat of social punishment

O. C. 1093 of
1920.

Bhagoban Chandra
Rei Choudhury, Defendant
No. 2.
25-5-21.

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and humiliation and that it might be in obedience to this resolution that none of my clients asked me to appear in Court from 23rd May 1921 to 23rd June 1921."

"10. That the resolution referred to above was enforced so strictly that no gentlemen could dare disobey it with impunity, that men of position and honour had to suffer much inconvenience and humiliation during this period and that it was, in no way, possible for me to attend Court against such strong current of public opinion."

"13. That as a matter of fact I did not join any Non-co-operation movement, I am not a member of any Congress Committee and I do not mix in any politics."

Preo Nath Roy Chowdhuri's written explanation contained the following paragraphs :

"1. That Non-co-operation movement had nothing to do with the general *hartal* declared by the Noakhali public out of sympathy for tea garden coolies stranded at Chandpur. The Non-co-operation movement was started long before the said *hartal* and has no connection with the keeping away from the Court by your Petitioner."

"2. That a general *hartal* in all departments of public life was decided upon in a public meeting held at Noakhali and that no one could safely ignore or disregard the resolution of the indignant public and in fact the clients did not come to me on account of *hartal* during those days. Your Petitioner also considered it safe and desirable to bow down to the popular will when public feeling was running so very high and so your Petitioner did not attend Court during the period of the same *hartal*, that is, from 23rd May 1921 to 3rd June 1921."

"3. That in the matter of not attending the Court during the *hartal* there was no combination or common object among the

members of the Bar and in fact the Bar Association passed no resolution at all in the matter."

"4. That it is not correct to say that the Petitioner joined the Non-co-operation movement alleged to have been started to boycott Courts and paralyse their work. As a matter of fact your Petitioner had been and is working as Pleader both before and after the *hartal*."

"5. That the client in question did not instruct me to attend the Court on the date fixed nor did he pay me for the same."

"9. That in O. C. Suit No. 1083 of 1920, pending in your Honour's Court, I was only instructed to file objection against the Plaintiff's prayer for temporary injunction and to take time for filing written statement on 11th January 1921; that since the filing of that objection I was not further instructed to do any other work for him, that on 25th May 1921 the said Defendant No. 2 did not pay me any fees nor did he even ask my legal advice."

"10. That Defendant No. 2 did not even inform me that his suit was fixed for hearing on 25th May 1921, he himself making *tadbir* in his cases and having not entered this case in my Sherista."

These two Pleaders and two others accepted a *vakalatnama* from the Defendant No. 2 in a Suit No. 1083 of 1920 on the 11th January 1921. The hearing of the suit was fixed for the 25th May 1921. Neither of the Pleaders attended the Court on that day, and the Defendant No. 2 filed a petition asking for a month's adjournment on account of the *hartal* which had begun on the 23rd May 1921 and which continued until the 3rd June 1921, and in consequence of which the Pleaders did not attend the Courts.

The petition is as follows:—"To-day is the date of the above-mentioned suit. To-day I went to Pleader's *basha* with copy of issue to file list of witnesses;

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making *hartal* in the course of Non-co-operation no Pleader looked into any papers. I pray for one month's adjournment in order to enable my Pleaders to consult with reference to suit papers as to what evidence should be adduced on my behalf and to file list of witnesses. Be it known that for the reasons stated above none of the Pleaders not having signed the petition I file this petition signing it myself. Dated 25th May 1921."

The Defendant when cross-examined said that Rajani Mitter was his retained Pleader: and that he did not go to the houses of the two Pleaders, concerned in this reference nor to the house of his Pleader, meaning thereby, as I understand, Rajani Mitter, and that he did not instruct the two Pleaders to work for him on the 25th May 1921.

The learned Judge however said that he was unable to accept this evidence, as the witness was in his opinion, evidently trying to save the Pleaders; and he found as a fact that the Pleaders were asked to do the necessary work on behalf of the Defendant No. 2 on the 25th May 1921.

I see no reason for disagreeing with this finding of fact, and in my judgment it must be taken for the purpose of this case that the Pleaders were asked to attend Court on the 25th May 1921 and that they refused to do so. The question therefore arises whether they were justified in so refusing. I have no doubt that the reason for their refusal was the *hartal* which was then in force. On account of an incident in connection with some coolies at Chandpur, resolutions had been passed at a public meeting in Noakhali, one of which was to the effect that the Pleaders should not attend the Courts. In consequence of this the Pleaders in a body, with one or two exceptions, abstained from attending the Courts.

Each of the two Pleaders, as already

mentioned, stated in his explanation that he had been instructed only in respect of a particular matter, in the suit and it was argued that they were under no duty to attend the Court on the day in question.

I cannot accept that contention. The Pleaders had accepted the *vakalatnama* and it is proved, in my opinion, that they were asked by the Defendant No. 2 to go to Court and protect his interests, and that they refused. In my judgment it was their duty to do so, unless it is proved that their obligations towards their client, entailed by the acceptance of the *vakalatnama*, were limited by a special arrangement, accompanying the acceptance of the *vakalatnama*. No such special arrangement has been proved by the Pleaders, upon whom the onus of proving it lay.

It was then said that no fees were paid for their attendance at Court on the 25th May 1921. No proof has been given that any fee was asked or that there was any arrangement that a fee should be paid before the Pleaders would attend Court. In the absence of such proof the mere fact that no fee was tendered or paid is, in my judgment, no justification for this refusal to attend to their client's further interests.

Further, having regard to the facts of the case and the statements in the written explanations of the two Pleaders, I have no doubt that even if a fee had been offered, they would not have accepted it or attended the Court.

It was then argued that there was no evidence of the common object alleged in the charge.

I agree that it has not been strictly proved that the Pleaders took part in what has come to be called the "Non-co-operation" movement.

In my judgment, however, it has been proved that the Pleaders did join in the

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'*hartal*,' one object of which was to boycott the Courts.

The excuses put forward in the written explanations of the Pleaders, in my opinion, cannot be accepted. In the one case, the Pleader stated that he did not attend the Court for fear of being put to great inconvenience and humiliation by the irritated public. In the other case the Pleader stated that he considered it safe and desirable to bow down to the popular will when public feeling was running so very high and so he did not attend Court during the period of the *hartal*.

The Pleaders must be judged by their conduct. The facts of the case do not show that there was any real risk of physical danger to them if they had attended the Court. They never made any attempt to do so. The learned Subordinate Judge has found that the plea that they were threatened with social punishment was a lame excuse. One Pleader allowed the fear of "inconvenience and humiliation" to override his duty to his client and to the Court. The other considered it "safe and desirable to bow down to the popular will" rather than do his duty to his client and to the Court. There being no adequate reason for the abstention from the Court, I regret to have to come to the conclusion that the Pleaders willingly acquiesced in, even if they did not actually sympathise with, the boycott of the Courts. By so doing they lent support to the movement, which was calculated to paralyse the administration of justice.

In my judgment therefore the Pleaders concerned in the Reference were guilty of grossly improper conduct within the meaning of cl. (b) of sec. 13 of the Legal Practitioners Act, and of such misconduct as would bring their case within cl. (f) of the same section.

Reference No. 8.

SANDERSON, C. J.—This is a reference by the learned District Judge of Noakhali forwarding a report of the Subordinate Judge under the Legal Practitioners Act. The charge was as follows :—"Whereas you being a Pleader of this Court joined the *hartal* and Non-co-operation movement and did not attend the Court along with other members of the Local Bar in furtherance of the common object of the said movement and the boycott of Courts from 23rd May 1921 to 3rd June 1921 and whereas you were engaged as a Pleader for the Plaintiff in the marginally noted suit pending in this Court that was fixed for hearing on the date mentioned against it and whereas you wilfully neglected your client's work and acted to the prejudice of his interest by absenting yourself from the Court on

O. C. 318 of
1920.
Prasanna Kumar
Rai, Plaintiff.
2-6-21.

that date, you thereby committed grossly improper conduct in the discharge of your professional duty by neglecting your client's work and acting to the prejudice of his interest [sec. 13 (b)] and you have further been guilty of misconduct by joining the said movement started to boycott Courts and paralyse the work of the Courts and absenting yourself from the Court on those dates (23rd May 1921 to 3rd June 1921) without any lawful excuse [sec. 13 (f)]."

The report of the Subordinate Judge was that the Pleader was guilty of grossly improper conduct in the discharge of his professional duty within the meaning of cl. (b) of sec. 13 of the Legal Practitioners Act and of misconduct within cl. (f) of the said section.

The learned District Judge concluded his reference as follows :—"The Opposite Party, as such Pleader, is liable to some punishment, however light, under sec.

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14 of the Legal Practitioners Act : as he, in my opinion, has brought himself within the disciplinary jurisdiction of the High Court and his misconduct which falls within clause (f) of sec. 13 of the Legal Practitioners Act is grave enough to deserve it. But I cannot say that his conduct deserves severe punishment."

Notice of the charge was given to the Pleader on the 12th July 1921, and on the 30th July 1921 the Pleader filed an explanation to which reference will be made later.

The material facts in this case are the following : one Jashada Kumar Roy and two of his brothers filed a mortgage suit in the Court at Noakhali. In this suit the Pleader Annada Charan Roy and another Pleader A. M. Bose accepted a *rakalat-nama* from Jashada Kumar Roy in January and February 1921 respectively. The 2nd June 1921 was fixed for the hearing of the suit : on that day Jashada Kumar Roy filed a petition in the Court which was as follows :—" On account of *hartal* of the Pleaders the witnesses or the Pleaders of the Plaintiffs in the above suit decline to attend the Court. The Plaintiffs are therefore unable to prove their case or to conduct it otherwise. So it is humbly prayed that the Court be pleased to adjourn the suit to some other date and grant the Plaintiffs ten days' time to produce witnesses." The result was that the hearing of the suit had to be adjourned.

At the hearing of the charge against the Pleader, Jashada Kumar Roy gave evidence and said that the contents of his petition were true to his own knowledge.

It was argued by the learned Vakil for the Pleader that though it was permissible to prove the fact of the filing of the petition, the contents of this petition were inadmissible in evidence, and that the case must be decided upon

the verbal evidence of Jashada Kumar Roy, and that as he said he had suffered no loss and had no complaint to make against his Pleader, the reference should be refused.

Jashada Kumar Roy is a cousin of the Pleader Annada Charan Roy and the learned District Judge has held that apparently interest for his cousin had made him forget what he had said in his petition.

In my judgment the contents of the petition were admissible in evidence. In my opinion it was admissible under sec. 157 of the Evidence Act in corroboration of the evidence which the witness had already given at the time when his attention was directed to the contents of the petition and when he said that the contents were true to his own knowledge. It is also to be noted that the petition was the foundation of the proceedings, and that no objection was raised to the admission of the evidence.

In my judgment it is clear that in this case the Pleader declined to attend the Court on account of the *hartal* of the Pleaders.

In the course of the argument, the learned Vakil for the Pleader informed us that "*hartal*" meant "Strike."

This conclusion is not based upon the statements in the petition only.

There is other evidence in this case. It appears that on the 22nd May 1921 a meeting was held in the town and resolutions were passed, one of which was that Pleaders and Mukhtears should not attend the Courts. This meeting was held to show sympathy in respect of an incident which had occurred at Chandpur. The object of such a resolution could only be to boycott the Courts and so interfere with the administration of justice. On the 23rd May 1921 the Pleaders in a body, with the exception of the Government Pleader and Public Prosecutor, abstained from attend-

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ing the Courts. This abstention lasted until the 3rd June 1921. There was an informal gathering of some Pleaders in the Bar Library called by the Pleader Annada Charan Roy, whose conduct is now under consideration, at which meeting the opinion was expressed by the majority that "as the public feeling is very high it is not safe to disobey."

These facts show conclusively that it was in consequence of the *hartal* that Annada Charan Roy did not attend to Jashada Kumar Roy's suit on the 2nd June and unless good cause can be shown for his abstention, in my judgment he must be held guilty of grossly improper conduct in the discharge of his professional duty to his client.

It was urged by the learned Vakil for the Pleader that the Pleader was under no duty to appear in the Court on the 2nd June 1921. He argued that the *vakalatnama* was no more than an authority to the Pleader to act. I cannot accept this contention. In this case the Pleader has not proved any special arrangement and in my judgment the acceptance of the *vakalatnama* in the suit by the Pleader entailed a duty upon the Pleader to attend the Court on the day fixed for the hearing of the suit or at least to make arrangements with the other Pleaders who had accepted the *vakalatnama* to protect the interests of the client even if the client had not specially requested the Pleader's services for the 2nd June. There is no question in this case of whether a proper fee was tendered by the client, because the Pleader in question, being related to the client, was working "*gratis*" for him.

It is not however necessary to pursue the consideration of the point further, for on the facts of this case I am satisfied that the client did request the Pleader to attend the Court on the 2nd June 1921 and that

the Pleader declined on account of the *hartal*.

It was then urged that the client was satisfied that the Pleader should not act and consequently it was a matter between the client and his Pleader and not a matter for the Court.

I cannot accept this contention. In the first place I am not prepared to hold that the Pleader can divest himself of his duty arising by the acceptance of the *vakalatnama* without the leave of the Court.

The provisions of Or. III, r. 4 (1) and (2) of the Civil Procedure Code support the view that unless and until the conditions specified in that rule are complied with, the duties and obligations of the Pleader will remain.

But it is not necessary to decide this point now, for on the facts of this case, in my judgment, it cannot be said that the Pleader discharged himself with the consent of the client.

The Pleader was bound to give the client reasonable notice so as to afford the client an opportunity of obtaining other legal assistance.

In this case, the Pleader must have known that it was impossible for his client to obtain such assistance on the 2nd June 1921: all the Pleaders were observing the "*hartal*" except the Government Pleader and Public Prosecutor, and the client had no option except to bow to the inevitable and to present his petition himself.

It was then urged that although the Pleader absented himself from Court, and although his absence was in consequence of the *hartal*, there was no evidence of his joining the *hartal*.

I put aside the question of the "Non-cooperation movement" as there is no evidence against the Pleader in this respect.

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I am satisfied however that there was a *hartal*: one of the objects of that *hartal* was to boycott the Courts: there is no evidence that the Pleader took part in promoting the *hartal*, but to my mind it is clear that he abstained from going to the Court on the 2nd June in consequence of the *hartal*; he took part in the discussion in the Bar Library, and he acquiesced in the *hartal*, the result of which was that not a single Pleader, except the two already mentioned, attended the Courts. He must have known that the observance of the *hartal* would result in a boycott of the Courts, and is a grave interference with the administration of justice. His intention must be gathered from his acts, and in my judgment he must be held to have intended to take part in the *hartal* to boycott the Courts.

It was however said that he did this through fear of the consequences which would ensue if he did attend to his duties as Pleader. The material statements in his explanation in this respect are paras. 2 and 3, which are as follows:—

“That a general *hartal* in all departments of public life was decided upon in a public meeting held at Noakhali and that no one could safely ignore or disregard the resolution of the indignant public. I also considered it safe and desirable to bow down to the popular will when public feeling was running so very high and so I did not attend Court during the period of the said *hartal*.”

“3. That in the matter of not attending the Court during the *hartal*, there was no combination or common object among the members of the Bar and in fact the Bar Association passed no resolution at all in the matter.”

I am by no means satisfied that the conditions in Noakhali were such as to render the Pleader's attendance to his

duties unsafe during the *hartal*. There is no suggestion that he made any attempt to attend the Court though he was able to go to the Bar Library which, we were told, is adjacent to the Court. Other people, as already mentioned, did attend the Courts and the learned Subordinate Judge characterised the threat of social punishment as an “empty threat.”

The town meeting was held on the 22nd May 1921. The very next day all the Pleaders, except those two already mentioned, abstained from attending the Courts. We were informed that there are about 70 Pleaders in Noakhali. I cannot believe that they were all so devoid of courage that no one of them dared to venture to attend to his work and duties as a Pleader.

The facts of this case point to the conclusion that there was a common object, *viz.*, the boycott of the Courts, and that in pursuance of that object the Pleader in this case deliberately abstained from discharging his professional duty. In my judgment therefore the Pleader failed in his duty both to his client and to the Court and he was guilty of grossly improper conduct in the discharge of his professional duty within cl. (b) of sec. 13 and of such misconduct as would bring his case within the meaning of cl. (f) of the said section.

Reference No. 9.

SANDERSON, C. J.—This is a reference by the learned District Judge of Noakhali under sec. 14 of the Legal Practitioners Act, 1879.

The learned Judge forwarded with his reference a report of the learned Munsif of the 3rd Court.

The charge was:—

“Whereas you being enrolled as a Pleader and authorised to act as such in this Court, absented yourself from Court,

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Misc. Case
No. 419 of 1921
(Or. XXI, r. 90,
O. P. C.)
Azamuddin,
Petitioner,
v.
Md Ibrahim
Bhuiya, Opposite
Party.

contrary to the wishes of your client and to the prejudice of his interests, on 28th and 30th May 1921, when the case noted in the margin, in which you were engaged for the Petitioner was called on,

you are guilty of grossly improper conduct in the discharge of your professional duties within the meaning of sec. 13 of the Legal Practitioners Act and have rendered yourself liable to be reported to the High Court under sec. 14 of the said Act."

The learned Munsif held that the charge had been established and reported the case to the High Court.

The learned District Judge concluded his reference by saying: "The Opposite Party, as such Pleader, is liable to some punishment, however light, under sec. 14 of the Legal Practitioners Act, as he, in my opinion, has brought himself within the disciplinary jurisdiction of the High Court, and his misconduct which falls within cl. (f) of sec. 13 of the Legal Practitioners Act is grave enough to deserve the punishment."

"But I cannot say that his conduct deserves severe punishment."

A preliminary point was taken by the learned Vakil appearing for the Pleader. He pointed out that the learned Munsif had found the Pleader to be guilty of "grossly improper conduct" within the meaning of sec. 13 (b) and the learned Judge had held the Pleader to be guilty of misconduct within sec. 13 (f) and that therefore as the report of the Munsif and the reference of the Judge did not agree, the reference should not be acted on by the High Court. In my judgment there is no ground for such a contention.

It is clear from the terms of sec. 14 that the report of the learned Munsif is to be

made to the High Court. The section however provides that the report of the learned Munsif should be made through the District Judge and that such report should be accompanied by the opinion of the District Judge through whom it is made. This was probably provided for the purpose of giving the High Court the benefit of the District Judge's opinion, and also as an additional protection to the person, whose case might be under consideration.

The report of the learned Munsif, having been made, has to come to the High Court, with the addition of the opinion of the District Judge, through whom it had to be made, and it rests with the High Court to decide what action, if any, is to be taken in respect of the learned Munsif's report. In my judgment the proceedings are in order in this respect, and the point taken by the learned Vakil has no foundation.

Notice of the charge was given to the Pleader on the 12th July 1921, and, on the 1st August 1921, the Pleader filed an explanation to which I shall refer later.

The material facts which led up to these proceedings were as follows:—

One Azamuddin, an illiterate agriculturist, had made an application to the Court for setting aside a sale. On the evidence it is clear, in my judgment, that S. K. Nag acted as Pleader for Azamuddin in connection with that application. The 29th May 1921 was fixed for the hearing of that application. On the morning of that day, Azamuddin, went to Noakhali and to the house of S. K. Nag and asked him to sign and move a petition in Court on his behalf.

The evidence of Azamuddin is that "the Pleader said he would not come to Court or sign my petition or *hajirah*. His clerk said he would not write my petition. I am an illiterate man, I could not write a petition or a *hajirah*. They told me to

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come to Court. I came to Court but could not take any steps. I found no Pleader or Pleader's clerk in Court that day. I had engaged no other Pleader in my case except Surendra Babu. I had requested my Pleader to come to Court. I could not know the result that day."

It appears that Azamuddin went to the Court and waited about until 3-30 P.M. He asked the Peshkar to give him the adjourned date of the case. The Peshkar wanted the number of the case and said he could not find the case without the number. This Azamuddin was not able to supply. The number was noted in the diary of the Pleader's clerk, but neither the Pleader nor his clerk had even taken the trouble to give Azamuddin the number of his case. The result was that the case was called on, and as no one appeared it was adjourned until Monday the 30th May 1921. This was without the knowledge of Azamuddin, and he returned to his home without knowing what had been done about his case.

On Monday the 30th May, the case was again called on, and as no one appeared the application was dismissed.

On the Wednesday or the Thursday following, Azamuddin again went to Noakhali and learnt from the Pleader's clerk that his case had been dismissed for default.

On the 14th June 1921 a petition was filed praying for the restoration of the application which had been dismissed on the 30th May 1921.

This petition was signed by the Pleader S. K. Nag.

The petition is as follows :—

"1. The Petitioner filed in this Court against the Opposite Party Miscellaneous Case No. 419 of 1920 for setting aside sale. But that case having been struck off, on 30th May 1921, for default on account of the absence of both the parties, the Petitioner has sustained a heavy loss.

"2. The Petitioner himself came to Noakhali on the date fixed, the 28th May 1921, but as *hartal* prevailed at that time in the town and as Pleaders and clerks did not attend Court and as the Petitioner himself does not know how to read and write he could not take any step, and having loitered the whole day in the Court went home without knowing the date. It is now seen that the above case was adjourned to 30th May 1921 and struck off for default in the absence of both the parties. The Petitioner could not comprehend that the date would be adjourned after two days. If the Petitioner could know that the case would be fixed for 30th May 1921 he would surely have attended the Court and the case would be granted *ex parte*.

"So the Petition for revival is fit to be granted.

"3. The cause of action has arisen from 30th May 1921 when the case was struck off.

4. So it is prayed :—

"(Ka). That on taking evidence the prayer for revival be granted and Misc. Case No. 419 of 1920 be restored to its Original number and justice done."

It is to be noted that the Pleader by signing the petition makes himself responsible for two material statements :—first, that in consequence of the application to set aside the sale being dismissed, the Petitioner (Azamuddin) had sustained a heavy loss, and secondly, that the cause of this heavy loss was that *hartal* prevailed at the time and Pleaders and clerks did not attend Court, and that as the Petitioner could neither read nor write he could not take any step. I am not aware whether the matter was set right as neither side was able to inform the Court what had been the result of the petition.

In my judgment it is clear that on the 28th May 1921 S. K. Nag was the sole Pleader for Azamuddin in connection with

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the application to set aside the sale : that was the day fixed for the hearing of the case ; Azamuddin requested him to go to Court and file a petition, the Pleader refused. He was asked to sign a petition, the Pleader refused : the Pleader's clerk would not even write out the petition.

The Pleader must have known that Azamuddin was illiterate : he must have known that unless he complied with Azamuddin's request, Azamuddin's application to set aside the sale would be in jeopardy, and Azamuddin's interests might be seriously prejudiced ; further he must have known that as there was a *hartal*, no other Pleader or Mukhtear would be available ; and unless some valid excuse can be found, in my judgment his conduct was most reprehensible.

Several technical points were raised by the learned Vakil for the Pleader, all of which in my judgment had no substance in them, and the fact that such points were taken on his behalf is a strong indication that the Pleader must have felt that on the facts there was no justification for his conduct and it is a matter of surprise to me that no word of regret for the unfortunate position, in which he placed his client, was forthcoming.

It was first argued that the *vakalatnama* was not produced : to my mind that is immaterial ; it was proved by Azamuddin that S. K. Nag was his Pleader in the "original . . . case for setting aside the sale" and the learned Vakil for the Pleader admitted in this Court that on the 28th May he was Azamuddin's Pleader in that matter.

It was next argued that there was no evidence of the Pleader's duty on the 28th May : in my judgment it is not necessary in this case to define the duties of a Pleader generally : I merely mention this so that I may make it clear that I do not adopt the suggestion which has been made

that a *vakalatnama* is merely an authority to act ; in my judgment it is much more than that and the acceptance of it entails duty on the part of the Pleader to his client. In this case it is not necessary to say more.

On the facts of this case, in my judgment, there can be no doubt it was the duty of the Pleader to give his assistance on the 28th May, when asked by Azamuddin so to do, and to take such steps as were necessary to protect his client's interests.

Another argument was raised that no fee was paid by Azamuddin to the Pleader on the 28th May and therefore he was not bound to act as Pleader. In my judgment this argument was without any foundation : in the first place Azamuddin's evidence was that the Pleader did not ask for any fee on the 28th : the real reason why the Pleader refused to act, was undoubtedly the *hartal* which was then going on, and the learned Vakil when asked by one of my learned brothers if the Pleader would have accepted a fee, if it had been offered to him, had to admit that "probably" he would not have accepted it. I think instead of using the word "probably" he might have used the word "certainly."

It was then argued that the Pleader had discharged himself on the 28th May and that the client agreed to such discharge. It is difficult to treat such an argument seriously : if the Pleader wished to discharge himself, he was bound to give his client reasonable notice : his refusal to act was on the morning of the 28th May : the case was fixed for that day, the Pleader knew his client could get no other advice on that day because of the *hartal*, and that he was an illiterate man, who could neither read nor write : it can not possibly be held that the notice was reasonable.

It is then said the client agreed to the discharge. There is no evidence of such agreement by the client : on the contrary

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the evidence is all the other way and it is clear that Azamuddin wanted the Pleader to go to Court : when the Pleader refused, Azamuddin had no alternative but to go to Court himself, and to my mind there is no ground for the suggestion that he agreed to the discharge of the Pleader.

Then it was said that there was no evidence that the Court made any order on the 28th May that the Pleader should take action on the 30th. That is true, but, in my judgment, it is immaterial : the facts show that the Pleader's absence on the 28th May was responsible for the dismissal on the 30th May.

There remains to be considered the explanation of the Pleader.

It appears that public meetings were held at Noakhali in respect of an incident at Chandpur, and resolutions were passed : one being to the effect that Pleaders and Mukhtears should not attend the Courts.

The learned Munsif said in his report that the Pleaders in a body, with the exception of the Government Pleader, did not attend Court.

The Pleader in para. 9 of his explanation stated as follows :—

“That a general *hartal* in all departments of public life was decided upon in a public meeting held at Noakhali as a token of sympathy for the ill-treated, stranded coolies at Chandpur, and no one could safely ignore or disregard the resolutions of the indignant public, I also considered it safe and desirable to bow down to the popular will when public feeling was running so very high, and so I did not attend Court during the said *hartal*.”

The learned Munsif who was himself on the spot, held that he was not satisfied that the conditions were such as to render the Pleader's attendance at Court unsafe during the *hartal*; and, as far as I can judge from the evidence, I entirely agree with him. The Government Officers, in-

cluding the ministerial and menial staff, and the District Board and Municipal Officers regularly attended their offices during the *hartal*. The learned Munsif further held that the alleged threats were of no practical consequence and that the Pleaders could really have no apprehension of danger in attending Courts. I agree with this finding also. In my judgment it is clear that the Pleader acquiesced in the *hartal* : he made no effort to go to Court. He said, “he considered it safe and desirable to bow down to the popular will when the public feeling was running so very high and so he did not attend Court during the said *hartal*.”

The facts as found were no justification of his conduct, and the fact that he went so far as to refuse to sign the client's petition, which he could have done in his own house, shows that he was acquiescing in, if not sympathising with, the *hartal*, one object of which was that the Pleaders should boycott the Courts and so bring the administration of justice to a standstill.

The Pleader had a duty not only towards his client but also towards the Court and it was clearly his duty to co-operate with the Court in orderly and pure administration of justice.

The Pleader has failed altogether in showing any justification for his refusal to act for his client, and to attend the Court ; and in my judgment he was guilty of grossly improper conduct in the discharge of his professional duty within cl. (b) of sec. 13 and of such misconduct as would bring his case within cl. (f) of the same section.

Reference Nos. 4, 7, 8 and 9.

WOODROFFE, J.—These references have been heard separately but they have certain points in common to which I address myself. The Pleaders concerned are charged with furthering a *hartal* or strike by abstaining from Court in breach of their duty

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towards their clients and the Courts. The *hartal* was proclaimed by a public meeting as an expression of public feeling regarding the treatment of certain tea garden coolies at Chandpur near Noakhali. There is no evidence to show that this *hartal* was part of or connected with the political movement known as the Non-co-operation movement, though as a method of expressing public opinion it may have had the actions of some of those who call themselves followers of the movement as an exemplar.

No one is obliged to be a legal practitioner or (if he qualifies himself as such) to practise. But if he becomes a legal practitioner, and holds himself out for and accepts employment he becomes an officer in a judicial system in which his position, rights and duties and the authority to which he is subject are determined. A person may stand out of such a system but if he enters it he is bound by the rules and must submit to the authority to which that system subjects him. It is obvious that he cannot act or combine with others to act against such authority. If the legal practitioner has a grievance and such grievance arises out of matters with which the Court is concerned, he must seek the remedy from the judicial authority appropriate to the particular case just as the remedy for other grievances should be sought from the administrative authority concerned. It follows that a legal practitioner cannot join in an action to boycott the Court or any particular Judge because of any grievances, real or alleged, whether touching the Courts or of a political or other character.

Action to boycott may be manifested either by initiating, preaching or otherwise furthering the boycott such as, (to deal with the matter before us) refusing without justifying reason to attend Court when bound to do so. The statement is so

qualified because there is no obligation to attend the Court provided that the legal practitioner is not bound to his client and the Court to do so. The issue therefore which arises in the cases is whether there is any overt act proved of the alleged intention to boycott the Courts which is the gravamen of the charge. And the chief question again here is whether an obligation to attend Court is established and if so, whether there was lawful excuse for the non-attendance which is admitted. For the Pleaders charged may either show, as they attempt to do, that they were not bound to attend Court and that if they were, the promulgation of a public *hartal* directed, amongst others, against the Courts was a sufficient excuse for such non-attendance.

I think it is open to any practitioner for reasons personal to himself to refuse to practise in a particular Court or before a particular Judge. But he can only adopt this course either by refusing briefs in such Court, or before such Judge, or if he has accepted a brief or *vakalatnama*, by first properly discharging himself on due notice to the client and in the latter case to the Court. But concerted action by a whole body of legal practitioners to boycott a Judge or Court in protest against an alleged wrong of one of its members or in respect of its conduct of the administration of justice generally is not permissible because the Bar in any such case cannot constitute itself an authority to adjudge on such grievance and its duty is not to impede the administration of justice by collective abstention from Court, but to make its representation through (if there be one) its Association to the High Court which has superintendence in such matters. In the present case moreover the abstention is alleged to have been due to causes wholly extrinsic to the administration of justice; namely, the action of the civil administra-

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tion in regard to some tea garden coolies, a matter in which the Pleaders concerned and others may have been rightly interested in their personal capacity but with which, *qua* Pleaders, and as a body of legal practitioners, they were not concerned.

The common form of defence in all the cases, is that since public opinion was running so high in sympathy with the stranded tea garden coolies at Chandpur, no one could safely ignore or disregard the united voice of the indignant public and therefore the Pleader in question "considered it safe and desirable to bow down to the popular will" and did not dare to attend Court. Now assuming that a Pleader was otherwise under an obligation to attend Court on behalf of his client he could successfully plead as a lawful excuse that he was by circumstances, not under his control, prevented from doing so. Thus a Pleader could obviously not be charged with grossly improper professional conduct because he did not work for his clients at the risk of receiving physical injury to himself. Nor might such excuse be, in my opinion, limited to such injury. We are not concerned in this case nor likely to be concerned in others, with outcasting strictly so called, because outcasting takes place in consequence of breach of caste rules which in no way touch such a matter as that before us. But the consequence of the ancient outcasting have been in recent times extended to cases of difference of political opinion. That is a party may say that if another person or party does not do, or does not abstain from doing what the first party wants or does not want done, then the second party will be subject to the penalties of the old outcasting or excommunication. The penalties may remain the same, though the motive differs, in one case being of a caste and in the other of a poli-

tical nature. To these penalties others may be added such as humiliation or insult. It may be true, as the learned Standing Counsel said, that so far as the old outcasting is concerned, the effect of it is much diminished in modern life in the large cities and it may be true that the effect of a political boycott is less in those cities than in the towns such as Noakhali and villages. But in these smaller towns and villages the menace conveyed by the threat of a boycott may be very great and might in my opinion exempt a legal practitioner from a charge of misconduct if he feared to brave it. To hold otherwise would be to make unwillingness to face a real danger or lack of courage, grossly improper conduct in the discharge of professional duty which is not in my opinion the law. In my opinion it would not be possible to charge a legal practitioner with grossly improper conduct, whatever his liability to his client might be, if he omitted to carry out his duty to his client by reason of his genuine fear of any real and substantial injury, physical or otherwise, to himself or family. Nor, in my opinion, would it make any difference if such fear were, in fact, unfounded if, in fact, it was sincerely entertained. And this for the reason that the Courts cannot punish a legal practitioner for grossly improper conduct because his apprehensions were beside the mark or he was devoid of courage. In such a case his client might have a remedy against him for neglect of a duty which his apprehensions did not excuse. But it would not be ground for the Court's action by way of punishment for grossly improper conduct. It might of course be that the apprehensions were so little-founded as to give rise to the inference that they could not have been sincerely entertained. But if sincerely entertained then no case of professional misconduct would be in my opinion made out,

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The question then which in my opinion we have to determine in these cases, is whether the Pleaders did not attend Court (assuming for the moment that they were bound to do so) because they were really afraid of the consequences which they thought might follow. This we must ascertain from the statements of the Pleaders in showing cause, their own conduct and the other evidence. In the first place these statements say that it was considered safe and "desirable" to bow down to the popular will. The latter would evidence an intention to adopt the resolution of that will and sympathy with it. The unanimity as regards the danger suggests the same conclusion. I think that the Pleaders were in sympathy with the *hartal*, evidenced by, amongst other things, their failure (though being a considerable and important body of the general public) to oppose it. It is easy under such circumstances to understand that the alleged consequences of disobedience were considered as being of no account. If it were a matter of safety only and not also desirability, it might well have been expected (I speak of the circumstances in these cases) that varying opinions would have been entertained in respect of the dangers to be incurred as the result of disobedience to the popular will. I have referred to the circumstances of this case because it might, as an abstract proposition, be argued that the general consensus of opinion was evidence of a real peril. In the present case it is denied that the boycott was part of the widespread, permanent and organised Non-co-operation movement but the strike arose out of a passing and local incident. The strike is said to have been an expression of the popular will. But the considerable body of Pleaders at Noulkhal were leading members of the community whose non-co-operation with the movement might have checked it, if not brought it to an end. It does not seem to me open to a considerable body of leading citizens to say that they were in fear of the consequences of disobedience to the popular will when, instead of opposing as they might have done successfully the menace of it, they gave it further weight by rendering it an unnecessary obeisance. We find that, notwithstanding it is reasonable to expect some difference of opinion as to the reality of the menace, a difference which might be due both to judgment and degree of courage, practically all the Pleaders abstained from attendance at Court. In one of the references, (9), the Pleader charged declined even to sign a petition in his own house showing that it was not in that particular instance a case of apprehension of danger in going out and attending Courts. And in other cases it seems to me that the refusal to attend was due to sympathy with the objects of the *hartal* and not to fear of the consequences of disobeying it. And what were these consequences in fact? One person was molested by having his bicycle taken from him in attending Court, the Government Pleader who with the Public Prosecutor attended Court was fined Rs. 2 by the "public" (whether it was paid or not does not appear) and had some night-soil thrown into his compound, another man was fined by the "public" Rs. 5 and the like. Large numbers of people carried on, and amongst these the Municipal *mehtars* made more decent and mannerly disposal of night-soil, doing, as did others, their service in the ordinary way. The whole affair was over within a fortnight. On these facts the conclusions at which I arrive is, firstly, that whatever may have been the risk involved, it was not sufficient to exempt the Pleaders from the performance of their duty and might have been nothing at all had the whole body of Pleaders (who appear to be all East Bengal men, a people not deficient

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in courage) attended Court instead of furthering and strengthening the boycott by their absence; and, secondly, that such risk, if any, was not the operative cause on the minds of the Pleaders in inducing them not to attend. They did not, in my opinion, attend, not because they were in fear of any penalties for doing so but because they were in sympathy with the cause of and object of the *hartal*. To put the matter concisely they bowed to the popular will not because they were afraid of it but because they approved of it.

That will was an expression of public feeling as regards the treatment of the stranded coolies. Now here we have no concern with the question of such treatment. I will however assume for the purposes of the judgment that the sympathy which the Indian public showed for the coolies was well-founded: still that is obviously no excuse. Whatever sympathy these Pleaders may have had for the coolies should not have been allowed to override their duty towards their client and towards the Court. If then their engagement to their clients so demanded they were obliged to attend Court.

The next question is whether they were so bound?

I have hitherto dealt with certain general principles affecting all the cases and to these I will limit my observations on this second part of the case. The details peculiar to each case are dealt with in the judgment of the learned Chief Justice whose final conclusions on the facts I adopt. I add only some observations on the general principles involved and which have been referred to before us.

I am of opinion that these proceedings are (as it has been contended and conceded) *quasi-criminal* in the sense that they may result in penalties. I am not prepared however without further argument to hold with the decision of the Madras High Court

cited to us that a Pleader cannot be examined on oath if he so wishes. I mention the point without discussing or deciding it for that is not here necessary.

Quasi-criminal proceedings are not (as the word shows) criminal proceedings in the sense that all rules of procedure applicable in criminal trials are necessarily in force in a *quasi-criminal* proceeding. This question is not of much moment here for reasons next stated. Thus I think that in such a proceeding as this it is open to the Pleader charged to say nothing, to give no explanation, to adduce no evidence, to refuse to be examined on oath or otherwise and to say to the Court proceeding against him: "Prove your case." This is a course legally open to him though, seeing that the Pleader is an officer of Court, I cannot say it is a proper course and certainly not a wise one if the Pleader has any defence. I cannot conceive that a legal practitioner who has a real defence on the merits will not disclose every fact and take every step to prove it. When there is no defence or the defence is doubtful it may be that a legal practitioner may adopt the course taken by a guilty accused in a criminal trial. Anyhow the prosecuting party must prove its case. If however (as here) the Pleaders charged do offer an explanation, the Court may take it into account in ascertaining whether the charge is made out. This is of some importance in the present case as in deciding whether the case is made out against each Pleader the latter's statement may be considered. The onus undoubtedly again is on the party making the charge, though I think that if the Pleader does offer an explanation or evidence the Court may, in considering whether the charge is proved, take into account such explanation and must consider such evidence. A point of evidence was taken in the Reference No. 8 against the admissibility of the previous

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petition of the client which it was said was only admissible in contradiction or corroboration of previous testimony and that there was nothing in the evidence to corroborate. I think the petition was improperly used, for the question by which it was made evidence was a leading one. But this rather goes to the weight of the evidence so elicited than its admissibility. And the matter of weight I have considered, for it may be that the question was put in this form to bind a witness who was disposed to go back on what he had previously said. But in law the effect was the same as if without the petition being put in or shown, the witness was asked whether he did not make each of the statements in it. An affirmative answer made the petition, though improperly elicited, substantive evidence in the case. It became incorporated with and part of the evidence taken on oath. The petition was of course evidence of a step taken in the proceeding and would be corroborative to the extent that there was evidence on the record which it might corroborate.

The evidence must doubtless establish the practitioner's guilt beyond all reasonable doubt. If it be said that the trial being of a *quasi*-criminal character the evidence must be incompatible with any theory of the innocence of the accused the answer I think is that we may in this case consider, as I have said, both the evidence offered against the Pleader and his answer to the charge. Further it may be (as urged) that the mere acceptance of a *vakalatnama* does not bind the Pleader to appear on every day of the proceeding in which it is given, for the giving of the *vakalatnama* may be accompanied by special terms or other circumstances may affect the matter. But I am of opinion that all that the prosecution has to prove is a *prima facie* case and that when as here

(except in Reference No. 9 where it was unnecessary) it is shown that a Pleader has accepted a *vakalatnama* in a general and common form, this is sufficient to start the case against him, and if it be desired to show that there was any special contract accompanying the acceptance of the *vakalatnamas* the burden of proving this, as a matter specially within his knowledge, is on the Pleader. If again it is alleged that the Pleader who has accepted a *vakalatnama* has discharged himself, he must show that he **has properly done so with sufficient notice to his client and with intimation to the Court.**

If again a Pleader stipulates for payment of fees before he does any work he is not bound to do such work without such payment. If however he accepts a *vakalatnama* without such stipulation that is, gives credit to his client, he must proceed to represent him, even though unpaid his fees until either his client discharges him or he properly discharges himself.

Applying these general principles to the present case, I am of opinion that the obligation to attend Court as charged is *prima facie* established, that no special contract affecting the general inference to be drawn from the acceptance of the *vakalatnama* has been established nor any valid self-discharge.

I am of opinion that the Pleaders other than D. P. Chakraborty in Reference No. 4, who is shown to have been engaged for one application only, abstained from attendance at Court when there was a duty upon them to attend and the abstention was without lawful excuse from motives of sympathy with the *hartal*, and that they therefore in fact acted in furtherance of it, in breach of their duty towards their client and the Court.* This follows from the finding which rejects the defence of fear. It was by public resolution ex-

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pressed to be the common object of the *hartal* movement to boycott the Courts. A meeting of Pleaders called by the legal practitioners in Reference No. 8 was then held at which it was resolved to bow to the popular will. And in fact all the Pleaders against whom proceedings are taken abstained from attendance, though they had business in Court which properly called for it. If we exclude, as I do, the theory of fear the only inference to be drawn is, that the intention of the Pleaders by their overt act of non-attendance when bound to attend was in furtherance of the *hartal*. There is no evidence that the *hartal* was part of the Non-co-operation movement and that the Pleaders charged are not Non-co-operators is shown by their appearance before us.

There is, I think, a stronger case in favour of the Pleader in Reference No. 8 on the question whether the evidence establishes duty to attend Court, seeing the nature of the relations between him and his client, the explanation given and the evidence. But on the other point in this case it is shown that the Pleader, who is Secretary of the Bar Library, convened the meeting to determine whether the *hartal* was to be obeyed, a meeting which was followed in fact by obedience to the *hartal* resolution.

Such action is not permissible because the question whether a resolution declaring a *hartal* directed against the Courts is to be approved and obeyed, or not, is not a question which can be at all considered by a legal practitioner. There is no question for discussion since the answer must necessarily be a disapproval of the boycott, though it would be, of course, lawful to meet to consider measures of self-defence or means of combating it.

As regards the question whether these cases fall under cl. (b) or cl. (f) of sec. 13 of the Legal Practitioners Act, I am dis-

posed to think they fall under both clauses, that is under cl. (b) in so far as they involve neglect of duty towards the client in accepting a *vakalatnama* and without excuse not fulfilling the duties involved in such acceptance; and under cl. (f) in so far as the practitioner's conduct was directed against the Court by abstention from attendance on account of the *hartal*. In the present case the two are closely connected, because one and the same act constitutes the neglect and furtherance of the *hartal*. It is plain on the view of the facts here taken that one or other section applies. The matter is of no practical importance in any event, particularly having regard to the order which we are about to pass in these cases.

References Nos. 4, 7, 8 and 9.

MOOKERJEE, J.—These are four References made by the District Judge of Noakhali under sec. 11 of the Legal Practitioners Act in respect of six Pleaders. Reference 4 relates to Babu Rajani Kanta Bose and Babu Durga Prosanna Chakraverty, Reference No. 7 to Babu Rajani Kanta Nag and Babu Priya Nath Rai Chaudhuri, Reference No. 8 to Babu Annada Charan Roy, and Reference No. 9 to Babu Surendra Kumar Nag. The References raise important questions of principle, which are of first importance and affect a large section of the legal profession in this Presidency; they may be conveniently considered together, though the investigation by the Subordinate Court proceeded, in each case, on evidence separately recorded.

It appears that in the month of May last, there was considerable excitement in the town of Noakhali, due to sympathy for tea garden coolies stranded at a neighbouring place called Chandpur. At a public meeting, convened in the Town Hall by the local Congress Committee, a resolution was

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carried that complete *hartal*, that is cessation of public activity of every description should be observed as an expression of the indignation of the community. At a second public meeting, it was resolved that those who might not loyally follow the previous resolution, should be punished with social boycott or in some equally deterrent manner. Subsequently, an informal meeting was held in the Bar Library, at the instance of Babu Annada Charan Roy, one of the Pleaders whose cases have been reported to us, and the opinion was expressed by the majority that it was not safe to disobey the public feeling which ran very high. It may be added that there is no evidence to show that the *hartal* thus proclaimed, though possibly inspired by the method adopted by Non-co-operators, was in any way connected with that political movement. But it cannot be disputed that the object was to paralyse the work of the Courts and to bring judicial administration to a stand-still. This result was in fact achieved, for all the Pleaders except two ceased to attend the Courts during the period of the *hartal* from the 23rd May to the 3rd June. The consequence was that cases, when they were taken up for disposal on the appointed dates, had either to be postponed or decided *ex parte* or dismissed for default. On the reports of the judicial officers presiding over the Courts where this took place, the District Judge has submitted the matter to this Court for disciplinary action against the Pleaders concerned. Apart from the special facts of each case, which will be considered later, three fundamental questions emerge for consideration, namely, first, when a Pleader has accepted a *vakalatnama*, is he bound to appear to conduct the case in its various stages; secondly, if he is so bound, does the liability continue till he has discharged himself by recourse to the appropriate procedure; and thirdly,

does failure to appear to conduct the case before he has so discharged himself render the Pleader liable to disciplinary action by the Court.

As regards the first question, it is essential to point out that a Pleader must be duly appointed before he can appear, act and plead in a case. Reference may be made to r. 1 and r. 4 (1) and 4 (2) of Or. III of the Code of Civil Procedure, 1908.

"Any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a Pleader duly appointed to act on his behalf.

Provided that any such appearance shall, if the Court so direct, be made by the party in person."

"The appointment of a Pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognised agent or by some other person duly authorised by power-of-attorney to act in his behalf."

"Every such appointment, when accepted by a Pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the Pleader as the case may be, filed in Court, or until the client or the Pleader dies or until all proceedings in the suit are ended so far as regards the client."

It has been argued in this Court that although when a Pleader has accepted a *vakalatnama* and filed it in Court, he thereby becomes authorised to act and plead on behalf of his client, it does not follow that he is under an obligation to do so on a particular occasion. In my opinion, this contention has been too broadly

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formulated. A Pleader who has accepted a *vakalatnama* and filed it in Court is ordinarily bound to appear and conduct his case, in the absence of an agreement to the contrary. It is conceivable that the *vakalatnama* may not set out explicitly all the terms of the engagement between the Pleader and his client, and amongst these there may be implied terms sanctioned by well-known and well-established usage of the profession. To take one example, at the time the *vakalatnama* is accepted and filed, there may be an understanding, express or implied, that the Pleader will appear to conduct the case only on one occasion, or only after he has been paid the fees settled or only after he has been furnished with the requisite papers. Reference may in this connection be made to the judgment of Mr. Justice Phear delivered with the concurrence of Mr. Justice Dwarka Nath Mitter in *Re, Gopinath Mudduck* (1). In that case a litigant who was Respondent in an Appeal from Appellate Decree in this Court, which had been decreed *ex parte*, had engaged Babu Hari Mohan Chakraverty, a Vakil of this Court, to apply for re-hearing. On the 26th May 1870, the Petitioner moved the Court to compel the Vakil to appear and argue his case, alleging that the Pleader had been paid his fees, and yet had declined to attend and plead his case. The Court accordingly called upon the Vakil to answer the allegation. The Vakil stated he had been paid only one-half of the fee agreed upon. The Court thereupon directed the Vakil to return the amount paid to him, and ruled that the acceptance of a *vakalatnama* by a Vakil of the High Court should in all cases be unconditional. But it is plain, that notwithstanding this expression of opinion *vakalatnamas* have been accepted by Vakils in this Court, subject to conditions implied by well-

known usage as is clear from the decision in *Ram Koer v. Puna Koer* (2). I am bound to add, however, that the true import of the observations made by Mr. Justice Phear was not, it seems to me, correctly appreciated by Sir Richard Garth, C. J. The view indicated by Phear, J., that if once a legal practitioner accepts a brief, he is bound to plead the cause of his client whether he is paid his fee or not, is not in conflict with the opinion maintained by Garth, C. J., that a legal practitioner may both as a matter of right and of professional propriety, insist upon the payment of his fee before he reads his brief or pleads his client's cause. As Garth, C. J., himself points out, if a legal practitioner takes a brief without a fee and without informing his client that the fee must be paid before he attends to the case, he cannot with propriety recede from it without due notice to his client upon the ground that the fee is not paid. To my mind, the true position is that the acceptance of a *vakalatnama* with the usual terms, which is filed by the Pleader in Court, *prima facie* places him under an obligation to appear and act on behalf of his client; and, if he fails to perform what is thus *prima facie* his duty, he must be ready to justify his conduct by proof that the client had failed to fulfil an implied term of the engagement, such as the advance payment of fee or the supply of the requisite papers or such like circumstances, which, perhaps, cannot, at least need not for our present purposes, be exhaustively enumerated. This view is identical with that adopted by Mr. Justice Sankaran Nair and Mr. Justice Sundar Aiyar, in *Muni Reddi v. Venkata Rao* (3) where the principle was enunciated that a Vakil is bound to appear and conduct his case, even if the fee or any portion thereof

(2) 3 Shome 75, 1880.

(3) I. L. R. 37 Mad. 238; s. c. 28 Mad. L. J. 477 (F. B.) (1912).

(1) 14 W. R. 7 (1870).

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remains unpaid, in the absence of any agreement to the contrary, or at least, notice to the effect to the client in sufficient time to enable him to make other arrangements [see the statement by Mr. Justice Sundar Aiyar in his luminous lectures on Professional Ethics, p. 270 and *Kally Churn v. Carapiet* (4). Reference may also be made to the observations of Lord Westbury in *Re, A Solicitor* (5) which favour a strict view of the duties of a solicitor]; and a similar opinion was expressed by Tottenham and Trevelyan, JJ., in *Satish Chandra v. Sarada Prosud* (6). But, as was pointed out by Wallis, C. J., in *Muthu v. Nurse* (7), the decisions of Lord Tenterden in *Rowson v. Earle* (8), of Tindal, C. J., in *Vansardan v. Browne* (9) and *Lawrence v. Potts* (10) and of Lord Esher in *Underwood v. Lewis* (11) favour a less stringent view of the duties of a legal practitioner. It is not necessary, however, for the decision of the cases now before us, to investigate in further detail this and co-related aspects of the matter, such as that raised in *Mohéspur Coal Company v. Jotindra* (12).

As regards the second question, it is clear that when a Pleader has accepted a *rakalatnama* with or without implied conditions, his liability continues, till he has discharged himself by recourse to the appropriate procedure. It is a mistake to suppose, however, that this is a matter solely between the Pleader and his client. The statutory provisions on the subject leave no room for doubt that the appoint-

ment of a Pleader, when filed in Court with his acceptance, continues in force until determined with the leave of the Court by a writing signed by the client, or the Pleader as the case may be; to this rule, there are two exceptions, namely, first, the death of the client or the Pleader, and secondly, the termination of the proceedings in the suit so far as regards the client. An instance of the application of this rule is furnished by the decision of Harington, J., in *Atul Chunder v. Lakshan Chunder* (13), see also *Prabhulal v. Kumar Krishna* (14) and *Prabhulal v. Kumar Krishna* (15). The principle has been recognised for more than half a century, as is clear from sec. 18 of Act VIII of 1859 and sec. 39 of Act X of 1877 and Act XIV of 1882, which were applied in the cases of *King v. King* (16) and *Watkins v. Fox* (17). It is not difficult to realise that serious uncertainties and inconveniences might arise in the conduct of judicial proceedings, if the appointment of a Pleader made in writing and lodged in the Court where the case was to be tried could be revoked without the knowledge and sanction of the Court. It is further well-settled that the legal practitioner must always give reasonable notice of his withdrawal from the case to his client: *Hoby v. Buitt* (18), *Harris v. Osbourn* (19), *Nicholl v. Wilson* (20) and *Whitehead v. Lord* (21).

As regards the third question, it is plain that the failure of a Pleader to appear to

(4) 2 Shome 124 (1878).

(5) 4 B. L. R. 29 (P. C.) (1870).

(6) 19 C. L. J. 432 (1891).

(7) I. L. R. 44 Mad. 978 (1921).

(8) [1829] Mood. & Mal. 538.

(9) [1832] 9 Bingham 402.

(10) [1834] 6 C. & P. 428.

(11) [1894] 2 Q. B. 306.

(12) I. L. R. 40 Cal. 386: s. c. 17 C. W. N. 278 (1912).

(13) I. L. R. 36 Cal. 609 (1909).

(14) 20 C. W. N. 437: s. c. 23 C. L. J. 326 (1916).

(15) 20 C. W. N. 443: s. c. 23 C. L. J. 473 (1916).

(16) I. L. R. 6 Bom. 416, 429 (1882).

(17) I. L. R. 22 Cal. 943, 945 (1895).

(18) 3 B. & Ad. 350 (1832).

(19) [1834] 2 Cr. & M. 629.

(20) [1843] 11 M. & W. 106.

(21) [1852] 7 Exch. 691.

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conduct the case before he has discharged himself in the manner prescribed by law, unless such failure can be justified, renders him liable to disciplinary action by the Court. It is neither practicable nor necessary to have a complete enumeration of justifying circumstances which must necessarily depend upon the facts of each case. In view of the arguments addressed to the Court, I may however state that, in my opinion, it may be successfully urged as a justifying reason for failure to attend to a case, that the absence was in fact due to overriding pressure of circumstances beyond the control of the Pleader, notwithstanding an honest desire on his part to perform his duty towards his client and towards the Court. No formula can be framed to enable us to measure accurately the nature and extent of such pressure, but, to my mind, it is essential that the Pleader, in full appreciation of his duty as the representative of his client and as an officer of the Court, should have been sincerely anxious to protect the former and to assist the latter. The relation of Pleader and client has been described by some as that of principal and agent, and by others as that of master and servant, in a limited and dignified sense, *Muruga v. Rajasami* (22). It may be a matter for controversy how far these analogies hold good but in any event, the relation involves the highest personal trust and confidence, so much so that it cannot be delegated without consent. The Pleader by his obligation is bound to discharge his duties to his client with the strictest fidelity and is answerable to the disciplinary jurisdiction of the Court for dereliction of duty. A Pleader however, is more than a mere agent or servant of his client. He is also an officer of the Court, and as such he owes the duty of good faith and honourable dealing to the Courts

before which he practises his profession. His high vocation is to inform the Court as to the law and facts of the case and to aid it to do justice by arriving at correct conclusions. The practice of the law is not a business open to all who wish to engage in it; it is a personal right or privilege limited to select persons of good character with special qualifications duly ascertained and certified; it is in the nature of a franchise from the State conferred only for merit and may be revoked whenever misconduct renders the Pleaders holding the license unfit to be entrusted with the powers and duties of his office. Generally speaking, the test to be applied is whether the misconduct is of such a description as shows him to be an unfit or unsafe person to enjoy the privileges and to manage the business of others in the capacity of a Pleader, in other words, unfit to discharge the duties of his office and unsafe because unworthy of confidence. His office is a very badge of respectability, a patent of trustworthiness, derived from his position on the Court's roll of counsel; consequently he ought not be suffered to pass for what he is not. Amongst various types of misconduct, there is none more reprehensible than such conduct as tends to impede, obstruct, or prevent the administration of the law or to destroy the confidence of the people in such administration; and any attempt on the part of a Pleader to boycott the Courts or to obstruct the administration of justice by a resort to any form of device, constitutes, in my opinion, ground for disbarment or suspension.

Before we pass on from these general observations to a consideration of the special facts of each case, it is necessary to notice an argument which was advanced in all the cases. It was contended that the proceedings under sec. 14 of the Legal Practitioners Act are *quasi-criminal* in

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character and must be based on evidence cogent and conclusive, such as is deemed necessary for a conviction in a criminal case; in support of the proposition, reliance was placed upon observations in the decisions in *In re Nilkanta Biswas* (23), *Kotha v. Queen* (24) and *It. v. Raghunath* (25). In my opinion, it is plain that the proceeding is not of a criminal nature. See *Government Pleader v. Bhagubai* (26) though as pointed out in *Nandalal v. Baser Ali* (27) and *Nallasiran v. Ramalingam* (28) it is undoubtedly a judicial proceeding. It was ruled in the cases of *Re Hardwick* (29) and *Re Eode* (30) that as the Court in making an order striking a solicitor off the rolls for misconduct does so in the exercise of its disciplinary powers over its own officers and not in the exercise of its criminal jurisdiction, an appeal lies from such order to the Court of appeal. The same principle was recognised by Lord Mansfield in *Exp. Brounsell* (31) when he overruled an objection to disciplinary proceedings against an attorney who had been convicted of felony, on the ground that the only misconduct imputed to him was the very offence which had formed the basis of his conviction. The same view has been affirmed by the Supreme Court of the United States in *Randall v. Brigham* (32) and *Exp. Wall* (33). The true position appears to be that these proceedings are neither civil suits nor criminal prosecutions. [In the matter

of *Janak Kishore* (34)]. They are special proceedings resulting from the inherent power of the Courts over their officers. Their object is to preserve the purity of the Courts and the proper and honest administration of the law. The purpose of suspension and disbarment is to protect the Court and the public from legal practitioners who, disregarding the sanctity of their office, pervert and abuse the privileges annexed to the responsible office they have secured from the Court. The form of proceeding, consequently, is not of controlling importance, so long as the essentials of fair notice and opportunity to be heard are present: *Re Ganapathi Sastri* (35). Sec. 14 of the Legal Practitioners Act, which describes the procedure for investigation when a charge of unprofessional conduct is brought in a subordinate Court against a legal practitioner, provides that the presiding officer shall send him a copy of the charge and also a notice that on an appointed day the charge will be taken into consideration. The section does not make it obligatory on the Pleader to submit a written defence and does not even provide for his compulsory presence or oral examination, *Re A Pleader* (36), but it does lay down that the presiding officer shall receive and record all evidences properly produced in support of the charge or by the Pleader presumably in answer to the charge. The essence of the matter, consequently, is that the Pleader must be allowed an opportunity of making his defence; *In the matter of Southekal Krishna Rao*, (37), *In re Golab Khan* (38); *In the matter of a second grade Pleader* (39) and *Govern-*

(23) 9 W. R. (Cr.) 29 (1868).

(24) I. L. R. 6 Mad. 252 (1883).

(25) 11 Bom. L. R. 1150; 10 Cr. L. J. 526 (1909).

(26) I. L. R. 36 Bom. 606 (1912).

(27) 23 C. W. N. 500 (1919).

(28) 32 Mad. L. J. 402 (1917).

(29) 12 Q. B. D. 138 (1883).

(30) 25 Q. B. D. 228 (1890).

(31) [1778] 2 Cowper 829.

(32) [1868] 7 Wallace 523.

(33) [1882] 17 Otto. 265.

(34) 1 P. L. J. 576 (1916); [1917] Pat. 60.

(35) 19 Mad. L. J. 504 (1909).

(36) 18 Mad. L. J. 184 (1907).

(37) L. R. 14 I. A. 154; s. c. I. L. R. 15 Cal 152 (1837).

(38) 15 W. R. 171 (1871).

(39) I. L. R. 24 Mad. 83 (1900).

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ment Pleader v. Moganlal Choksi (40). The Pleader need not make any defence if he so chooses, though I am emphatically of opinion that he should be absolutely candid with the Court in such a proceeding. He may, however, unwisely, decline to render any assistance to the Court, maintain a stolid silence and take up the position that the case against him must be completely proved. But if he does adopt such an attitude, he obviously runs a grave risk, for even in a criminal case, sec. 312 of the Criminal Procedure Code provides that if an accused person refuses to answer a question put by the Court, the Court and the jury, if any, may draw such inference from such refusal as it thinks just; see sec. 114, 111 (b) of the Indian Evidence Act; *R. v. Dwijendra Chandra* (41). On the other hand, if the Pleader does submit a written statement in answer to the charge, the Court is bound to take it into consideration and may draw such inference as legitimately arises from its contents. To take an example, if the Pleader in his written statement seeks to justify his conduct on certain allegations of fact, it may well be inferred that the conduct was not justifiable on other hypothetical or imaginable grounds. A singular illustration of such a contingency was furnished in the course of argument in one of the cases now before us. It was urged with considerable insistence that the failure of the Pleader to appear in Court on the appointed day did not render him liable to disciplinary action, inasmuch as it had not been affirmatively established that he had been offered his fee for the day by the client. But in answer to a question put by the Court, the reply was given that even if the fee had been tendered, it would not have been accepted, as the Pleader had decided not to attend the Court on account of

the *hartal*. In my opinion when in answer to a charge made against a Pleader, a written statement has been filed in a proceeding under sec. 14, it is not obligatory on the Court to rule out all conceivable hypothetical grounds which could have been but had not been set up in answer. The justice of the case may ordinarily be met, if the enquiry proceeds on the basis of the charge and the answer.

In one of the cases, an additional point was urged with some emphasis. It was contended that no disciplinary action can be taken by the High Court when the District Judge and the Judge of the Subordinate Court are not agreed as to the specific provision of sec. 13 which covers the misconduct attributed to the legal practitioner concerned. This argument is manifestly untenable and is based upon a misapprehension of the scope of the authority of this Court in the exercise of its disciplinary jurisdiction. Sec. 14 contemplates an enquiry and report by the Subordinate Court. This is forwarded by the District Judge with his opinion thereon. As pointed out in *Re Rasik Lal Nag* (12) the ultimate decision rests with the High Court and the authority of this Court is not taken away by any divergence of opinion between the Judge of the Subordinate Court and the District Judge either as to the facts or as to the law applicable. It is consequently immaterial that while the Judge of the Subordinate Court thought that the facts attracted the operation of sec. 13 (b), the District Judge deemed the case governed by sec. 13 (f). I am further of opinion that the case is really comprehended within the scope of both the clauses of sec. 13 just mentioned; the conduct of the Pleader was reprehensible not only because he neglected his duty towards his client, but also

(40) 9 Bom. L. R. 866 (1907).

(41) 19 C. W. N. 1043 (1054) (1915).

(42) I. L. R. 44 Cal. 889, s. c. 20 C. W. N. 1284 (1916).

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because he sympathised with and acquiesced in a boycott of the Court; the former makes clause (b), the latter makes cl. (f) applicable.

In Reference No. 4, we are called upon to consider the cases of Babu Rajani Kanta Bose and Babu Durga Prosonna Chakraverty. As regards Babu Rajani Kanta Bose, it is plain that his conduct was reprehensible. He was present at the public meeting where the *hartal* resolution was carried and took an active part in the proceedings. He then absented himself from Court and did not appear in the case in which he had been engaged. He has not shown cause, and we have been informed that he has retired from the practice of his profession. It is, consequently, not necessary to discuss his matter further. As regards Babu Durga Prosanna Chakraverty, the evidence indicates that his services were engaged by the client for only one occasion, consequently his failure to appear on another occasion does not support the charge of professional misconduct.

In Reference No. 7 we are concerned with the cases of two Pleaders, Babu Rajani Kanta Nag and Babu Priyanath Rai Chaudhuri. The evidence makes it abundantly clear that these Pleaders had accepted a *vakalatnama* and yet did not appear in Court when the case was taken up. There can be no doubt that they acted in this manner, because they were in sympathy with the *hartal* resolution, and it is idle for them to urge that they had no intention to boycott the Court or paralyse the administration of justice. I feel no doubt that they could have attended the Court as the Government Pleader and the Public Prosecutor had done and that the risk or consequent inconvenience and possible humiliation by an irritated public has been unduly magnified. I consider that

their conduct in not attending to the case in which they had been engaged was unjustifiable, and they have rendered themselves liable to disciplinary action by this Court.

In Reference No. 8 we have to deal with the case of Babu Annada Charan Roy. In his written defence, he has urged that no one could safely ignore or disregard the *hartal* resolution adopted by an indignant public, but he has also added that he considered it safe and desirable to bow down to the popular will. The evidence shows that he had convened the meeting at the Bar Library where the opinion was expressed by the majority that it was not safe to disobey the strong public feeling. I think there is no reasonable doubt that he acquiesced in the *hartal* resolution and neglected to perform his duty towards his clients and towards the Court. This, in my opinion, makes him liable to disciplinary action by this Court.

In Reference No. 9, we have to consider the case of Babu Surendra Kumar Nag. In my opinion, his conduct was far more reprehensible than that of the other Pleaders and the line of defence adopted in the lower Court as also in this Court has placed him in a position of great peril. He was engaged by one Azamuddin as Pleader in a suit which resulted in a sale of the property of his client. He then applied to have the sale set aside; the matter was fixed for hearing on the 28th May 1921. The client saw him at his house in the morning and requested him either to file a list of the witnesses present or to make an application to the Court for adjournment. The Pleader refused the request. The client then went to the Court but as he was illiterate and ignorant of the number of the case, he could not take steps to apply for adjournment. The case appears to have been postponed along with other cases till the 30th May. The client,

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however, was not apprised of this, and the case was dismissed for default, as on the adjourned date neither he nor his Pleader was present. On the 14th June, the Pleader presented an application for restoration of the case, which recites that as *harta* prevailed at the time and as Pleaders and clerks did not attend Court and as the Petitioner himself could not take steps by reason of his illiteracy, he could not appear on the date to which the case was adjourned without his knowledge. In view of the statement contained in this petition, which was signed by the Pleader himself, it is difficult to understand how the charge of unprofessional conduct can be seriously met. It has been urged, however, that as no *vakalatnama* was filed along with the application for reversal of sale, the Pleader was not liable to attend on the appointed date. There is no foundation whatever for this contention, for it is well-settled that no fresh *vakalatnama* is necessary to entitle the Pleader to appear in proceedings subsequent to the decree, *Shah Makhan Lal v. Sree Kissen* (43) *Suttocharan v. Suroof Shunder* (44), *Gopal v. Hargobind* (45) and *Sadashiv v. Vithaldas* (46). The Pleader did in fact present the application for reversal of the sale and subsequently, the petition for restoration of that application on the strength of his appointment as Pleader in the suit; and no weight can be attached to the fact that a fresh *vakalatnama* was not filed. There is also no force in the contention that he was not paid his fees; he did not demand his fees and would not have attended the Court even on payment. The truth is he sympathised with the movement for boycott of the Court and con-

sidered it safe and desirable to bow down to the popular will. His conduct is, in my opinion not capable of justification on any imaginable ground and can only be characterised as amounting to a deliberate and reckless disregard of the interest of the illiterate and ignorant litigant who had the misfortune to engage his services. As observed by the Special Bench of seven Judges in *Re Roop Nath Banerjee* (47), his case has undoubtedly not been improved by sophistical arguments put forward to sustain an indefensible position, and he has clearly rendered himself liable to disciplinary action by the Court.

I desire to add that the conduct and attitude of the Pleaders, whose cases we have been called upon to consider, appear, in my judgment, to be lamentably deficient when tested from the standpoint of the honour and dignity which we are accustomed to associate with gentlemen who claim the position and privileges of members of the legal profession. As observed in *Government Pleader v. Jogannath* (48) their position as a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice, their special training and their responsible *practice* gave them influence with the public, and it was their duty to use that influence so that the administration of justice might not be brought into contempt [*Re Desai* (49)]. They should have been actuated by a keen sense of duty and loyalty to the Courts and to their clients. They should have made a strenuous endeavour to resist and defeat the ignoble attempt to boycott the Courts and to imperil the administration of justice. Their paramount duty was, in the language used

(43) 8 W. R. 42 (1867).

(44) 12 W. R. 485 (1869).

(45) 5 Bom. H. C. R. (A. C. J.) 83 (1888).

(46) I. L. R. 20 Bom. 198 (1895).

(47) 1 Shome 125 (1878).

(48) I. L. R. 23 Bom. 252; s. c. 10 Bom. L. R. 1169 (1902).

(49) I. L. R. 44 Bom. 418 (1919).

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by Lord Shaw [*Re A Vakil* (50)], to co-operate with the Court in the orderly and pure administration of justice. It is thus a matter of the deepest concern that they passively acquiesced in, if not actively sympathised with, the movement to paralyse the Courts, and, what is most deplorable, they did not hesitate to cast baseless aspersions on the judicial officers who instituted these disciplinary proceedings solely with a view to vindicate the authority and maintain the dignity of the Courts.

References Nos. 4/21, 7/21, 8/21 and 9/21.

SANDERSON, C. J.—After due consideration we have decided to take no further action in respect of the References Nos. 1 of 1921, 7 of 1921, 8 of 1921 and 9 of 1921. Some of the reasons which have actuated us in coming to this conclusion, are,

(1) that these are the first cases of the kind which have been brought before this Court;

(2) that the Pleaders concerned, with the exception of one who has ceased to practise, have resumed work and attended the Courts;

(3) that there was undoubtedly a strong feeling in Noakhali on the occasion in question;

(4) the Pleaders may have acted in haste and without due consideration of the serious nature and effect of their conduct.

We have therefore decided to treat as leniently as possible the Pleaders concerned in the References now before us, in the hope and belief that the warning, which we now give, will have the effect of preventing a repetition of such conduct.

It must be recognised however that the Court takes a very serious view of this matter.

The Pleaders in Noakhali were a con-

siderable body in point of numbers, and were persons whose influence and action must have had a considerable effect on the *hartal*. It is, perhaps, not too much to say that if the Pleaders had abstained from observing the *hartal*, it might have failed altogether, or at any rate it would have had much less effect. But apart from this the Pleaders are a privileged body, with duties not only towards their clients but also towards the Courts of which they are Pleaders, to co-operate in the orderly and pure administration of justice.

The Pleaders in question failed to perform their duties in both respects, and they joined in a *hartal*, one of the objects of which was to paralyse the administration of justice.

Such conduct cannot and will not be permitted, whether it be on account of some alleged grievance in connection with the administration of the Courts or in furtherance of some movement political or otherwise. Therefore while deciding to take a lenient course in these cases, the first of the kind brought before us, we desire to make it clear that if such conduct is repeated in the future, it may entail serious consequences to those concerned.

J. N. R.

References discharged.

PRIVY COUNCIL.

[APPEALS FROM BENGAL.]

VISCOUNT CAVE.

LORD SHAW.

MR. AMEER ALI.

1921,

Heard, 10 and

13, June.

Judgment, 19, July.

THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL, Appellant,
v.

MAHARAJADHIRAJ SIR
BIJOY CHAND MAHTAB
BAHADUR, MAHARAJA
OF BURDWAN,
Respondent.

Chur land thrown up in river within the boundaries of a permanently settled estate, if liable to assessment with revenue—Act IX of 1847, sec. 6—

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Reg. II of 1819, Arts. 3, 31—Reg. I of 1793, Arts. 3, 6—Reg. XIX of 1793, sec. 1—Reg. XI of 1826, sec. 1 (1), (4).

The intention and effect of Act IX of 1847 was merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed.

THE SECRETARY OF STATE FOR INDIA v. SRIMATI FAHAMIDUNNISSA BEGUM (1) followed.

The question whether chur lands formed since the Permanent Settlement in beds of rivers belonging to a permanently settled zemindari are assessable as "land added to the estate" within the meaning of sec. 6 of the Act IX of 1847 has to be determined by reference to the pre-existing law and particularly to Reg. II of 1819.

The effect of Reg. II of 1819 is to declare that churs formed since the Decennial Settlement upon land which at the time of the Settlement had been river-bed are to be treated as unsettled; and this express provision cannot be excluded by showing that the river-bed from which the churs have been thrown up was at the date of settlement the property of the zemindar and that the settlement was imposed upon the zemindari as a whole.

In view of Art. 3 of Reg. II of 1819, a river-bed was not intended to be treated as "waste land" coming within the protection of Art. 31 of the Regulation.

THE SECRETARY OF STATE FOR INDIA v. SRIMATI FAHAMIDUNNISSA BEGUM (1) distinguished on the ground that the land which was held to be exempt from assessment in that case was land which was specifically comprised in the settlement,

but which, having since been submerged, had formed again.

These were two consolidated appeals from one judgment and four decrees, dated the 22nd May 1918, of the High Court of Judicature at Fort William in Bengal, which partly affirmed and partly reversed one judgment and three decrees, dated the 9th July 1913, of the Subordinate Judge of Burdwan, and which reversed a judgment and decree, dated the 14th July 1913, of the District Judge of Bankura, who had reversed a judgment and decree of the Subordinate Judge of Bankura, dated the 15th March 1912.

The Plaintiffs-Respondents claimed that certain *churs* which had been formed in the beds of the rivers Damodar and Darakeshwar, which flowed through the zemindari of the Plaintiffs, were the properties of the Plaintiffs, and that the Crown had no right to assess any revenue on the *churs*, nor to make any settlement in respect thereof with certain third parties who were also made Defendants in the suits. The Plaintiffs also claimed possession of the *churs* with mesne profits. The High Court had allowed the claim of the two Plaintiffs and the Crown appealed.

The present consolidated appeals arose out of four suits. The Respondent, Maharaja of Burdwan, filed three suits on the 11th, 16th and 30th August 1909 in the Court of the Subordinate Judge of Burdwan. The fourth suit was filed by the other Respondent, Rajnarayan Chandra Dhurja of Maliara, on the 3rd February 1911 in the Court of the Subordinate Judge of Bankura.

The Appellant, Secretary of State for India in Council, was the only Defendant in the fourth suit and the principal Defendant in the other three suits.

The River Damodar flows through the zemindari of the Maharaja into the River Hooghly. The length of the river is

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144 miles from Theraut in the north, to Gurchumbook in the south, and it is six miles from Gurchumbook to Alipur, where the river joins the Hooghly. In the Burdwan suit the river is divided into two parts, namely, one called *Ka*, and the other called *Kha*. The riparian villages on both sides of this portion of the river belong to the Maharaja. In the *Kha* portion the Maharaja also owns the villages on both banks of the river from Bhasna to Protabpur, and the villages on the northern bank from Protabpur to Theraut. The *churs* in dispute being situated partly in the Bankura and partly in the Burdwan Districts necessitated the filing of separate suits.

The case of the Maharaja in the Burdwan and Bankura suits was that his zemindari, comprising the Districts of Burdwan, Hooghly and Bankura, included the bed of the River Damodar from Theraut to Gurchumbook; that he was the owner of the whole bed of that river as well as of all the *churs* that had been or might be formed in that river; that the entire Government revenue had been permanently settled in respect of the whole of his zemindari in the said Districts by the Permanent Settlement, and that the Crown had no right or title whatever to the *churs* which had been formed in the River Damodar. The same case was made by the Respondent Rajnarayan Chandra Dhurja in respect of the *churs* formed in the River Damodar, where it flowed through the Pergunnah Maliara. And the Maharaja made the same claim to the *churs* that were formed in the River Darakeshwar within the ambit of his village Khatnagar.

The Plaintiffs asserted that the Crown had no right under Act IX of 1847 or under any other law, to survey and settle the *churs* which had been formed in the beds of the Rivers Damodar and Darakeshwar, and that the settlements made by the

Crown were void and inoperative. The Plaintiffs therefore claimed declaration of their proprietary right to the *churs* (specified in the schedule attached to the plaints) with possession thereof, and mesne profits.

The Secretary of State for India in Council denied the claim of the Plaintiffs in all the four suits. The defence in each suit was substantially the same and reference to the written statement filed in the Burdwan suit is sufficient to indicate it. The main defence was that neither the bed of the River Damodar nor any portion of it was included within any estate or zemindari held by the Plaintiff in either suit at the time of the Permanent Settlement; that neither Plaintiff had any title to the bed of the river or to the *churs* in question, and that the settlement made by the Crown under Act IX of 1847 was valid and binding on the Plaintiffs. It was admitted that the River Darakeshwar was not navigable, but it was pleaded that the River Damodar was navigable in all seasons of the year, and consequently its bed could not have been included in the permanently settled estate of the Plaintiffs. It was further pleaded that even if the Plaintiffs were held to be the owners of the *churs* in question, the Crown was entitled to assess them with revenue, and to make settlements in respect of them in case the Plaintiffs refused to pay the revenue assessed.

The remaining pleas are not material for this report.

The three suits, namely, Burdwan, Bankura and Khatnagar suits, were tried together by the Subordinate Judge of Burdwan. The fourth, i.e., Maliara suit, was tried by the Subordinate Judge of Bankura. The former delivered judgment on the 9th July 1913, and the latter on the 15th March 1912.

The judgment of the Subordinate Judge

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of Burdwan contained an elaborate examination of the evidence and the authorities bearing on the questions raised on the present appeal. He found on the evidence that the River Damodar is and always has been a non-navigable river and that finding was affirmed on appeal by the High Court.

He found that the *Ka* portion of the river bed was surrounded on all sides by and was situate in one compact zemindari of the Maharaja; that it was permanently settled at the time of the Permanent Settlement as one compact estate, and that the settlement of land included not only the land covered over with crops, but also the land covered with water, *i.e.*, river beds. He held that the *Ka* portion of the beds of the Rivers Damodar and Darakeshwar lying within his permanently settled estate was the property of the Maharaja, on the ground that they were expressly included in his permanently settled estate; that the *churs* formed therein consequently belonged to the Maharaja, and that the Crown having permanently fixed the revenue in respect of the whole compact estate had no right to assess any revenue on the *churs* formed therein. He therefore allowed the claim of the Maharaja to the proprietary possession of the *churs* formed in the *Ka* portion of the River Damodar in the Burdwan suit, and those in question in the Khatnagar suit, with mesne profits and costs.

In regard to the bed of the River Damodar marked *Kha* in the Burdwan suit, and that in question in the Bankura suit, the learned Subordinate Judge held that they were not expressly included, but only included by implication. He said as follows:—

“I also find that by the presumption of law, *i.e.*, by the principle of middle-thread, the Plaintiff has a right to the river and its bed up to its middle line, so far as it borders the Plaintiff's permanently settled

estate; that the Permanent Settlement having been made, with the Plaintiff's ancestor, of the riparian *pergunnahs* on both sides of the river as *Ka*, and on one side of the river as in *Kha*, in the Burdwan suit, the Plaintiff has the proprietary right to the River Damodar and its bed as claimed in the Burdwan suit; that further the Plaintiff being the owner of the riparian *pergunnahs* Barahazari and Bishunpur in Bankura district, which are permanently settled estates, the Plaintiff has a right, by the said presumption of law, to the river and its bed up to its middle line bordering the said *pergunnahs*, and, lastly, that the half of the river and its bed as in *Kha* in the Burdwan suit, and half of the river and its bed as in the Bankura suit even by the said presumption of law, was impliedly included within the said estates permanently settled at the time of the Permanent Settlement.”

The Subordinate Judge further held that the *churs* formed in the river bed which was impliedly included within the permanently settled estates of the Maharaja, were the properties of the Maharaja, but he held that the Maharaja was liable to pay additional assessment that may be imposed by the Crown in respect of them, and that the Maharaja having refused to accept a settlement, the proceedings of the Settlement Court could not be set aside by the Civil Court, and were binding on the Maharaja. In regard to such *churs* (excepting Pursha and Madhabpur) therefore the learned Subordinate Judge held that the Maharaja was entitled merely to a declaration of his proprietary right to the same, and to get *Malikana* in respect of them, and that he was not entitled to possession thereof. He accordingly made three decrees partly allowing and partly dismissing the claim of the Maharaja.

The Subordinate Judge of Bankura also held that the bed of the River Damodar in question in the Maliara suit, was included in the estate permanently settled with the Maharaja, and that the *churs* formed

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in that bed were the property of the Plaintiff, and that the Crown had no right to assess any revenue in respect of them. He therefore made a decree allowing the claim of the said Plaintiff, and from that decree there was an appeal to the District Judge of Bankura, who delivered judgment on the 14th July 1913. He held that the Crown was entitled to assess revenue on the *churs* in question in the Maliara suit, and that the settlements made by the Crown in respect of them were valid, and he accordingly made a decree dismissing the suit of the said Plaintiff with costs.

From the decrees of the said Subordinate Judge of Burdwan, five appeals were filed in the High Court of Judicature at Fort William in Bengal, namely, three appeals by the Secretary of State for India in Council (Nos. 66, 82 and 375 of 1914), and two appeals by the Maharaja (Nos. 61 and 90 of 1914). The Respondent, Rajnarayan Chandra Dhurja, also filed a second appeal (No. 3,180 of 1913), in the same High Court. All the said appeals were heard together by the said High Court, which delivered judgment on the 22nd May 1918. The learned Judges of the High Court dismissed the appeals of the said Secretary of State, holding that the decision of the Subordinate Judge of Burdwan was right. Mr. Justice Fletcher, who delivered the judgment of the Court, observed as follows:—

“I agree with the conclusion of the learned Judge that the bed of the River Damodar, in so far as it flowed through the Chuckla or Zamindari of Burdwan, was a portion of the property permanently settled with the Plaintiff's predecessors. The main argument on behalf of the Government is that *churs* that form in the River Damodar are resumable under the provisions of the Bengal Alluvion and Diluvion Regulation of 1825 (Reg. II of 1825), and that is so even if the river is non-navigable and formed part of the permanently settled

estate. That argument, however, is, I think, altogether opposed to the decision of the Privy Council in the case of *Secretary of State v. Fahamidunnissa Begum* (1). Before there can be a further assessment of Government revenue, there must be a ‘gain’ from the public domain. The mere fact that a portion of the permanently settled estate has become more valuable, is no ground for altering the assessment. The fact that no amount, or only a small amount, in respect of a particular piece of property entered into the calculation on the basis of which the Government revenue was permanently settled, and that the property has become of much greater value, is no ground for disturbing the Permanent Settlement of the estate. [See *Balsurya Prashad Row v. The Secretary of State for India in Council* (5).]”

For the same reason the learned Judges of the High Court allowed the second appeal of the Plaintiff, Rajnarayan Chandra Dhurja.

In regard to the appeals of the Maharaja the learned Judges of the High Court affirmed the finding of the said Subordinate Judge that the Maharaja was the owner of the bed of the non-navigable river Damodar, which was impliedly included in permanently settled estates of the Maharaja, but they were of opinion that on that finding the Crown was not entitled to assess any revenue on the *churs* formed in that bed. Mr. Justice Fletcher concluded his judgment as follows:—

“Then as regards the right of the Crown to assess further revenue on *churs* forming on these portions of the river, I am unable to agree with the conclusion of the learned Judge. In this respect I would refer to two decisions, one being the case of *Commissioners for Land Tax for the City of London v. Central London Railway Company* (3) and the other being the case of *Attorney-General*

(1) L. R. 17 I. A. 40; s. c. I. L. R. 17 Cal. 590 (1880).

(3) L. R. [1913] A. C. 304.

(5) L. R. 44 I. A. 168; s. c. I. L. R. 40 Mad. 886 at p. 907; 21 C. W. N. 1089 (1917).

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for *British Columbia v. Attorney-General for Canada* (4).

The effect of these decisions is that where property is bounded by a road or a river the boundary, even if given as the road or the river, is the middle of the road or river as the case may be. This principle is too well recognised in our law to be now departed from. If that be so, then the permanently settled estate of the Maharaja included half of the bed of the river we are now considering, and the assessment of the Government revenue on the estate was imposed on it just as much as any other portion of the estate. I am unable to distinguish the present case from the decision of the House of Lords above referred to. If the assessment of land tax on a house in the City of London included therein the assessment of one-half of the street, I think it follows that the assessment of the Government revenue on the riparian moujahs in question was imposed not only in the moujahs but on the adjoining half of the bed of the river. In the result, the appeals of the Secretary of State for India in Council must be dismissed with costs to the Maharaja of Burdwan only. The appeals of the Plaintiff (except as regards *chur* Pursha with which only Defendant No. 17 in the Bankura suit is concerned) will be allowed with costs. Second Appeal No. 3180 of 1913 will be allowed, and the judgment and decree of the District Judge set aside and the judgment of the Subordinate Judge restored, with costs both in this and the lower Courts."

The High Court made decrees accordingly and from those decrees the Secretary of State for India in Council preferred these appeals to His Majesty in Council.

Mr. A. M. Dunne, K. C. (with Mr. Kenworthy Brown) for the Appellants refers to Bengal Reg. II of 1819, Reg. XI of 1825, Reg. III of 1828, Act IX of 1847 (Alluvion and Diluvion Act), Bengal Act IV of 1868, Amending Act of 1848 and Act XXXI of 1858. Under Act IX of 1847 Government is entitled to assess *churs*. Refers to *Lopez v. Muddun Mohun*

(4) L. R. [1914] A. C. 198.

Thakoor (2), *The Secretary of State for India v. Srimati Fahamidunnissa Begum* (1) and *Jagadindra Nath v. Secretary of State for India* (6). The High Court did not consider the construction of Act IX of 1847 because they thought that *The Secretary of State for India v. Srimati Fahamidunnissa Begum* (1) made it inapplicable. Submits that the judgment of first Court in the Burdwan suit is right; he draws distinction between ownership of land and its assessibility with revenue.

Mr. L. DeGruyther, K. C. (with Mr. Upjohn, K. C. and Mr. Dubé) for the Respondents.—It was not correct to say that assessment was made only upon cultivated land under Reg. I of 1793, the settlement was final save that (a) some land-settlements had not yet been completed, and (b) as to Government lands. Disputes followed as to accretions and hence Reg. II of 1819 and Reg. II of 1825. Reg. II of 1819 applied to *lakhiraj* lands and lands added to limits of estate (per pre-amble) but affirmed finality of settlements already made. In that Regulation the important word is "gained." "Waste lands" in sec. 31 includes "*chur*" lands.

The Secretary of State for India v. Srimati Fahamidunnissa Begum (1) defines "gain." When Reg. II of 1819 was passed no provision was made for abatement.

Both Courts found the river-bed to be within the boundaries of the estate. Referred to *Balsurya Prashad Row v. Secretary of State* (5).

Commissioners of Land Tax for the City

(1) L. R. 17 I. A. 40; s. c. I. L. R. 17 Cal. 590 (1898).

(2) 13 M. I. A. 487 (1870).

(5) L. R. 44 I. A. 166; s. c. I. L. R. 40 Mad. 886; 21 C. W. N. 1089 (1917).

(6) L. R. 20 I. A. 44 at p. 50; s. c. I. L. R. 30 Cal. 291; 7 C. W. N. 198 (1902).

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of London v. Central London Railway Company (3) was also referred to.

Mr. Dubé, following, refers to *Lopez v. Muddun Mohun Thakoor* (2) and *Budrunnissa v. Prosunno Kumar* (8).

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT CAVE.—These are consolidated appeals from decrees made by the High Court of Judicature at Fort William in Bengal in four suits. Of these suits three were brought by the Maharaja of Burdwan, with whose ancestor the zamindari of Burdwan was permanently settled in the year 1793; and the fourth by the zamindar of Maliara, with whose predecessor that zamindari was similarly settled in the same year. The causes of action in all the four suits were similar in character. The lands comprised in the zamindari of Burdwan are in part traversed and in part bounded by two rivers, the Damodar and the Darakeshwar; and the Maliara lands are similarly bounded by the first-mentioned river. Since the date of the settlements a large number of *churs* (or sand-banks) and islands have been thrown up in these rivers; and the revenue authorities, purporting to act under Act IX of 1847, recently caused a *dcara* survey to be made of these *churs* and islands (hereafter for the sake of brevity referred to as *churs*) and assessed them with revenue, and on the refusal of the zamindars to accept a settlement, settled them with third parties. The zamindars disputed the right of the Government to make such an assessment and claimed to be the owners of the *churs* where they lay opposite to their settled lands and to be entitled to hold them as part of their settled property

free from any additional assessment; and it was to establish this claim that these suits were brought. The decision of the Subordinate Judge of Burdwan in the suits brought by the Maharaja was partly for and partly against his claim, while the decree of the District Judge of Bankura in the Maliara suit was wholly against the zamindar. On appeal the High Court decided all the suits in favour of the Plaintiffs, and thereupon these appeals were brought by the Defendant, the Secretary of State for India in Council.

The evidence in the suits is voluminous, but the material facts may be shortly stated; and for this purpose it will be sufficient to refer to the facts in the first two suits only, *viz.*, those brought by the Maharaja of Burdwan with reference to the *churs* in the river Damodar; for it is common ground that the decision in these two suits must determine the result of the other two suits also.

The Damodar is a river of some width but little depth flowing into the Hooghly near Gurchumbook. For a distance of 53 miles, *viz.*, from Theraut to Basna, it forms the southern boundary of lands belonging to the zamindari of Burdwan; and for the next 91 miles, *viz.*, from Basna to Gurchumbook, it runs through the lands of that zamindari, which accordingly adjoin the river on both banks, except that a few of the riparian mouzahs were some time since sold for arrears of revenue and no longer belong to the zamindari. From Gurchumbook up to Ampta—that is to say, for a distance of about 14 miles—the river is navigable at all seasons of the year; but beyond the last-mentioned point it is navigable at certain seasons only, and for present purposes may be treated as non-navigable. The Maharajas of Burdwan appear to have fishing rights in the river and to own certain private ferries upon it. They also

(3) 13 M. I. A. 467 (1870).

(8) L. R. [1913] A. C. 864.

(7) 14 W. R. 25; 6 Beng. L. R. 255 (F. B. (1870).

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at one time levied tolls on boats passing up and down the river; but these tolls were abolished by the Government in the year 1772—that is to say, before the date of the decennial settlement—and have not since been levied.

For some time before 1791 yearly settlements were effected with the successive Maharajas, and it appears that on the occasion of one of these yearly settlements, *viz.*, that for the year 1772, a deduction was made for *nadi sikasti*, or diluvion by river. The *kabuliyat* relating to the settlement of 1788 is produced; and by this document Maharaja Tej Chandra, who is therein described as “zaniindar of pergunnah Burdwan, etc., in the province of Bengal,” accepted the sum of Rs. 40,15,109-2a. as the revenue for the settlement of “the said chuckla,” and agreed to cultivate the land and to raise no objection to paying the revenue on the score of inundation, of the lands being washed away by the river, etc.

In 1790, when the decennial settlements were introduced, difficulty was experienced in effecting an agreement with the Maharaja, with the result that some mouzahs were sold by Government to raise arrears of revenue; but ultimately in 1791 a settlement for nine years was agreed upon. No *sarad* or *kabuliyat* relating to this important settlement has been produced, but its terms are evidenced by a statement headed “Dowl Bundbust or Particular Statement of the Jumma of Pergunnah Burdwan payable yearly by the Zamindar Maharaja Tej Chand Bahadur for nine years from the beginning of the Bengal year 1198 to the end of 1206, or from the 10th April 1791, to 11th April, 1800.” This statement contains the items making up the sum of Rs. 40,15,109.2a. specified in the *kabuliyat* for the year 1788, and after certain deductions for *sayer* abolished, lands sold for arrears of revenue,

and other matters, brings out the total revenue payable by the zamindar during the nine years at Rs. 32,93,892 per annum. No reference is made to the river-bed; and it was found by the Subordinate Judge that, while the income from the fishing and ferrying rights was included in the assessment, no part of the bed was included in any of the settled pergunnahs and mouzahs. Indeed it is plain that in arriving at the revenue for the purposes of the settlement the bed of the river was not taken into account. It is this settlement which was made permanent by Reg. I of 1793.

Upon these and other like materials the Subordinate Judge came to the conclusion that the whole bed of the river where it ran through the zamindari lands, and the bed *ad medium filum aquæ* where it bounded those lands on one side only, was the property of the zamindar, and accordingly that the *churs* formed on these parts of the river-bed belonged to the zamindari; but as to the effect of the permanent settlement he drew a distinction. He held that, the zamindari having been settled as “the said chuckla”—that is to say, as a compact estate—in the year 1788, and (as he assumed) also in the year 1791, the settlement included and covered the river-bed where it was bounded on both sides by the zamindari lands, and that the *churs* formed on this part of the bed could not be the subject of an additional assessment under the Act of 1847; but as to that part of the river which was bounded on one bank only by the zamindari lands, he held that the bed of the river *ad medium filum*, being included in the adjoining lands by presumption of law only, was not covered by the settlement, and that the *churs* since formed on this part of the bed were liable to assessment as unsettled land. On appeal the High Court, while upholding the findings of the Subordinate

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Judge as to the proprietary rights of the zamindar in the river-bed and *churs*, rejected the distinction drawn by him as to the effect of the Permanent Settlement, and held that the zamindar was entitled to hold all the *churs* in dispute as part of his permanently settled lands and free from further assessment. The appeal is therefore brought as to all these *churs*.

In dealing with this appeal their Lordships accept the concurrent findings of the Courts as to the ownership of the bed of the river and of the *churs* formed upon it since the date of the settlement, and the assumption of the Subordinate Judge that the decennial settlement of 1791 (which was made permanent in 1793) was similar to the settlement evidenced by the *kabuliyat* of 1788 in assessing the zamindari as a whole. They also put aside for the moment the subordinate arguments founded on the facts that some of the riparian mouzahs had been alienated before the settlement, and that the lower part of the river was navigable; and they proceed to consider the important question of law, whether on the facts as found the revenue authorities were entitled to assess the newly formed *churs* to revenue as being "land added to the estate" within the meaning of sec. 6 of Act IX of 1847. It has already been decided by the Board in *The Secretary of State for India v. Srimati Fahamidunnissa Begum* (1) that the intention and effect of the Act of 1847 was merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed; and accordingly the question raised as to the assessability of the *churs* in dispute must be determined

by reference to the pre-existing law and particularly to Reg. II of 1819.

Reg. I of 1793, by which the decennial settlements were made permanent, declared (by Art. 3) to the zamindars and other proprietors of land with whom a settlement had been concluded that "at the expiration of the term of settlement no alteration will be made in the assessment which they have respectively engaged to pay, but that they, and their heirs and lawful successors, will be allowed to hold their estates at such assessment for ever." The main purpose of this declaration appears from Art. 6, which contains the following paragraph:—

"The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them, or their heirs or successors, by the present or any future Government, for an augmentation of the public assessment in consequence of the improvement of their respective estates."

Reg. XIX of 1793, which deals mainly with alienated lands, contains the following recital showing the origin of the settlements for revenue:—

"By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every begah of land (demandable in money or kind, according to local custom), unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter."

Reg. II of 1819, which is expressed to be passed for (among other things) defining the right of Government to the revenue

(1) L. R. 17 I. A. 40; s. c. I. L. R. 17 Cal. 590 (1889).

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of lands not included within the limits of estates for which a settlement has been made, contains (in Art. 3) the following provisions :—

“*First*.—It is hereby declared and enacted that all lands which, at the period of the decennial settlement, were not included within the limits of any *pergunnah*, *mouzah* or other division of estates for which a settlement was concluded with the owners, not being lands for which a distinct settlement may have been made since the period above referred to, nor lands held free of assessment under a valid and legal title of the nature specified in Regs. XIX and XXXVII, 1793, and in the corresponding Regulations subsequently enacted, are and shall be considered liable to assessment in the same manner as other unsettled *mehauls* and the revenue assessed on all such lands, whether exceeding one hundred *begahs* or otherwise, shall belong to Government. . . .

“*Second*.—The foregoing principles shall be deemed applicable not only to tracts of land, such as are described to have been brought into cultivation in the *Sunderbuns*, but to all *churs* and islands formed since the period of the decennial settlement, and generally to all lands gained by alluvion or dereliction since that period, whether from an introcession of the sea, an alteration in the course of rivers, or the gradual accession of soil on their banks.”

Art. 31 of the same Regulation saves the rights of the proprietors of permanently settled estates to the full benefit of “all waste lands included within the ascertained boundaries of such estates respectively at the period of the decennial settlement and which have since been or may hereafter be reduced to cultivation,” and concludes with the following general declaration :—

“*Second*.—It is further hereby declared and enacted, that all claims by the revenue authorities on behalf of Government to additional revenue from lands which were at the period of the decennial settlement included within the limits of estates for which a permanent settlement has been concluded, whether on the plea of error

or fraud, or on any pretext whatever, saving, of course, the case of lands expressly excluded from the operation of the settlement, such as *lakheraj* and *thannadarry* lands, shall be and be considered wholly illegal and invalid.”

On an analysis of the terms of these Regulations, so far as they are material to the question now under consideration, it appears that, while lands included in a permanent settlement were carefully excluded from further assessment, this protection was extended only to lands actually in existence at the time of the settlement and specifically included in the estate as settled. The produce of “every *begah*” of these lands was to be assessed to revenue once for all (Reg. XIX of 1791); and even waste land producing little or no revenue to the proprietor, if “included within the limits of any *pergunnah*, *mouzah* or other division of estates for which a settlement was concluded,” was to be free from further assessment on being brought into cultivation (Reg. II of 1819, Art. 31). But lands not included in the settled *pergunnahs* and *mouzahs* were to be considered liable to assessment as unsettled property; and “these principles”—*i.e.*, that lands not included within the limits of the settled *pergunnahs* and *mouzahs* were to be the subject of additional assessment—were to be deemed applicable to all *churs* and islands formed since the decennial settlement, and generally to all lands gained by alluvion or dereliction since that period (Reg. II of 1819). It appears to their Lordships that the effect of the Regulation last referred to is to declare that *churs* formed after the decennial settlement are to be treated as unsettled; and that this express provision cannot be excluded merely by showing that the river-bed from which the *churs* have been thrown up was at the date of settlement the property of the *zamindar*, and

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that the settlement was imposed upon the zamindari as a whole. The ownership of the bed may determine the proprietary rights in the *churs*; but property is one thing and assessability is another. The Regulation declares in terms that new *churs* are to be included in the category of unsettled lands, and contains no exception for *churs* formed upon a river-bed belonging to a settled estate. Such *churs* must therefore be treated as unsettled.

This conclusion is strongly supported by the terms of Reg. XI of 1825, which deals with the rules to be observed in determining claims to lands gained by alluvion or dereliction. The fourth rule laid down in that Regulation, while providing that "in small and shallow rivers, the beds of which, with the julkur right of fishery, may have been heretofore recognised as the property of individuals, any sandbank or *chur* that may be thrown up shall, as hitherto, belong to the proprietor of the bed of the river," adds the words "subject to the provisions stated in the first clause of the present section." These last-mentioned words refer to the proviso to the first clause, which prevents the owner of an increment of land gained from a river or the sea from being exempt from assessment to revenue under Reg. II of 1819; and they show conclusively that the intention of the Regulation was to provide that all *churs* newly formed since the decennial settlement, though upon a river-bed which is "recognised as the property" of the owner of the settled estate, are to be treated as land gained since the settlement, and liable to be assessed accordingly.

There is nothing inequitable in such a construction. Sec. 5 of Act IX of 1847 provides that, when on inspection of the *deara* survey map it appears that land has been washed away from or lost to any estate paying revenue to Government, a

proportionate deduction shall be made from the jumma; and if a deduction is to be made for land washed away, there is no reason why an addition should not be made in respect of land gained by alluvion or dereliction. In the latter case, while it may be that the area nominally belonging to the estate is unaltered, the cultivable area is increased and with it the potential revenue of the estate.

It was suggested in argument that a river-bed might be treated as "waste land" coming within the protection of Art. 31 of Reg. II of 1819; but their Lordships are not of that opinion. Indeed the express provision in Art. 31 that waste land shall not be the subject of an additional assessment when brought into cultivation, when contrasted with the provisions of Art. 3 of the same Regulation as to newly formed *churs* and islands, affords further support to the view that the legislative authority intended to put such *churs* upon a different footing from the waste lands and to make them liable to assessment.

The learned Judges of the High Court appear to have thought that such a construction of the Regulations as is here adopted would be opposed to the decision of this Board in the above cited case of *The Secretary of State for India v. Srimati Fahamidunnissa Begum* (1), but on examination of that case it will appear clearly that the lands there held to be exempt from assessment were not *churs* formed since the settlement upon land which at the time of settlement had been river-bed, but were lands specifically comprised in the settlement and which, having for a time been covered with water, had afterwards emerged again by reason of alluvion or dereliction. The estate there in question, containing at the date of the decen-

(1) L. R. 17 I. A. 40: s. c. I. L. R. 17 Cal. 590 (1889).

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nial settlement 1,042 begahs of land, had become wholly submerged by the action of the Ganges and the Brahmaputra; but an area amounting to 2,000 begahs had recently re-appeared above water, and it was this reformed land—which had been specifically included in the decennial settlement and in respect of which the assessed revenue had been paid even during the period of its submergence—which it was sought to assess to additional revenue. The Board, affirming the decision of the High Court in Bengal, decided against this claim, holding that “lands within the limits of settled estates which had become covered with water and afterwards reformed were not lands gained from the river or sea by alluvion or dereliction within the meaning of the legislation of 1847, which is confined to lands so gained since the period of settlement.” It is obvious that such a conclusion has no application to a case like the present, where the land in question is new land formed since the settlement was made. Lord Herschell, by whom the judgment of the Board was delivered, insisted more than once on the circumstance that the land in question was land which had been assessed to revenue at the date of the settlement and had since been inundated and recovered, and that revenue had throughout been paid upon it; and the terms of the judgment indicate that, if the land in question had been formed for the first time since the date of the settlement, the decision would have been the other way.

Lopez v. Muddun Mohun Thakoor (2) was referred to; but that case, which dealt with the proprietary right in land reformed after submergence upon the original site and not with assessment to revenue, has no direct bearing on the present case. Reliance was also placed on certain rating cases [*Commissioners of Land Tax for the*

City of London v. Central London Railway Company (3), *The Attorney-General for British Columbia v. The Attorney-General for Canada* (4)]; but those decisions turned on English or Canadian law, and cannot affect the construction of the express provisions of the Bengal Regulations.

In the result their Lordships are satisfied that the *churs* and islands, which since the decennial settlement of the zamindari of Burdwan have been formed in the River Damodar opposite to lands belonging to that zamindari, were liable to assessment under the Act of 1847, and accordingly that the appeals in the first two suits should succeed. Having regard to this conclusion, it is unnecessary to consider the question of the ownership of any *churs* which may have been formed opposite to lands alienated from the zamindari or in the navigable part of the river.

As stated above, the *churs* formed in the river Darakeshwar, which were in question in the third suit, and those formed in the Damodar over against lands of the zamindar of Maliara, which were the subject of the fourth suit, are for present purposes in the same position as the *churs* already discussed. The appeals in these suits also should therefore be allowed, and the decision of the District Judge of Bankura in the fourth suit should be restored.

Their Lordships will humbly advise His Majesty that these appeals should be allowed and the suits dismissed, and that the Respondents should pay the costs in all Courts and the costs of these appeals.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Solicitors to the India Office* for the Respondents.

R. M. P.

(3) L. R. [1913] A. C. 364.

(4) L. R. [1914] A. C. 158.

[INSOLVENCY JURISDICTION.]

No. 190 OF 1914.

GREAVES, J.

1920,

10, February.

} *Re* LALBEHARI SHAH.

Insolvency—Presidency Towns Insolvency Act (III of 1909), secs. 5, 6, 36, 101, sec. 18, Sch. II—Appeal, time within which to be filed—Signing of the findings and of the report—Jurisdiction of the Registrar in Insolvency—Validity of a mortgage, whether could be decided by the Registrar—Consent when infants are concerned, effect of.

Under sec. 101 of the *Presidency Towns Insolvency Act, 1909*, the period of limitation for an appeal from the order of the Registrar in Insolvency is twenty days from the time when the report is signed by the Registrar and the matter is thereby completed and not from the time when the findings of the Registrar are signed or filed.

The Registrar in Insolvency has no jurisdiction to deal with the question of validity or otherwise of a mortgage alleged to have been executed by the insolvent.

This was an appeal from the order of the Registrar in Insolvency, dated the 14th August 1919.

The facts of the case will appear from the judgment.

Mr. H. D. Bose (with him *Mr. B. K. Ghose*) for the Respondents.—I take a preliminary objection that the appeal is not maintainable. There is no next friend of the Appellants who are infants on the record. In the second place the appeal is out of time. Under sec. 101 time-limit is 20 days. Time begins to run from the date when the findings are signed and filed. What happens subsequently is not material. The matter is not governed by the Limitation Act, no office copies are to accompany the grounds of appeal. As to the question of jurisdiction, the Registrar decided what was referred to him by the Court. The order of reference has not been set aside and could not be challenged

in these proceedings. There was also consent of parties.

Mr. A. N. Chaudhuri (with him *Sir B. C. Mitter, Mr. S. N. Banerjee* and *Mr. N. N. Bose*) for the Appellants.—The first is only a technical objection. We have made an application to have the cause-title amended. As to the question of limitation time begins to run when the report is signed. Before the report is signed the rights of the parties are not finally determined. Again it is clear that the Registrar has no jurisdiction to decide the question of the validity of the mortgage. It does not come under sec. 6 of the Act. In this case consent is of no avail as there are infants concerned.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This matter comes before me by way of an appeal from a decision of the Insolvency Registrar of this Court. The facts are shortly as follows :—On the 23rd July 1914 Lalbehari Shah and others were adjudicated insolvents upon the petition of a creditor one Motilal Boid. He was a creditor for Rs. 6,48,000 and he filed a retainer through an attorney, *Mr. S. N. Dutt*, to represent him in the insolvency proceedings. Motilal Boid is the father of the present Appellants before me. He died on the 29th February 1916 leaving him surviving his widow Panni Bibee and the Appellants, his infant sons. He also left a brother Dhoneraj Boid. On the 7th August 1916 an application was made by the brother as next friend of the infants for examination of certain witnesses under sec. 36 of the Insolvency Act. The retainer was signed by him and he made an affidavit that he had no interest adverse to the infants. He signed as next friend and the retainer that he gave to his attorney was in respect of all the proceedings. On the 23rd August 1916 the mortgagees got an order to prove their mortgage before the Registrar in Insolvency

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under sec. 18 of the second schedule of the Insolvency Act and the Official Assignee was directed to sell the Premises No. 3/2, Sovabazar. On the 1st September 1916 Panni Bibee was appointed under the Guardians and Wards Act as guardian of her infant sons and on the 16th September 1916 she gave to her brother-in-law Dhoneraj Boid a power of attorney to act on her behalf. On the 18th September 1916 the mortgaged properties were sold by the Official Assignee. On the 2nd February 1917 Panni Bibee applied for an order to examine the mortgagees under sec. 36 of the Insolvency Act and an order was made for their examination. It is said that Panni Bibee made the application really as next friend of the infants and in error of the fact that she was not their next friend. Be that as it may, it appears that all the proceedings before the Registrar in Insolvency were conducted on behalf of Panni Bibee not as next friend of the infants but as a creditor of the insolvent's estate and of course she was a creditor of her husband's estate by reason of her position as his widow. On the 6th July 1918 the examination of the witnesses took place that is to say of the mortgagees for a period of two days and the Assistant Referee who was then acting as the Registrar in Insolvency stated that he would go into the question of the validity of the mortgages although I understand that he arrived at no final decision on that day. On the 3rd February 1919, Mr. Remfry, the Registrar in Insolvency, stated that he thought that he would go into the question of the validity of these mortgages and on the 17th February 1919 the parties agreed to the question of the validity of the mortgages being gone into before him. From the 21st to the 27th February the witnesses on behalf of the mortgagees were examined before him and from the 19th March to the 10th April the witnesses

called on behalf of the Appellant were examined. On the 12th July 1919 the Registrar in Insolvency signed his findings and just before the figures of the amount due on the mortgage occurs this : "I therefore find and report that there is now due on the mortgage the sum of Rs. 27,000 for principal and interest." Those findings were filed on the 15th July 1919. On the 25th July 1919 the report of the Registrar in Insolvency was settled and passed and he there states that he had gone into the question of the validity of the mortgages and considered the facts placed before him and he holds that the mortgage is a valid one and that the consideration alleged therein was duly paid, and then he goes to state what is due to the mortgagees. On the 14th August 1919 the report was signed and filed on that day and on the 3rd September 1919 the present appeal was filed. Some dispute has arisen as to whether in fact it was presented on the 3rd September 1919 or on the 4th September. What happened, I understand, was that on the 3rd September it was tendered on the Original Side in the English Department and that the attorney who tendered the appeal was then told that it should have been presented in the Insolvency Jurisdiction of the Court and apparently it was presented in the Insolvency Jurisdiction of the Court on the 4th September 1919. It is not contested certainly for the purpose of this application, that the time to file the appeal, if otherwise in time, would have extended until the reopening of the Courts after the long vacation. Accordingly it does not seem to me to matter whether it was in fact filed on the 3rd or 4th September. On these facts being stated to me two preliminary objections were taken on behalf of the mortgagees. First it was said that the appeal is made or presented by infants without their having any next

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friend and I have an application made by the mortgagees asking that the appeal should be dismissed with costs to be paid by the attorney on the ground that no next friend had been named on behalf of the infants. On the other hand I have another application before me for the amendment of the appeal by inserting the name of the next friend. It seems to me that having regard to the provisions of Or. XXXII, r. 2, I have a discretion as to how I shall deal with the matter when a plaint or other proceedings have been taken without the infant being represented by a next friend and it does not seem to me therefore that there is any substance in this preliminary objection because I shall accede to the application to amend the appeal upon the addition of the name of the next friend upon the costs of the mortgagees of appearing on this application and the costs of their application to which I have already referred being paid. But there is a more substantial preliminary objection and that is that the appeal was filed out of time. It is said that the Registrar's findings having been signed on the 12th July 1919 and filed on the 15th, time runs as from one or other of these dates or in any case at the very latest from the 25th July 1919 when the report was settled and passed. On the other hand it is said on behalf of the Appellants that time did not commence to run until the report was signed by the Registrar on the 14th August 1919. Now it appears that in accordance with the practice of the office, time is taken to run as from the time that the report is signed, because I find a note on the application for appeal, "Report signed 18-8-18—appeal in time" this being signed by the Registrar in Insolvency. It therefore remains to consider the provisions of sec. 101 of the Presidency Towns Insolvency Act in order to ascertain whether the preliminary objection on this

point should prevail or not. Sec. 101 provides that the period of limitation for an appeal from any act or decision of the Official Assignee or from an order made by an officer of the Court empowered under sec. 6 shall be 20 days from the date of such act, decision or order as the case may be. Some discussions took place before me on this preliminary question as to whether the Registrar was a person empowered under sec. 6 of the Act. It is not necessary for me to deal with that now for that is a question which will arise if I decide that the preliminary objection is not well-founded. So it only remains for me to decide whether the order of an officer of the Court referred to in sec. 101 is under the circumstances the findings that were filed on the 15th July or that the report that was actually signed on the 14th August. The conclusion that I have come to is that the 20 days provided by sec. 101 run not as from the findings being filed or signed but as from the matter being completed and the report being signed, that is to say, when the matter is completed and the parties know their position. That therefore disposes of the preliminary objection and it now remains for me to deal with the appeal on its merits; but before I do so I should add that as the matter has been ventilated it does not seem to me to matter whether Panni Bibee was alone before the Registrar or whether the infants unrepresented by a next friend were before the Registrar, because even if the infants were not before the Registrar, it is conceded that being affected by the order that the Registrar has made, they are entitled in any case to appeal. That disposes then of the preliminary objection and the two applications that are made, that is to say, with regard to the amendment of the application and with regard to the dismissal of the appeal. I now proceed to deal with the appeal on its merits. I now

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come to deal with the appeal as presented. The first ground of appeal is that the Registrar had no jurisdiction to go into the question of the validity or otherwise of the said mortgage in the reference directed to him and that he erred in adjudicating on the same although the parties consented to that course being adopted.

The other grounds of appeal are, secondly, that the mortgage transaction was fictitious; thirdly, that he should have found on the evidence that the adjudication was collusive; and so on.

Counsel appearing on behalf of the Appellants has stated before me that all he desires to do at the present time is to question the jurisdiction of the Registrar to deal with the validity of the mortgage under the reference to him under Sch. II, sec. 18, of the Presidency Towns Insolvency Act, and he asks that there should be deleted from the report all the findings of the Registrar in Insolvency with regard to the validity of the mortgage, and that is the only question that is now before me on this appeal. It seems to me that although the Registrar dealt with this question by the consent and argument of the parties it is clear that he had no jurisdiction to deal with a question of this kind. Sec. 6 of the Insolvency Act states what are the matters that can be referred to the Registrar in Insolvency, *viz.*, to hear debtor's petitions; to hold public examinations of insolvents; to make any order or exercise any jurisdiction prescribed as proper to be made or exercised in chambers, to hear and determine any unopposed or *ex parte* application; to examine any person under sec. 36. The only one of these headings which this could possibly come under would be heading 6 (2) (c), but that heading only deals with matters to be dealt with in chambers, and r. 5 of the Insolvency Rules specifically lays down what are the matters that are to be heard

and determined in open Court which are, among others 5 (d), applications to set aside or avoid any settlement, conveyance, transfer, security or payment or to declare for or against the title of the Official Assignee to any property adversely claimed. It seems to me that you only have to read sec. 6 of the Presidency Towns Insolvency Act and r. 5 to arrive at the conclusion that the Registrar in Insolvency, as indeed I think he thought himself, had no jurisdiction to deal with a matter of this kind apart from consent of parties. He did so having regard to the consent and on the footing that all the parties interested were *sui juris*. In this view the appeal succeeds upon the only point which is now raised before me, that is to say, as to whether the Registrar in Insolvency had any jurisdiction to deal with this question and by his decision adversely affect the infants. I am expressing no opinion on this appeal with regard to the validity of the mortgage and whether it is now open to the Appellants to attack the mortgage or not. I make no order as to costs.

Mr. H. N. Dutt, Solicitor for the Applicant.

Mr. S. M. Dutt, Solicitor for the Mortgagee.

M. N. K.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 931 of 1920.

SUBHAWARDY, J.

CUMING, J.

1921,

Heard, 5 and

6, December.

1922,

Judgment,

10, February.

RAM TARAN TEWARY
and ora., Plaintiffs,
Appellants,

v.

SM. KUMEDA DASSEE,
Defendant,
Respondent.

Putni Regulation (VIII of 1819, Bengal), sec. 3
— *Stipulation in a mourasi mukurari kabulyat for*

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the delivery of ghee and goat annually, if enforceable—Second clause of the section whether abrogates all previous restrictions on abwabs as embodied in Regulation V of 1812, sec. 3.

In a mourasi mokurari kabuliyat executed in 1877 there was a stipulation at the end that the tenant should deliver annually one seer of ghee and one goat to the landlord putnidar:

Held—That in view of the clause imposing the delivery of the goat and the ghee standing completely isolated from the terms relating to the rent proper and its mode of payment, the goat and ghee were not part of the rent, and as such were not recoverable, being in the nature of an abwab and hence an illegal imposition.

KRISHNA CHANDRA SEN v. SUSHILA SUNDARI DASSI (1), APARNA CHARAN GHOSE v. KARAM ALI (2), TILAKDHARI SING v. CHULAN MAHTON (3), RADHA PRASAD SING v. BAL KOWAR KOERI (4) and EBBS v. BOULNOIS (5) referred to and discussed.

Sec. 3 of the Putni Regulation did not restrict the application of the general law against abwabs as embodied in sec. 3 of Reg. V of 1812.

ASANULLAH KHAN v. TIRTHABASINI (6) and BIJOY SINGH v. KRISHNA BEHARY (7) referred to and discussed.

This was an appeal preferred on the 14th April 1920 against a decree made by the Subordinate Judge of Asansol in Zillah Burdwan (Babu Bejoy Gopal Chatterji), dated the 18th January 1920, affirming a decree made by the Munsif of Asansol (Babu Nalini Kanta Bose), dated the 9th December 1918.

(1) I. L. R. 26 Cal. 611 (1899).

(2) 10 C. W. N. 527: s. c. 4 C. L. J. 527 (1906).

(3) I. L. R. 17 Cal. 181 (P. C.) (1899).

(4) I. L. R. 17 Cal. 721 at p. 740 (1899).

(5) L. R. 10 Ch. App. 479 (1875).

(6) I. L. R. 22 Cal. 688 (1895).

(7) 21 C. W. N. 959 (1917).

The facts of the case will appear from the judgment.

Babu Pyari Mohan Chatterjee for the Appellants.

Babu Kanai Lal Shaha for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The facts of this appeal are these.

The Plaintiff sued to recover arrears of rent for the years 1321 to 1324 B. S. with cesses and damages on a registered *mourasi mokurari kabuliyat* executed in 1877.

The lease recites that "within the aforesaid mouza you have granted me a *patta* of 12 bighas of land at an annual *jama* of Rs. 6 and Rs. 24 as premium." After reciting how the money should be paid and in what instances, the lease states that the landlord should have right to the minerals, etc., and lastly the words appear: "also it should appear that I would deliver one seer of *shyama ghee* and one kid every year." No amount is mentioned as payable in lieu of the *ghee* and goat in case of default.

The trial Court held that the Plaintiff was entitled to recover rent at the rate of Rs. 6 per annum and that he was not entitled to recover the *ghee* and the goat.

This finding was upheld by the Appellate Court on the ground that the *ghee* and goat are not mentioned as part of the rent.

The Plaintiffs have appealed.

They contend that the *ghee* and goat are part of the consideration for which the lease is granted and are not *abwabs*. They argue that they are *putnidars* and so the tenancy is governed by the terms of sec. 3 of Reg. VIII of 1819 and that therefore though sec. 179 of the Bengal Tenancy Act does not help them because the lease was created before the passing

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of the Bengal Tenancy Act, still their position under the Putni Regulation is the same as it would be under the Bengal Tenancy Act. So that even if it be considered as an *abwab* and not part of the rent they are still entitled to get it.

The Respondent contends that the case is not governed by sec. 3 of the Regulation referred to but by sec. 3 of Reg. V of 1812 and that there is nothing to shew that the Plaintiffs are *putnidars*. With regard to the last objection of the Respondent it appears that in the plaint the Plaintiffs describe themselves as *putnidars* which averment has not been traversed in the written statement. We therefore accept the Plaintiffs' statement that they are *putnidars* and proceed to determine the case on that basis. A number of cases have been cited at the bar of which we will notice the following.

In the case of *Krishna Chandra Sen v. Sushila Sundari Dassi* (1), it was held that even if the imposition were an *abwab* still it was recoverable. This case was governed by the Bengal Tenancy Act and it was held that sec. 74 did not control sec. 179 of the Act. This case has no application to the present case.

The next case we have been referred to is the case of *Aparna Charan Ghose v. Karam Ali* (2). This was a case of a permanent tenancy created by a lease dated 1860. In that case it was held sec. 10 of Act X of 1859 or sec. 3 of Reg. V of 1812 made all impositions upon all classes of tenants including a permanent tenure-holder in excess of the specified rent illegal.

The next case to be considered is the case of *Tilakdhari Sing v. Chulan Mahton* (3), a decision of the Privy Council. In

that case it was decided that payments, over and above the rent, were *abwabs* and could not be recovered. The Judicial Committee do not seem to make any distinction between what was arbitrary or uncertain and what was not.

This case was discussed in the case of *Radha Prasad Sing v. Bal Kowar Koeri* (4) and Sir Comer Petheram, C. J. (page 740) considered that the meaning of sec. 74 of the Bengal Tenancy Act was that no imposition under any name whatsoever shall be recovered from the tenant for, or in respect of, the occupation or tenure beyond the sum fixed for rent. O'Kinealy, J., in considering the meaning of the expression "*abwab*" states (page 745) "this too I think is the sense in which *abwabs* were considered as arbitrary or indefinite in the old Regulations—arbitrary in the sense, they were unauthorized by law—indefinite in the sense that though levied in a certain proportion to, and upon, the original assessment, there was no definite rule guiding the zemindar in fixing the proportion they bore to the produce of the land."

All these cases discussed and determined the law relating to *abwabs* and illegal taxations and are of not much help to us in the consideration of the question of the correct interpretation of sec. 3 of Reg. VIII of 1819 with reference to the law then in force prohibiting illegal impositions.

We may note that when the lease in the present case was created, *i.e.*, in 1877, the law relating to illegal impositions was contained in secs. 54 and 55 of Reg. VIII of 1793, sec. 3 of Reg. V of 1812, sec. 10 of Act X of 1859 and sec. 11 of Bengal Act VIII of 1869.

The Appellants submit that the second clause of sec. 3 of the Putni Regulation overrides all previous prohibitions against

(1) I. L. R. 26 Cal. 611 (1899).

(2) 10 C. W. N. 527; s. c. 4 C. L. J. 527 (1906).

(3) I. L. R. 17 Cal. 131 (P. C.) (1889).

(4) I. L. R. 17 Cal. 721 at p. 740 (1890).

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such impositions and makes all engagements between a *putnidar* and his lessees, on whatever terms, binding on the parties to the same and hence even the stipulation regarding the payment of *abwabs* is enforceable as against the latter, being one of the terms on which the lands are let out. It is contended, on the principle that a special provision qualified a general one [*Ebbs v. Boulnois* (5)], that this clause by its general terms abrogates all previous restrictions as to *abwabs* so far as relating to *putni* tenures. We may mention here that it is not seriously contended in view of the clause imposing the delivery of the goat and *ghee* standing so completely isolated from the terms relating to the rent proper, its mode of payment and the penalty attaching to non-payment, and appearing in the lease by way of post script as it were, that the goat and *ghee* are part of the rent as such, payable in respect of the demised premises, but it is urged that being part of the consideration of letting such stipulation is enforceable by virtue of the 2nd clause of sec. 3 of Reg. VIII of 1819.

Reg. VIII of 1819 was enacted to govern a class of tenures known as *putni taluks*, the nature of which the preamble to the Regulation describes in these terms:—“The character of which tenure is that it is a *taluk* created by the zamindar, to be held at a *rent* fixed in perpetuity by the lessee and his heirs for ever.” Sec. 2 of the Regulation validates leases fixing *rent* in perpetuity though in contravention of the provisions of Reg. XLIV, 1793. This is followed by sec. 3 which confers on the zamindar and the *putnidar* the right of letting and under-letting on any terms. Cl. 1 of the section recognizes the validity of the terms of the engagements between the zamindar and the *putnidar* and cl. 2 makes any en-

gagement between the *putnidar* and his sub-lessee binding on both parties. Sec. 8 of the Regulation authorises the zamindar to bring the *taluk* to sale for “any arrear of *rent*.” There is no provision in the Regulation for enforcing any “term or engagement” other than the payment of rent. Reading the Regulation as a whole and considering its policy and scheme, it seems to us that the “engagements” mentioned in sec. 3 of the Regulation cannot be engagements as to rent and other terms connected therewith. If the “goat and *ghee*” mentioned in the lease under consideration is not part of rent, as we hold it is not, the stipulation regarding the delivery thereof is not legalized by Reg. VIII of 1819 but is subject to the law relating to “*abwabs*” in force at the time of the creation of the lease. It is hardly necessary to observe that if the above articles are not to be considered rent or part of the rent reserved by the lease, they are *abwabs* or illegal cesses.

The question as to whether sec. 3 of the *Putni Regulation* creates an exception to the general rule against *abwabs* as enunciated by Reg. V of 1812 and other enactments has not been yet directly raised in this Court. The reason for it may be that the answer to it was deemed too obvious for serious consideration. There have been cases in this Court in which the question whether certain impositions in a *putni* lease were *abwabs* or not came up for consideration and was elaborately discussed. It will suffice to notice two of them.

In the case of *Asanullah Khan v. Tirthabasini* (6), the question was whether *chaukidari* tax payable by the *putnidar* under the *putni* settlement is an illegal cess. After a careful review of various enactments relating to *abwabs* and the

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case-law on the point, it was held by Macpherson and Banerjee, JJ., that as *chaukidari* tax was part of the ground rent quite as much as the actual rent, it was not an *abwab* and was therefore recoverable. At page 688 of the Report their Lordships remark as follows:—"A stipulation for the payment of such an amount cannot, we think, be regarded as one for the imposition of an arbitrary or indefinite cess within the meaning of sec. 3 of Reg. V of 1812 or for an imposition, under the denomination of *abwab*, *mathaut* or other like appellations in addition to the actual rent within the meaning of sec. 74 of the Bengal Tenancy Act, for this simple reason, that the imposition here depends primarily not upon the will of the zamindar but upon the law of the land (Bengal Act VI of 1870). It is this Act which imposes the liability on the zamindar, and the zamindar merely stipulates with the *putnidar*, when granting the *putni* that the latter should, among other sums, regularly pay him the amount levied from him under the Act." These observations clearly indicate that had the imposition been one dependent upon the will of the zamindar it would have been an imposition of an arbitrary or indefinite cess illegalised by Reg. V of 1812. It was not contended there that that Regulation was superseded by the Putni Regulation.

The next case demanding reference is the case of *Bijoy Singh v. Krishna Behary* (7). In that case the tenant, in the *kabuliyat* which was in respect of a *putni* tenure executed in the year 1882, stipulated to pay a sum of Rs. 15 every year in the month of Bhadra as the *mamuli* (usual) for the Iswar Thakur. This covenant was contained in a clause separate from that stipulating the yearly rent. The question was whether this sum of Rs. 15 was an *abwab* and irrecoverable.

(7) 21 C. W. N. 969 (1917).

The Court held that this sum was not intended to be part of the consideration for the use and occupation of the land or as part of the rent and being an *abwab* was irrecoverable. As appears from the judgment of the Chief Justice it was agreed by both sides that the matter was governed by sec. 3 of Reg. V of 1812. Chatterjea, J., in a considered judgment in that case held that the sum of Rs. 15 mentioned in the *kabuliyat* did not form part of the consideration for the lease, and even if it did, it did not form part of the rent. This observation affords an answer to the contention of the Appellants before us that the stipulation for the delivery of the goat and *ghee* is a part of the consideration though not of rent.

Subsequent to Reg. VIII of 1819 the law against illegal cesses was re-enacted, though in indirect terms by sec. 10, Act X of 1859 and sec. 11, Bengal Act VIII of 1869. Both these Acts were of general application and having made no reservation in cases of *putni* settlements, there is no reason for holding that they did not apply to tenures or holdings created under the Putni Regulation. These enactments furnish ample ground to strengthen the supposition that the legislature did not intend that the Putni Regulation should restrict the application of the general law against *abwabs* as embodied in sec. 3 of Reg. V of 1812. Even if it were otherwise, the provisions of Act X of 1859 and Act VIII of 1869, Bengal Council, which were applicable to permanent leases [*Aparna Charan v. Karam Ali* (2)] would govern sec. 3 of the Putni Regulation.

It is to be understood that we have proceeded on the assumption that Reg. VIII of 1819 controls all the incidents of the tenure in question, a point which in view of the interpretation we put on the law

(2) 10 C. W. N. 527: s. c. 4 C. L. J. 527 (1906).

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we have considered unnecessary to discuss.

For the reasons given above we hold that the stipulation regarding the *ghee* and goat is, in its term and effect, the imposition of an *abwab* and as such not enforceable.

The result is that this appeal fails and is dismissed with costs.

J. N. R.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2189 OF 1919.

CHATTERJEA, J.

PEARSON, J.

1921,

12, July.

SASTI CHARAN CHAKRA-

BARTTY, Plaintiff,

Appellant,

v.

AKUBJAN BIBEE and

ors., Defendants,

Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 148A—Suit by some of the co-sharer landlords for their share of rent only—Position of the purchaser in execution of the decree in such suit—Such purchaser if a necessary party to a suit by some of the other co-sharer landlords for the entire rent—Sec. 163, position of the purchaser at a sale in execution of the decree in the later suit His right to khas possession—Sec. 88, sub-division of the tenancy 'without the consent of the landlord'—Landlord's consent means consent of all the landlords.

Some co-sharer landlords having an 8 as. share in the landlord's interest brought a suit for rent against the tenants of an occupancy holding in respect of their 8 as. share, and obtained a decree and in execution of that decree put up to sale only an 8 as. share of the holding. It was purchased by A. who obtained possession thereof. Some of the other landlords then brought a suit for the entire rent of the whole occupancy holding against the original tenants, making the other co-sharer landlords Defendants in the suit. The purchaser at the previous sale was not, however, made a party to the suit. The suit was decreed ex parte and in exe-

cution of the decree the entire occupancy holding was put up to sale under sec. 163 of the Bengal Tenancy Act. The purchaser at the said sale not having obtained actual possession brought the present suit for recovery of possession on declaration of his title by purchase at the rent sale:

Held—That the other landlords were not bound to recognize A., the purchaser at the first sale, as their tenant as the purchase made by him was merely of the right, title and interest of the tenants in an 8 as. share of the holding. On the other hand A. was bound by the later rent sale, his position being that of an unregistered transferee.

ASGAR ALI v. ASABODDIN KAZI (1) followed.

In the suit by the other co-sharer landlords for the rent of the entire holding A., the purchaser, was not a necessary party, because at the first sale only the interest of the tenants in an 8 as. share passed to the purchaser. Under the provisions of sec. 88 of the Bengal Tenancy Act any sub-division of the tenancy required the consent of all the landlords. In the absence of any sub-division of the holding with the consent of all the landlords, the right of the landlords to put up the entire holding to sale was not affected by the purchase made by A.

A co-sharer landlord has a right to claim the whole rent on behalf of the entire body of landlords, sec. 148A being only an enabling section.

PRAMADA NATH ROY v. RAMANI KANT ROY (2) referred to.

The mere fact that something was claimed that was not properly due would not make the decree any the less a rent-decree.

(1) 9 C. W. N. 134 (1904).

(2) I. L. R. 35 Cal. 331 : s. c. 12 C. W. N. 249 (P. C.) (1907).

SASTI CHARAN CHAKRABARTY v. AKUBJAN BIBEE.

JAGUN PROSAD v. POSUN SAHOO (3) *referred to*.

This was an appeal against the decree of Babu Narendra Nath Lahiri, Additional Subordinate Judge of Zillah Bakarganj, dated the 28th of May 1919, modifying the decree of Babu R. K. Gupta, Munsif, 5th Court at Barisal, dated the 23rd of March 1917.

The material facts will appear from the judgment.

Babus Brojalal Chaukerbutty, Prakash Chandra Mazumdar and Aswini Kumar Gupta for the Appellant.

Dr. Saral Chandra Basak and Babu Bipin Ch. Ghose for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for *khas* possession of a holding which the Plaintiff purchased at a sale held in execution of a decree for arrears of rent obtained by the landlords against the Defendants Nos. 1 to 14.

It appears that the Defendants Nos. 1 to 14 held an occupancy holding under the Defendants Nos. 15, 16 and their co-sharers. The Defendants Nos. 15 and 16 had an 8 annas share in the landlord's interest. They brought a suit for rent against the tenants in respect of their 8 annas share for the years 1314 to 1317 B. S., obtained a decree and in execution of that decree put up to sale only an 8 annas share of the holding and it was purchased by the Defendant No. 25 on the 30th July 1912. She obtained a certificate of sale on the 28th September 1912, and has been in possession of the 8 annas share since then.

Some of the landlords other than Defendants Nos. 15 and 16 then brought a suit for the entire rent of the whole occupancy holding for the years 1316 to 1319

against the original tenants Nos. 1 to 14 making the Defendants Nos. 15, 16 and other co-sharers parties to the suit. The suit was decreed *ex parte* on the 12th March 1913. In execution of the decree the entire occupancy holding was put up to sale under sec. 163 of the Bengal Tenancy Act and was purchased by the Plaintiff on the 26th March 1915. The Plaintiff not having obtained actual possession brought the suit out of which this appeal arises, for recovery of possession on declaration of his title by purchase at the rent sale.

The Court of first instance held that the Plaintiff by his purchase at the rent sale was entitled to a decree for *khas* possession and gave a decree accordingly. That decree was set aside by the lower Appellate Court.

The lower Appellate Court has held that the Defendant No. 25 was not bound by the sale, because she was not made a party to the suit although she had purchased an 8 annas share of the holding before the institution of the rent suit.

But we think that the other landlords were not bound to recognise her (Defendant No. 25) as their tenant as the purchase made by her was merely of the right, title and interest of the tenants in an 8 annas share of the holding. On the other hand the Defendant No. 25 was bound by the sale held on the 26th March 1915, in execution of the decree for arrears of rent against the original tenants, her position being that of an unregistered transferee [see the case of *Asgar Ali v Asaboddin Kazi* (1)].

It has been contended on behalf of the Respondents that the Defendant No. 25 was a necessary party; because the Defendants Nos. 15 and 16 who are some of the co-sharer landlords were bound to recognise her as a tenant. It is argued that

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if all the co-sharers had brought a rent suit and if the Defendants Nos. 15 and 16 had been in the category of Plaintiffs, the Defendant No. 25 could not have been left out in the rent suit.

But at the sale held at the instance of Defendants Nos. 15 and 16 only the interest of the tenants in an 8 annas share passed to the purchaser. There could not be any sub-division of the tenancy without the consent of all the landlords, having regard to the provisions of sec. 88 of the Bengal Tenancy Act.

It is true that the Defendants Nos. 15 and 16 as co-sharer landlords having separate realisation of rent in respect of their share were entitled to realise their share of rent separately. But such an arrangement, expressed or implied, merely affects the right to sue separately and in no other respect modifies the terms of the holding and the right to bring the tenure to sale for arrears of rent remains intact [see the case of *Promada Nath Roy v. Ramani Kant Roy* (2)]. It may be said that in this view, a purchaser of a share of a holding at the instance of some of the co-sharer landlords, can be deprived of his right by the other co-sharer landlords bringing a suit for arrears of the entire rent on behalf of all the landlords. But on the other hand, if the contention of the Respondent is correct, it would be open to one of the co-sharer landlords, who might have a very small share, to sue a tenant, sell a small share of the holding and by recognising the purchaser, deprive the entire body of landlords from putting the entire holding to sale for the entire rent. We think that in the absence of any sub-division of the holding with the consent of all the landlords, the right of the entire body of landlords to put up the entire holding to sale was not affected by

the purchase made by the Defendant No. 25 at the sale held in execution of the decree obtained by Defendants Nos. 15 and 16.

The lower Appellate Court was of opinion that the plaint was not in proper form, and that under sec. 148A the landlords who brought the suit for rent ought to have proceeded with their share only of the rent. Sec. 148A, however, is only an enabling section. A co-sharer landlord is given the right to proceed with the suit for his share only of the rent where he is unable to ascertain whether any amount is due to the other co-sharers. A co-sharer landlord has a right to claim the whole rent on behalf of the entire body of landlords as laid down in the case of *Promada Nath Roy v. Ramani Kant Roy* (2), and it is only in a case so framed that the decree has the effect of a rent decree. The right is recognised in sec. 158 (B), sub-sec. 1, cl. (iii) of the Bengal Tenancy Act. We do not think, therefore, that there is any force in this objection.

It is contended by the learned Pleader for the Respondent that the decree was bad inasmuch as it was not in favour of the landlords who were not the Plaintiffs in the rent suit, but were made *pro forma* Defendants to the suit. But although that is so, the decree declares the share of each of the co-sharer landlords and the rent due to each of them. It is to be observed that sec. 158B, sub-sec. 2, clearly lays down that when one or more co-sharer landlords having obtained a decree in a suit framed under sub-sec. (1) or under sec. 148A applies or apply for the execution of the decree by the sale of the tenure or holding, the Court shall, before proceeding to sell the tenure or holding, give notice of the application to the other co-sharers: and it may also be pointed

(2) 1. L. R. 35 Cal. 331 at pp. 344, 345: s. c. 12 C. W. N. 249 (P. C.) (1907).

(2) 1. L. R. 35 Cal. 331: s. c. 12 C. W. N. 249 (P. C.) (1907).

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out that the proviso to sec. 169 of the Bengal Tenancy Act which deals with the question of disposal of proceeds of a sale held under Chap. XIV, lays down that where a tenure or holding has been sold in execution of a decree obtained by one or more of the co-sharer landlords in a suit framed under sec. 148A or sub-sec. 1 of sec. 158B, payment of the amount due under such decree shall notwithstanding anything contained in cl. (b), be made to the decree-holder and to the other co-sharer landlords in proportion to the amount found to be due to each.

We do not think, therefore, that the sale was bad by reason of the form of the decree.

The learned Pleader for the Respondents also contended that the claim included arrears, a portion of which was sued for previously in the suit brought by Defendants Nos. 15 and 16. It was pointed out that the suit brought by them was for recovery of arrears for 1314 to 1317 and that the suit for the entire rent brought by the other landlords was for the period 1316 to 1319, so that the arrears of 1316 to 1317 (the subject-matter of both the suits), were twice sued for. But no objection appears to have been raised in the rent suit to that portion of the claim. The Defendant No. 25 no doubt, was not made a party to the suit, but the original tenant was there; 8 annas share was left in him, and the mere fact that something was claimed that was not properly due would not make the decree any the less a rent-decree [see the case of *Jagun Prasad v. Posun Sahoo* (3)].

We may add that the question of fraud was raised in the first Court and was found against the Defendants; and that the point was not pressed in the lower Court.

For all these reasons, the decree of the

lower Appellate Court is set aside and that of the Court of first instance restored with costs.

J. N. R.

Appeal decreed.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

VISCOUNT CAVE.

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

1922,

Heard,

17, February.

Judgment,

7, March.

L. OPPENHEIM AND
COMPANY, Appellants,
v.

HAJEE MAHOMED
HANEEF SAHIB,
since deceased,
Respondent.

Contract to buy goods, between London and Madras merchants—Stipulation for arbitration in London—Award made in London—Suit on award—Defence that arbitrator had given no opportunity to Defendant to be heard, if may be taken in the suit—English Arbitration Act, 1889—Supreme Court Rules, Or. 64, r. 14—Irregularity not going to the root and not apparent on the face of award.

In a contract to purchase sheepskin of a specified quality by a merchant carrying on business in London from a merchant carrying on business in Madras, it was stipulated that any differences not amicably settled was to be submitted to arbitration in London in the usual way and the award of such arbitration was to be binding on both buyer and seller. The buyer having sued the seller in the Madras High Court for enforcement of an award made by an arbitrator in London, the seller objected that the award was not binding on him as the arbitrator had proceeded to arbitrate without giving him an opportunity to be heard:

Held—That as the arbitration clause provided for an arbitration which was to take place in London and in accordance with English law and procedure, any objection to the award on the ground of misconduct or irregularity had to be taken by

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motion to set aside or remit the award, under the English Arbitration Act of 1899, within the time limited by Or. 64, r. 14, of the Rules of the Supreme Court. No such objection having been taken, the award became fully binding on both parties to it, as if it had been incorporated in the contract.

Any defence going to the root of the award, e.g., that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could have been pleaded in the suit, but a defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both parties had agreed to be bound.

THORBURN v. BARNES (2) referred to.

This was an appeal from a decree, dated 6th November 1918 of the High Court of Judicature at Madras in its Appellate Jurisdiction which reversed a decree, dated 19th February 1918 of the said High Court in its Ordinary Original Civil Jurisdiction.

The facts may be shortly stated as follows :

By a contract dated the 23rd October 1913 the Appellants bought from the Respondents sheepskins for shipment to London. The arbitration clause in the said contract which is fully set out in the judgment provided *inter alia* for "arbitration in London, in the usual manner." On arrival in London the skins were alleged to be inferior to the quality contracted for and a reference was made by the Appellants to arbitration. They nominated Mr. Pringle as their arbitrator. The Respondents, though receiving notice, failed to appoint their arbitrator and Mr. Pringle eventually made an award in the Appellants' favour for £258-5-9. The Appellant thereupon issued a writ against the Respondent for the amount of the award and eventually

obtained judgment in the King's Bench Division for a total sum of £296-12-9 which included interest and costs. The Appellants then filed the present suit against the Respondent in Madras claiming alternatively the amount of the judgment, or of the award, or of the loss sustained.

The claim on the judgment was dismissed by the trial Judge (Coutts Trotter, J.), [*Vide* sec. 13, Civil Procedure Code and *Keymer v. P. Visanatham Reddy* (1)] but the suit was decreed for the amount of the award.

On appeal the Appellate Division of the High Court (Wallis, C. J., and Napier, J.) reversed the judgment of the lower Court and the Appellants now appealed to His Majesty in Council.

[The appeal was originally heard before a different Board on December 1st 1921, but was reheard on February 17th 1922.]

Mr. L. DeGruyther, K. C. and Harold Morris, K. C. for the Appellants.—No notice of hearing was given to the Respondent by Mr. Pringle and the question arises whether there was misconduct on the part of the arbitrator, and whether that is to be determined by English or by Indian Law. The contract was made in England, was to be performed in England and the parties must have intended English Law to apply. Their rights must be regulated according to the intention of the parties as appears from the contract. *Hamlyn v. Talisker Distillery* (3). The obvious intention here was for English Law to apply in all proceedings, including proceedings to set aside the award. No proceedings for that purpose were taken within the time fixed by Or. 64, r. 14, of the Rules of the Supreme Court, England.

(1) L. R. 44 I. A. 6 : s. c. I. L. R. 40 Mad. 112; 21 C. W. N. 358 (1916).

(3) L. R. (1894) A. C. 202.

(2) L. R. 2 C. P. 384 (1867).

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In English Law the award being "*ex facie*" correct misconduct by an arbitrator does not make the award absolutely invalid. *Bache v. Billingham* (4). The Indian Law is found in:—*Bindessuri Pershad Singh v. Janki Pershad Singh* (5), *Surjan Raot v. Bhikari Raot* (6) and *Ghellabhai Atmaram v. Nandu Bhai* (7). This deals with Indian arbitrations only and has no bearing on a contract such as the one now before the Board. No Court in India has jurisdiction to set aside this award because no Indian Court had jurisdiction over the subject-matter of the award, or over the arbitrator.

Reference was also made to:—

Indian Arbitration Act, IX of 1899, secs. 11 and 14.

Indian Civil Procedure Code Act V of 1908, Sch. II, secs. 15 and 20.

No one appeared for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT CAVE.—This is an appeal from a decree of the High Court of Judicature at Madras, in the exercise of its Appellate jurisdiction, allowing an appeal from a decree made by Mr. Justice Coutts Trotter in the exercise of the Ordinary Original Civil Jurisdiction of the same Court.

The Appellants are merchants carrying on business in London, and the original Respondent (who has died during the pendency of this appeal and is represented by the present Respondents) was a merchant carrying on business in Madras.

By a contract in writing made in London and dated the 23rd October 1913, the Appellants bought from the Respondent 20,000 tanned Madras sheepskins of

a specified quality to be shipped to the Appellants in London. The contract contained the following clause:—

"Any differences arising out of this contract, failing amicable adjustment, to be submitted to arbitration in London in the usual manner, and the award of such arbitration to be final and binding on both buyer and seller."

Certain skins were shipped to London, and the Appellants paid to the Respondent £1,495, 15s. 4d. in respect of those skins. When the skins arrived in London, the Appellants alleged that they were of inferior quality and refused to accept delivery. They were ultimately sold, with the consent of the Respondent, at the price of £1,242 10s. 0d., thus leaving a deficiency of £253 5s. 4d., which the Appellants demanded from the Respondent and which the Respondent refused to pay. Thereupon the Appellants, in pursuance of the arbitration clause contained in the contract and of the English Arbitration Act, appointed Mr. R. H. Pringle as arbitrator on their behalf in the difference which had arisen, and caused the Respondent to be served at Madras with a notice, dated the 3rd February 1916, whereby they informed him of the appointment of Mr. Pringle and required him, within seven days from the service of the notice, to name to the Appellants or their agents in Madras an arbitrator to act on their behalf in London in the matter of the difference which had arisen, the notice stating that otherwise the difference would stand referred to Mr. Pringle alone as sole arbitrator. The Respondent refused to appoint an arbitrator to act on his behalf or to take part in the arbitration; and thereupon Mr. Pringle, at the request of the Appellants, proceeded with the arbitration. He gave no opportunity to either party to appear and give evidence before him, but, having read the contract and correspondence and inspected the skins, he made his award in

(4) L. R. [1894] 1 Q. B. 107 at p. 113.

(5) I. L. R. 16 Cal. 482 (1899).

(6) I. L. R. 21 Cal. 213 (1893).

(7) I. L. R. 20 Bom. 238 (1895).

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writing, dated the 11th July 1916, and thereby awarded that the Respondent should pay to the Appellants the sum of £258 5s. 9d., with interest and costs.

On the 15th July 1916, the Appellants brought an action in the King's Bench Division of the High Court of Justice in England for the amount payable under the award, and, the writ of summons having been served by leave upon the Respondent at Madras and no appearance having been entered, the Appellants, on the 28th November 1916, recovered judgment against the Respondent for the sum of £286 2s. 9d., being the amount of the award with some interest and costs.

The Appellants then brought the suit out of which this appeal arises against the Respondent in the High Court of Judicature at Madras, claiming the sum of £286 2s. 9d. due under the judgment of the King's Bench Division, or in the alternative £263 10s. 9d. being the amount of the award and costs, with interest, or as a further alternative £253 5s. 4d., being the loss on the contract. The Respondent pleaded (among other pleas which are not now material) that the judgment of the High Court of Justice in London was not binding upon him, as it was not given on the merits, that the claim under the contract was barred by limitation, and as to the award, that it was not binding upon him as no notice was given to him by the arbitrator that he was proceeding to arbitrate.

The suit was heard by Mr. Justice Coutts Trotter, who held that, having regard to the decision of this Board in *Keymer v. Reddy* (1), the action upon the judgment could not be maintained, as the judgment had been entered in default of appearance and the action had not been tried upon its merits, and that the claim

under the contract was statute-barred. This part of the judgment has not been challenged and need not be further referred to. With regard to the award, the learned Judge in a lucid judgment held that the plea of want of notice could not be raised by defence in the suit. After observing that the grievance of the Respondent was more imaginary than real, the award having been made by a commercial man who took the commercial documents with which he was familiar and saw the goods and gave his opinion on the spot, he added that if the objection could have been raised in the proceedings he would have felt constrained to give effect to it. But he referred to *Thorburn v. Barnes* (2) as a complete authority for the proposition that according to the English law any objection relating to an irregularity in bringing an award into existence must be taken by motion under the Arbitration Act, 1889, to set aside or remit the award, and if not so taken could not be raised by way of defence to an action on the award. He therefore held that the defence that the award was tainted with irregularity by the fact that the Respondent had not had an opportunity of being present at the arbitration, was not open to him in the suit. An application having been made by Counsel for the Respondent to treat the written statement as an application to the Court at Madras to set aside the award, the learned Judge held that he had no jurisdiction to entertain such an application, adding :—

“How a judge in Madras is supposed to have jurisdiction to upset an award made by an arbitrator in London passes my comprehension, and it is perfectly clear that the Court which is given jurisdiction by the English Act is the English Court.”

He added that even if he had had juris-

(1) L. R. 44 I. A. 6; s. c. I. L. R. 40 Mad. 112; 21 C. W. N 358 (1916).

(2) L. R. 2 C. P. 384 (1887).

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diction he would have declined to exercise it.

Against this judgment an appeal was brought and was allowed by the Appellate Division, the learned Judges of that Division holding that the rule in *Thorburn v. Barnes* (2) did not apply in India. Thereupon the present appeal was brought.

In their Lordships' opinion Mr. Justice Coutts Trotter came to the right decision and this appeal should succeed. The contract of the 23rd October 1913 was made and was to be performed in England; and the arbitration clause provided for an arbitration which was to take place in London and in accordance with English law and procedure. Under that law, by which both parties agreed to be bound, any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator must be taken by motion to set aside or remit the award, and if not so taken cannot be pleaded in answer to an action on the award. In the present case no such motion was made within the time limited by Or. 64, r. 14, of the Rules of the Supreme Court, England, or at all, and accordingly the award became as fully binding on both parties as if it had been incorporated in the contract. No doubt any defence going to the root of the award—for instance, that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could have been pleaded in the suit; but a defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both parties had agreed to be bound.

On this view of the case the Indian law as to arbitration is irrelevant, and their Lordships accordingly express no opinion on the question whether if the arbitration had taken place in India the defence on the ground of irregularity could have been pleaded. It is plain that the Indian Court

could not set aside an English award on that ground.

In order to prevent misconception it appears desirable to add that it was not pleaded or contended at any stage of the proceedings that the award had merged in the English judgment, and accordingly their Lordships do not deal with that point.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and that the order of Mr. Justice Coutts Trotter should be restored, the Respondents to pay the costs in both Courts in India and the costs of this appeal.

Solicitors: *Messrs. Veasey & Co.* for the Appellants.

G. D. M

PRIVY COUNCIL.

[APPEALS FROM MADRAS.]

		T. R. VENKATA Row <i>alias</i>
LORD BUCKMASTER.		GANESHA ROW,
SIR JOHN EDGAR.		since deceased
MR. AMEER ALI.		(now represented
SIR LAWRENCE JENKINS.	1921,	by T. V. Narayana
Heard, 7 and		Row), Appellant,
8, November.		v.
Judgment,		T. V. TULJARAM
8, November.		Row and ors.,
		Respondents.

Hindu law—Mitakshara joint family—Father giving up decree on behalf of self and minor son Decree, found not binding on minor son, if bound father's undivided share—Power of father to dispose of joint property.

R, the managing member of a joint Hindu family, for himself and as guardian of his minor son G, after obtaining a decree for money against T, by compromise surrendered all his rights and those of G, the consideration mentioned being that T would not prosecute an appeal he had preferred against that decree. Two more sons were born to R subsequently to

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the compromise. On attaining majority having sued to set aside the compromise, it was held that the compromise did not bind G :

Held—That as the decree was a portion of the joint family property, R could deal with it only with the consent of G or as manager for a justifying necessity; and therefore the compromise failed as a whole and did not bind even the then existing share of R in the undivided property.

That the compromise having been set aside T was entitled to proceed with his appeal.

These are three consolidated appeals from one principal judgment and three decrees, dated the 30th August 1916 of the High Court of Judicature at Madras, which affirmed a judgment and decree, dated the 24th March 1916 of the same High Court in its Ordinary Original Civil Jurisdiction.

In 1897 under a decree for partition of family property being the decree passed in Civil Suit No. 266 of 1886, Tuljaram Row (the Defendant-Respondent, and Cross-Appellant) was liable to his brother Rajaram Row and the son of the latter (*viz.*, Venkata Row *alias* Ganesha Row) in a sum of Rs. 86,000 and cross-appeals were pending against that decree.

In November 1897, Rajaram Row who was the guardian *ad litem* of his son, without the sanction of the Court entered into a compromise in pursuance of which he entered up satisfaction of the amount due under the decree, and Tuljaram withdrew his appeal.

On attaining majority Venkata Row, the Appellant, repudiated the compromise and brought the present Suit No. 194 of 1906 against his father Rajaram Row and his uncle Tuljaram Row praying for a decree for the said sum of Rs. 86,000 and interest amounting in all to Rs. 1,60,000.

That suit was dismissed by the lower Courts but by an order in Council, dated the 7th March 1913 that dismissal was set aside: the Lords of the Judicial Committee holding that the said compromise was not binding on the Plaintiff and remitting the case to the High Court of Madras for the determination of Issues Nos. 6 and 7 which were:—(6), Is the Plaintiff entitled to recover in any event more than a moiety of the amount sued for? And (7), Is the Plaintiff entitled to charge interest, and if so, at what rate?

The full history of the case and the earlier judgment of the Board will be found reported in 17 Calcutta Weekly Notes, 765.

The order in Council made in pursuance of that judgment contained the following terms:—

(1) That this appeal ought to be allowed; the decrees of the High Court of Judicature at Madras, dated respectively the 2nd day of September 1908 and the 28th day of September 1909 set aside: (2) that in lieu thereof it ought to be declared that an agreement of compromise, dated the 21st day of November 1897 and the satisfaction entered thereunder are not binding on the Appellant and that he ought to be remitted to his original rights under the decrees in the Suit No. 266 of 1886 on the file of the said High Court: (3) that the suit out of which this appeal arises ought to be remitted to the said High Court in order that the other questions arising between the parties and covered by Issues Nos. 5 and 7 may be disposed of: and (4) that the costs of the Appellant of the appeal to the said High Court in its Appellate Jurisdiction ought to be paid by the Respondent T. V. Tuljaram Row and that the costs incurred in the said High Court at the trial of the suit and those of the further proceedings which are to be taken there ought to abide the result of those proceedings.

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In 1906 Rajaram Row had only one son : two more sons were born to his wife, *viz.*, Ramchandra Row and Krishna Row, and they were made parties to the suit on remand before the High Court (Wallis, J.) who held that Venkata and his two brothers were together entitled to share in a moiety of the fund in dispute. Against this judgment cross-appeals were filed by Venkata and Tuljaram Row which were heard by the Officiating C. J., Abdur Rahim, and Seshagiri Ayyar, J. The learned Judges held that the declaration by the Judicial Committee in favour of Venkata "was made not to him individually but as representing the undivided members of the family," and that the compromise should as far as Rajaram was concerned be regarded as an alienation by him of his then existing share.

From the decrees of the High Court the present appeals were brought to His Majesty in Council.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellant, Venkata *alias* Ganesha Row.—The compromise is not an alienation of his own rights by Rajaram. It was on behalf of the whole family that Rajaram was relinquishing the family rights. Once that compromise is set aside Rajaram's rights revive as an ordinary member of the family. Venkata's suit is on behalf of the family.

As regards the after-born sons they cannot share in the moiety, decreed to Venkata. Rajaram's alienation operated as a severance and the amount decreed to Venkata operates as his self acquired property.

Reference was made to the following cases :—*Ram Chunder Dutt v. Chunder Caomar Mundul* (1), *Naro Gopal v. Paragauda* (2), *Soundararajan v. Arunachalam*

Chetty (3) and *Baboo Hurdi Narain v. Ruder Perakash* (4).

Messrs. Murray, K. C. (Solicitor-General for Scotland) and *Ingram* for the Respondents Nos. 1 and 2.—The compromise was a complete compromise between Tuljaram and all the members of the family so that each individual's claims became barred.

Venkata being a minor the Board have held that his claim could not be barred, but the compromise holds good against all other members of the family including the unborn sons.

Tuljaram has elected to stand by the terms of the compromise with everyone except Venkata.

Rajaram's compromise bound the unborn sons also and they had no interest in the decree because Rajaram had no interest at the date of their birth.

Venkata's rights lapsed at his death and his son can take nothing except as a coparcener.

Padarath Singh v. Raja Ram (5) and *Muhammad Husain v. Khushalo* (6).

In any event Venkata can only get the property subject to the equities on it in favour of Tuljaram.

Messrs. Upjohn, K. C. and Dubé for the Respondents Nos. 3 and 4.—The Board have only found that the compromise is not binding on Venkata.

Tuljaram elected to be free from the compromise and to prosecute his appeal. The compromise has therefore gone altogether. If you held it as still valid as against Rajaram, it is bound to affect Venkata indirectly. Once you say definitely that one party to the compromise is not bound the compromise must be void *ab initio*.

(3) I. L. R. 39 Mad. 159 at p. 180 (1915).

(4) L. R. 11 I. A. 261 s. c. I. L. R. 10 Cal. 626 (1883).

(5) I. L. R. 4 All. 235 (1892).

(6) I. L. R. 9 All. 131 (F. B.) (1886).

(1) 13 M. I. A. 181 at p. 198 (1869).

(2) I. L. R. 41 Bom. 347 (1916).

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The suggestion that Rajaram as *karta* made a disposition of family property which bound all except one member is contrary to the whole idea of the Hindu family.

Rajaram did not profess to act as manager, so that his act bound neither Venkata nor future members of the family, but only himself. In any event it was an improvident act and not for the benefit of the family.

Mayne's Hindu Law, para. 341.

The argument that Rajaram's alienation operated as an immediate severance is tantamount to arguing that Venkata is bound by the compromise.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—The real question for determination on these appeals is as to the effect of a compromise entered into on the 21st November 1897, between Rajaram Row, purporting to act both for himself and as guardian of his minor son Venkata Row, and Tuljaram Row. The compromise related to certain claims then existing between Rajaram Row and his son, as constituting a joint Hindu family, against Tuljaram Row, and it arose in this manner. Originally Venkata Row, together with his four sons, Ramchandra Row, Luchmand Row, Rajaram Row, and Tuljaram Row, formed a joint Hindu family, governed by the Mitakshara law. Venkata Row died in 1871, survived by his sons, and in 1881 the joint family was dissolved, and a division of the joint estate took place, leaving the great part of it in the hands and under the control of Tuljaram Row, who was the manager of the family. In 1886 a suit was brought by Atmaram, the son of Luchmand, against Tuljaram Row, for the purpose of ascertaining the extent of the family assets remaining in his hands, for the necessary

accounts, partition, and other relief, and to this suit all the members of the family were parties. Two orders were made in that suit, one on the 21st October 1896, and the other on the 17th August 1897, and by these orders Tuljaram Row was decreed as liable to pay to Rajaram Row and his branch of the family certain sums of rupees. The compromise to which reference has been made was a compromise of the rights possessed by Rajaram Row and his son under these decrees.

The compromise was a very simple matter. It consisted in releasing Tuljaram Row from all liability to make the payments which he had been ordered by the High Court to make, payments which were on the face of them considerable in extent; and the only consideration mentioned was that Tuljaram would agree not to prosecute an appeal which he then had on foot against these orders. In other words, Rajaram Row, acting in his own interest and on behalf of his infant son, gave up and surrendered, without any further struggle, all the rights to which he was then entitled, together with his son, in the decrees of October 1896, and August 1897.

It is not surprising in these circumstances that on Venkata Row attaining his majority in 1906 he should have taken steps to challenge the validity of this compromise. A suit was accordingly instituted by him under the name of Ganesha Row against Tuljaram and Rajaram Row seeking to recover the monies mentioned in the decrees as "the undivided son" of Rajaram Row. He failed both before the Judge of first instance and in the Court of Appeal. The matter then came before the Judicial Committee, and on 7th March 1913, it was decided that the compromise did not bind, and could not bind, the infant, who ought to be remitted to his original rights under the decrees in the

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suits referred to, and the case was remitted to deal with the remaining issues on this footing.

Two further sons were born to Rajaram Row before the case came on for hearing on remand, and as they were also members of the joint family with their father and the Plaintiff, they were added as Defendants and are the third and fourth Respondents on these appeals. On behalf of the Plaintiff it was argued that the compromise became wholly ineffectual by virtue of the order, as the family had never been divided, that consequently the new members of the family were entitled to their share and their rights could not be established if the compromise remained.

Wallis, J., before whom the remitted issues were tried, decided that Ganesha could only be entitled to a half-share, but as the further members of the family had come into existence, namely, two further sons of Rajaram, he directed that they should be added as Defendants, and on this being done he decreed that Ganesha and his two brothers were together entitled to a half-share of the monies with interest, in other words, he gave Ganesha one-sixth of the whole. The judgment also dealt with other matters no longer material, and it gave rise to as many as four appeals, of which it is only necessary to consider that of Ganesha, whose representatives are the present Appellants. His appeal failed because the High Court regarded the order of the Privy Council as rendering the compromise binding on Rajaram Row's then existing share, but, in fact, the order only declared the compromise was not binding on Ganesha Row, who was remitted to all his original rights under the compromised suits.

The Appellants urge that in the events that have happened this entitles the whole family to share in the whole fund, as other-

wise the rights of the Appellants would have been seriously curtailed by the order which intended that they should be preserved.

Their Lordships think that this argument is well founded. The agreement of the 21st November 1897, did not purport to be a release of individual rights or shares in the fund at all; it did not purport to effect any division of the joint family estate that then existed between Rajaram and his son in the subject-matter of these decrees. On the contrary, what it purported to do was to release the whole of the debts that were then owing to the joint family, in consideration of Tuljaram not prosecuting his appeals.

Now it has been held by this Board that that attempted arrangement failed so far as the infant was concerned: and, if it failed so far as the infant was concerned, their Lordships think that in the events that have happened it must also be regarded as failing wholly to convey any of the joint estate at all. They have arrived at that conclusion for these reasons. Rajaram Row, unless he was attempting to divide the joint family, could only deal with this property with the consent of his son or in his capacity as manager of the estate. In his capacity as manager of the estate he was only able to deal with it for certain limited purposes, and none of those purposes are, or can be, suggested as the consideration why these considerable sums were released. It follows, therefore, that the attempt to alienate or to release from the estate these substantial portions of the joint family property failed, and that there was no efficacy given to the arrangement that was then contemplated.

Their Lordships have expressly stated that this is their view of this agreement in the events that happened. It might possibly have been that different circumstances would have arisen if Venkata Row,

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the son, had predeceased his father, and there had been no further members of the joint Hindu family. In that case it is possible that the arrangement would have been one which Rajaram Row would have been unable to dispute; but those are not the circumstances that exist at the present time. At the present time the joint family continues; the joint family finds that this is a portion of the joint family estate which has been improperly alienated, and which they are entitled to recover. It, of course, follows equally upon that that Tuljaram Row will be entitled to prosecute his appeals, and their Lordships are a little astonished to find that, although liberty has been given to him to proceed, an order has been made which has restrained the prosecution of these appeals until after the hearing of these appeals by this Board. Were this matter ordinary English litigation, of course no tribunal here would consider hypothetical rights, the exact character and extent of which could only be ascertained after the hearing of other pending litigation; but unwillingness to let litigants, who have entrusted their disputes to the Board for determination, from a place so far distant as India, be disappointed in receiving judgment, has led their Lordships to disregard the ordinary rules that are followed in these matters, and to hear the appeal, notwithstanding the fact that it is impossible to know the exact amount upon which they will operate.

In the result their Lordships will humbly advise His Majesty that the decrees of the High Court ought to be set aside and that it ought to be declared that whatever sums may ultimately be recovered in respect of the monies that were ordered to be paid by the decrees of the 21st October 1896, and the 17th August 1897, referred to in the agreement of the 21st November 1897,

form part of the joint family estate which was constituted on the 21st November 1897, by Rajaram Row and his son Venkata Row. If on the other hand, that family has, as is stated, been dissolved, the declaration will be that the shares in the monies are to be fixed as at the date of its dissolution. As regards the cross-appeal, the Cross-Appellants are entitled to have the case remitted to the High Court to hear the appeal O. S. A. No. 4 of 1897, and to issue a revised decree in O. S. No. 266 of 1886, finally determining the sum, if any, that is due.

As regards the costs, the Respondent, Tuljaram Row, must pay one set between the Appellants and the Respondents, Ramchandra Row and Radha Bai.

Solicitor: *Mr. Douglas Grant* for Venkata Row.

Solicitor: *Mr. D. Graham Pole* for Tuljaram Row.

Solicitor: *Mr. H. S. L. Polak* for Ramchandra Row.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

PRIVY COUNCIL APPLICATION

No. 20 OF 1921.

SANDERSON, C. J.	NAGENDRABALA DAS,
RICHARDSON, J.	Applicant,
1922,	<i>v.</i>
27, March.	DINANATH MAHISH,
	Respondent.

Civil Procedure Code (Act V of 1908), sec. 110—Petitioner if has to show that any substantial question of law is involved, where though the High Court's decree purported to dismiss the appeal, it yet substantially overruled the decision of the lower Court.

In a certain suit the lower Court held amongst other things that in view of the frame of the suit it was not open to it to direct a conveyance to the Plaintiffs of the mortgaged properties. On appeal, the High Court dismissed the Plaintiffs' appeal

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with costs and affirmed the decree of the lower Court with one variation, namely—“that the decree as also the mortgaged properties will be included in the conveyance to the Plaintiffs :”

Held—That though the decree of the High Court purported to dismiss the appeal with costs, it was impossible to hold that it affirmed the decision of the Court below. Therefore it was not necessary for the Petitioner to show that any substantial question of law was involved in the appeal to His Majesty.

This was an application filed on the 1st August 1921 for leave to appeal to His Majesty in Council against the judgment of this Court, dated the 20th May 1921 delivered by Mookerjee and Buckland, JJ., in Regular Appeal No. 249 of 1919.*

The facts of the case will sufficiently appear from the judgment.

Babu Panchanon Ghosh for the Petitioner.

Babu Brojo Lal Chuckerbutty for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an application for leave to appeal to His Majesty in Council by Srimati Nagendrabala Dasí and Nobo Kumar Hazra against the judgment of this Court dated the 20th May 1921, and the first question which we have to decide is whether the decree of the High Court is one which affirmed the decree of the Court immediately below.

The position is somewhat curious, because the Plaintiffs were the Appellants although the Petitioners now before us had put in cross-objections, and the Plaintiffs' appeal was dismissed with costs, yet the decree of the learned Subordinate Judge was affirmed with one variation, namely :

—“That the decree as also the mortgaged properties, purchased by the assignee in execution, will be included in the conveyance and the Plaintiffs will be allowed two months from the date of the decree of this Court to deposit the amount mentioned in the judgment of the Subordinate Judge.” The decree made by the first Court was to this effect, that the suit be decreed and that the Defendants Nos. 1 and 2 do assign the decree in favour of the Plaintiffs on the latter depositing Rs. 13,750 and so on. As already pointed out this Court varied that decree by directing that the Plaintiffs were entitled not only to an assignment of the decree but also to a conveyance of the mortgaged property purchased by them in execution. The learned Judges of this Court stated in an earlier part of their judgment as follows : “It was apparently overlooked that, during the pendency of the suit, the decree had already been executed and the hypothecated properties purchased by the assignees of the decree.” With every respect to the learned Judges it appears to me that this was not quite a correct statement of the position as regards the Court of first instance, because on reading the judgment of the learned Subordinate Judge it seems to me that the learned Subordinate Judge had not overlooked but had drawn attention to the above-mentioned fact, and had come to the conclusion that having regard to the way in which the suit was framed, it was not open to him to declare that the Plaintiffs were entitled to the conveyance of the property purchased by the assignee of the decree. The passage in the judgment is at p. 136 of the paper-book and is as follows : “The Plaintiffs have not added any prayer for reconveyance of their mortgaged properties to them. Still, however, money is due to the decree in question and the Plaintiffs may on that account as well pray for an assignment of the decree in

* Since reported in 35 C. L. J. 882.

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their favour. What the effect of such a decree will be on the lands thus sold in execution of the mortgage decree in question is a different question with which the Court has nothing to do in the present suit as framed." I read the judgment of the learned Subordinate Judge to mean that in the suit, as framed, it was not open to him to direct a conveyance to the Plaintiffs of the mortgaged properties. If that be so, then it seems to me that the judgment of the High Court was one which overruled that decision, because the learned Judges came to the conclusion that in that suit as framed, it was open to the learned Subordinate Judge to direct a conveyance of the mortgaged property to the Plaintiffs and inasmuch as they directed by their judgment that the mortgaged properties should be included in the conveyance under these circumstances, it seems to me that it is impossible for us to hold that the decree of the High Court affirmed the decision of the Court below.

The result is that it is not necessary for the Petitioner to show that any substantial question of law is involved, and the only other question which we have to consider is the question of value; upon the appeal to the Judicial Committee of the Privy Council the Petitioners have a right to appeal against the whole decree of this Court, and it cannot be disputed that the subject-matter of the suit as well as the subject-matter of the appeal is of the value of more than rupees ten thousand. Consequently in my judgment a certificate should be granted.

RICHARDSON, J.—I agree.

J. N. R.

Leave granted.

[INSOLVENCY JURISDICTION.]

RANKIN, J.

1921,

6, December.

Re ARCHIBALD
GILCHRIST PEACE.

Insolvency—Presidency Towns Insolvency Act (III of 1909), secs. 70, 82—Separate creditors—Misfeasance, neglect or omission—Distribution of assets—Notice of claim not disposed of—Personal liability of the Official Assignee—Method of ascertaining his liability—Costs.

The Official Assignee distributed the assets of the insolvent after deducting commission, etc., to the two scheduled creditors, though he had notice of claim by three other creditors and their claims were neither admitted nor rejected:

Held—That the Official Assignee was personally liable for the amount of which the three creditors had been deprived.

A creditor who lodges his proof in the statutory form is entitled that it should be dealt with without doing anything more.

The facts of the case will appear from the judgment.

Mr. N. N. Sircar (with Mr. S. M. Bose) for the Creditors.—In this case the Official Assignee comes under sec. 82 and is guilty of misfeasance, neglect or omission and is personally liable to compensate the creditors the loss they have suffered on account of the distribution of the assets before dealing with the claims of the three creditors, who are the applicants. The Official Assignee had notice of their claims before he distributed the assets. There could be no justification for such a conduct. Creditors had reason to believe that their claims were admitted. If the proof was not sufficient the Official Assignee ought to have asked for further evidence. The creditor had nothing further to do. Moreover there is no such rule by which any time limit is imposed within which the claim is to be admitted or rejected.

Mr. A. A. Avetoom for the Official Assignee as Assignee of the Insolvent.—

* *Re* ARCHIBALD GILCHRIST PEACE.

The Official Assignee treated the scheduled creditors as the separate creditors of the insolvent under sec. 70 and hence preference was given to them. The creditors did nothing except filing their claims; they ought to have taken steps to have their claims admitted. The Official Assignee acted *bonâ fide* and is not guilty of any misfeasance. If the Official Assignee was not right in acting strictly within the provision of the Act relating to the distribution of dividends, he acted in a manner analogous and suitable to the particular circumstances of the case.

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—This is an application brought by three creditors against the Official Assignee. The insolvent, one Archibald Gilchrist Peace, was adjudicated on the 7th August 1918, and on the same day filed his schedule of affairs in which he disclosed the number of his creditors as two. The first creditor Bijoy Sing Duduria was put down as a creditor for Rs. 12,340-11-0, and the consideration was this : “Lent to the insolvents late firm of Gilchrist Peace and Ross.” The second creditor is Kathleen Irene Marie Paul Ghose. The amount is Rs. 27,800, and the consideration is stated in the same words as in the case already mentioned. The present applicants filed their several proofs of debt by the 7th May 1919. What happened thereafter was that Mr. Faulkner as Official Assignee being told by the insolvent that a friend would provide money to enable these two creditors to be paid off to their satisfaction, did, in fact, utilise the assets of the estate which had come to his hand together with a further sum of money obtained from the friend in question to pay off the two creditors after arranging a small abatement from these considerable debts. Payment was made

about the 26th August 1919. The present applicants complain, first of all, that their proofs of debt filed in May 1919 were in no way noticed; they were neither admitted nor rejected nor dealt with in any way. Before distributing the sum of about Rs. 40,000 to the two scheduled creditors, no notices such as the statute requires before the payment of a dividend were issued to the public : none were issued to the applicants or to any one else. The sum obtained from the insolvent's friend was sufficient not only to pay off the two creditors to their satisfaction, but also to pay a commission to the Official Assignee of 5 per cent. upon the full amount. Under these circumstances the excluded creditors bring this application, and they say that they are not only within general principles of law in view of the fact that Mr. Faulkner is a trustee, but that they are within an express provision in the Presidency Towns Insolvency Act, *viz.*, sec. 82.

I have to enquire, first of all, whether this is a case of misfeasance, neglect or omission within the meaning of that section or a case of breach of trust within any other principle that may be applicable. I quite agree that under sec. 82 this Court would not hold the Official Assignee personally liable, if, in any matter which he could reasonably take it upon himself to decide, he while proceeding regularly under the statute, made a decision on a point of law for which there was a reasonable case. At the same time this Court cannot accept the principle that any mistake—if only it can be put as a mistake in law—is such as to leave the person damnified without a remedy. I regret to say that in the first place I think it was in this case negligent for the Official Assignee with the insolvent's schedule before him to treat the two scheduled creditors as personal creditors or what sec. 70 calls “separate creditors” of this insolvent as distinct from joint

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creditors. The language of the schedule itself is too plain for argument. It seems, moreover, that two suits had been brought, each against both Peace and Ross, in respect of these debts. In the one case they were described as carrying on business as Messrs. Gilchrist Peace and Ross: in the other case they were not so specifically described, but were sued as for a partnership debt as persons who had been partners but had dissolved partnership. In each case both persons were sued and judgment was recovered for one and the same sum against both. Now, the Official Assignee says that execution had been levied against some of the separate property of Mr. Peace. What there is, either in that fact or in the form of the decrees, or in the constitution of the suits, to warrant or even to assist the suggestion that these were not provable in Peace's insolvency as being debts due in the first instance upon the joint estate, I am unable to make out. However, that was only the first step. The second thing which happened was this: the proofs filed on the 7th May 1919 were in no way dealt with until after the whole estate and the monies coming from the fund had been distributed. Now, upon that Mr. Faulkner says that it is not for him to deal with these proofs unless he is moved to do so by creditors. That is entirely wrong. If further evidence, further vouchers, further materials are desired by the Official Assignee he can say so and call for such additional particulars as he thinks right, but a creditor who lodges his proof in the statutory form is entitled that it should receive attention without doing anything more. I do not find that in our rules in this Court there is the same rule as there is in England giving a limited time in which a proof must either be admitted or rejected or further particulars demanded, but there can be no doubt that a creditor who lodges a proof should

have his proof dealt with upon such lodgment. In any case the Official Assignee had notice on the 7th May that certain persons were claiming to be creditors in this insolvency by reason of debts due to them from the firm of Messrs. Gilchrist Peace and Ross. He says that the insolvent had professed to be unable to give any particulars about the debts of the firm. With that knowledge the Official Assignee took it upon himself to distribute the money which had come into his hands as part of the insolvent's estate together with other monies provided for that purpose, in the payment of certain costs or charges and then in payment of the two scheduled creditors alone. It is suggested that because these creditors had not moved somebody to put their names into the insolvent's schedule, this in some way furnishes an excuse or warrant for what was done by the Official Assignee. That is an entire misconstruction of the Act. But in any case how with notice of these claims the Official Assignee thought it reasonable, safe or permissible to distribute the whole estate ignoring them, I do not profess to follow. He had not rejected the proofs. I do not gather that he had any intention at that time to reject or to admit them. It is said by Mr. Faulkner that if his action was not strictly within the dividend provisions of statute, nevertheless he acted in a manner analogous and suitable to the particular circumstances of the case. I cannot say too plainly that it is quite impossible to administer a bankrupt's estate unless that course of conduct is to be discontinued finally and altogether. It is not possible for this Court even to pretend to distribute a bankrupt's estate with reasonable certainty unless the rules as to distribution of dividends are regarded by the Official Assignee as absolutely sacrosanct. It will be difficult enough even then, but it is not

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possible to tolerate such a course of conduct as acting by way of analogy, giving no notice and taking the risk.

In this matter I have to make up my mind whether what has happened has been an excusable mistake in viewing the facts, an excusable mistake in law, or a course of conduct that is well over the line which marks such mistakes of judgment from what the statute calls misfeasance, negligence and omission of duty. I regret to say that I think I should be taking sec. 82 out of the statute altogether if I failed to hold that the Official Assignee in this case has thrown over all the rules laid down for his guidance in so far as procedure is concerned, and has taken risks which there was no need to take. Even in so doing he has acted without reasonable care and has made mistakes in judgment which are not excusable. In my opinion it is a case in which the Court cannot help itself, but must make the Official Assignee personally liable for the sums of money which are now no longer at the credit of this estate and of which these three creditors have in fact been deprived.

The question is, what sum of money is that? I cannot take it that the money provided by the insolvent's friend was money belonging to the estate. That is to assume, on no evidence at all, that the insolvent was committing fraud which the Official Assignee should have found out. The only view warranted by the evidence, is that some friend of the insolvent for the purpose of paying off these two creditors, thinking that they were the only ones, provided the necessary money. It is not possible for me to say whether, had he known that there were other creditors he would have refused to part with any money or would have provided more. The fact that the Official Assignee's commission was taken on the money in fact provided does not for this purpose make any differ-

ence. All I am concerned with is the question: how much money belonging to this insolvent's estate has been put by the Official Assignee's conduct into an improper course of distribution? Now, the three debts of the present creditors before me amount to some Rs. 13,551. The two scheduled creditors got over Rs. 40,000. The total sum realised from assets of the insolvent by the Official Assignee amounted to Rs. 7,718, from which has to be deducted, first of all, 5 per cent. upon that sum and then something like Rs. 150 for costs that would come in front of any unsecured creditors. There is, therefore, a sum of some Rs. 535 that has to be deducted from the amount belonging to this estate. That leaves a sum of Rs. 7,183 which on this footing would have to be rateably distributed between the Rs. 13,000 worth of creditors before me now and the Rs. 40,000 worth of scheduled creditors. The result of that method of calculation is that the Official Assignee must be ordered to replace a sum of something like a third of Rs. 7,183, but the exact figures I am not settling now; I am only mentioning figures as illustrations of the method by which I think his liability is to be assessed. I will refer it to the Registrar in Insolvency to take the necessary account on the lines which I have indicated, and the only matters that remain are the questions of costs.

Now, the costs of this application, the Official Assignee must also pay personally. I have come to the conclusion that the best order with regard to the costs of the previous application in the circumstances is this: while I shall not give him any costs, I shall not award the applicant any costs. There was some question of interest having to be knocked off. The proofs as filed were not quite in order and although I did allow them at certain figures, it is to be remembered that the Official Assignee

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though not entitled to reject them altogether or for the reasons given, was within his rights in demanding strict proof and further particulars. For these reasons I will confine myself to an order that the Official Assignee must pay the costs of the present application.

Costs to be as of a bankruptcy motion in Court.

Mr. H. C. Dey (of Messrs. Neogy and Dey), Solicitor for the Official Assignee as Assignee of the Insolvent.

Mr. K. C. Mukherjee (of Messrs. Morgan & Co.), Solicitor for the Creditors.

M. N. K.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 82 of 1920.

PRIONATH GHOSE and

ors., Plaintiffs,

Appellants,

v.

SURENDRA NATH DAS

and ors., Defendants,

Respondents.

MOOKERJEE, J.
CUMING, J.

1922,

13, February.

Mourasi mokurari lease creating a heritable and transferable tenancy at a fixed rate of rent—Agreement by successors-in-interest to pay an enhanced rate of rent, if destroys the character of the original tenancy or creates a new tenancy—Novation of contract.

Where a mourasi mokurari lease created a transferable, permanent and heritable tenancy at a rate of rent fixed in perpetuity, and the successors-in-interest of the tenant by an agreement consented to pay rent at an enhanced rate and a decree for rent was obtained by consent on this basis:

Held—That the circumstance that one of the terms of the lease was altered by agreement of parties, namely, that the rent originally fixed was increased, did not destroy the tenancy: It cannot be said that there was a supersession of the ori-

ginal tenancy or that there was a novation of contract. The consent decree for rent at an enhanced rate did not give the tenancy a fresh start in all respects, nor did the alteration of rent necessarily destroy the transferable character of the tenancy.

Semle:—Though the enhancement was made by consent of the parties, the enhancement should be deemed to have been made subject to the original agreement that the rent was not enhanceable.

RAMANUJ ROY v. THE MIDNAPUR ZEMINDARY Co. (1) referred to.

BAMAPADO ROY v. THE MIDNAPUR ZEMINDARY Co. (2) distinguished.

This was an appeal under sec. 15 of the Letters Patent preferred on the 17th December 1920 against a judgment of Mr. Justice Beachcroft, dated the 18th November 1920, in S. A. No. 428 of 1919 which had been preferred on the 12th of March 1919 against the decree of Babu Krishna Kumar Sen, Additional Subordinate Judge of Zillah Hooghly, dated the 3rd of December 1918, affirming the decree of Babu Sasi Kumar Ghose, Munsif, 1st Court at Uluberia, dated the 6th June 1917.

The facts of the case will appear from the judgment of

BEACHCROFT, J.—This is an appeal by the Plaintiffs. Their suit was for ejectment on the ground that the Defendants were purchasers of an untransferable occupancy holding and that consequently they had no right to remain in possession of the land in suit. The history of the land so far as we are concerned, begins with one Digambar Pandit who was the *makuridar*. His interest was bought in execution by one Amar Nath Ray in August 1874 corresponding with Bhadra 1281. Amar Nath Ray is the predecessor in interest of the Plaintiffs. Digambar

(1) 16 C. W. N. 725 (1912).

(2) 16 C. L. J. 322 (1912).

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Pandit had created a *dar-makurari* interest of the land in January 1872 at a rental of Rs. 11 a year in favour of one Rup Chandra Das. In 1882 the heirs of Rup Chandra Das were holding the land at a rental of Rs. 16 with effect from the beginning of 1282. The exact status of these heirs is the vital point in the case. The heirs of Rup Chand transferred their interest in 1881 to Haran Chandra Das, whose heirs subsequently transferred their interest again by two *kabalas* to the Defendants, and it is on the ground that these Defendants are the purchasers of a non-transferable occupancy holding that the suit was based. It has been dismissed. The question involved in the case is whether the heirs of Rup Chand Das took a fresh settlement of the land at the rate of Rs. 16 or whether they continued as holders of the original *dar-makurari* on a rent increased from Rs. 11 to Rs. 16. Both the Courts found against the Plaintiffs.

On their present appeal, the point of law which is propounded in their favour is that the lower Appellate Court has not taken into consideration all the facts and circumstances of the case and has therefore made an error in procedure. The matters on which stress is laid are these (i) That when Amar Nath Ray purchased this interest of Digambar Pandit in 1281 he was entitled under sec. 66 of Act VIII of 1869 (which was the Act then in force) to avoid incumbrances, that is in this particular instance the *dar-makurari* interest held by Rup Chandra Das; (2) that as the alteration in the rent took effect very shortly afterwards, namely, from the beginning of 1282, the Court ought to have inferred from the proximity of time and from the fact that Amar Nath had a right to annul the encumbrance that he in fact did annul the encumbrance and created a fresh tenancy. It is further

argued that the lower Court did not take into consideration certain terms in the *kobala* by which Rup Chand's heirs sold to Haran Chandra Das, and it is said that the terms used in that document show that what was transferred was an occupancy right and not a *dar-makurari* right. There is another document on which the learned Subordinate Judge largely relies and that is the decree made on compromise in 1876 in the suit brought by Amar Nath Ray against the heirs of Rup Chandra Das. The learned Judge says that on a consideration of this decree it is clear that the original tenancy of Rup Chand Das continued with this difference, that by mutual agreement the rent was enhanced to Rs. 16. I am told that there is no evidence as to the arrangement between Amar Nath and Rup Chand's heirs except that which is referred to in the Munsif's judgment to the effect that Amar Nath also verbally assured them that he would allow their permanent tenure to remain quite unaffected. Therefore whatever oral evidence there is as regards the circumstances under which the change was made is on the side of the Defendants. The question is whether the documentary evidence supports the Plaintiff's contention.

Now as pointed out, the first point taken is that the learned Judge has not considered the fact that Amar Nath probably exercised his right to annul the encumbrance and it has often been held that merely because a Judge does not mention certain matters of evidence, it cannot be said that he has not taken them into consideration, more especially, where, as here, the judgment is one of affirmance. But apart from that the argument suggests that the proper inference from the alteration in the rent made is that Amar Nath exercised his right. But this is pure speculation. As was pointed out by the learned Munsif the mere fact that there

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was an increase of rent is not in itself inconsistent with the view that the original *darmakurari* lease was not annulled.

Then there are the pieces of documentary evidence, one referred to by the learned Judge and the other to which he has not referred. The one which he has not referred to—the *kobala* of 1881—is discussed in some detail by the Munsif and it was pointed out by him that the use of the words “*korfa*” and “*jote*” does not show that there was a new settlement. I take the view that the words used are as consistent with the existence of the *darmakurari* interest as with the existence of an occupancy right. So, that document by itself does not give us any definite assistance one way or the other. The learned Judge has referred to the other document, namely, the decree which was prior in time to the *kabuliyat* of 1881. The learned Judge in dealing with that has said that a consideration of that decree shows that there was not a new tenancy. In so far as the language of the decree goes—in drawing any conclusion from the language of the decree—I think, the Judge is right. The only passage in the decree which throws any light on the point is a passage which recites the facts to this effect: “After his death his wife on behalf of her minor sons agreed verbally to give an enhancement of Rs. 5 and to pay rent at the rate of Rs. 16 per year from the beginning of the year 1282.” It does not set out in terms as to whether the original lease continued or whether a fresh lease was granted; but the use of the words “*enhancement* of Rs. 5” seems to be consistent with the view that the original lease continued to exist at enhanced rent rather than with the view that some new lease was created and some rent which was in excess of the original rent was imposed. In the circumstances I see no ground for interference with the decision of the learn-

ed Subordinate Judge and this appeal must be dismissed with costs.

Babus Ram Chundra Majumdar and *Phanindra Lal Moitra* for the Appellants.

Babus Monmatha Nath Ray and *Biraj Mohan Majumdar* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal under cl. 15 of the Letters Patent from the judgment of Mr. Justice Beachcroft in a suit for ejectment.

The controversy between the parties is limited to one question, namely, whether the disputed tenancy was or was not transferable. On the 2nd January 1872 the lands in suit were included in a *mourasi mokerari* lease granted by one Digambar Pandit to Rup Chandra Das. It is not disputed that the tenancy so created was intended to be transferable. The tenancy was also permanent; in other words heritable and not held for a limited term. The rent was fixed in perpetuity at Rs. 11. It appears that one Amar Nath Roy purchased the interest of Digambar Pandit at a sale for arrears of rent held at the instance of the superior landlords. The purchaser thereafter brought a suit for arrears of rent against the representatives of Rup Chandra Das on the allegation that by agreement of parties the rent had been fixed at Rs. 16 annually. On the 7th September 1876 a decree for rent was obtained by consent on this basis. These Plaintiffs are the successors in interest of Amar Nath Roy; and the Defendants have acquired the interest of the representatives of Rup Chandra Das by successive transfers. The Plaintiffs contend that the tenancy purchased by the Defendants was not transferable and that they are consequently liable to be ejected as trespassers. The trial Court negatived this contention and dismissed the suit. The view so taken has been affirmed by the

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Court of appeal below as also by Mr. Justice Beachcroft.

The Appellants have not disputed and cannot dispute that the tenancy granted to Rup Chandra Das by Digambar Pandit was transferable. But they have argued that the tenancy ceased to exist when the representatives of Rup Chandra Das agreed to pay rent at an enhanced rate. They have also contended that if this position is not maintainable, the effect of the agreement to pay enhanced rent was to destroy the character of the tenancy as a tenancy at a fixed rate of rent and consequently to destroy its character as a transferable tenancy. In our opinion, there is no foundation for either branch of this contention.

The tenancy granted to Rup Chandra Das was heritable, was not held for a limited term, was subject to the payment of a fixed rent and was unquestionably transferable. The circumstance that one of these elements was altered by agreement of parties, namely, that the rent originally fixed was increased did not destroy the tenancy. No principle has been invoked which can support the view that there was a supersession of the original tenancy or that there was a novation of contract. Such a position is not supported either by the actual intention of the parties or by any recognized principle of law. We are therefore unable to accept the argument that when the decree for rent was by consent of parties made at an enhanced rate, there was a fresh start in all respects: nor are we able to uphold the contention that the alteration of rent necessarily destroyed the transferable character of the tenancy. It is not necessary for us to decide whether the tenancy has lost its character as a tenancy held at a fixed rate of rent. Much may, indeed, be urged against such a view on the basis of the decision in *Ramantij Das v. The*

Midnapur Zemindary Co. (1). In that case there was a tenancy held at a fixed rate of rent. By consent of parties the rent was enhanced. Notwithstanding this circumstance it was ruled that the enhancement must be deemed to have been made subject to the original agreement that the rent was not enhanceable. That distinguished the case from the decision in *Bamapado Roy v. The Midnapur Zemindary Co.* (2), where the original nature of the tenancy was not known and it was consequently held that the fact that the rent had been altered once negated the theory that the rent had been fixed in perpetuity. But even if it be assumed that as a result of the compromise decree, the tenancy has, in this case, lost its character as a tenancy held at a fixed rate of rent, it does not follow that the other incidents have been thereby affected. As already stated, the tenancy was heritable, was transferable, and was not held for a limited term. It is difficult to appreciate how these elements can be affected merely because by a compromise between the parties the rent has been increased. We hold accordingly that the tenancy was transferable and that the Defendants are not trespassers.

The judgment of Mr. Justice Beachcroft is affirmed and this appeal dismissed with costs.

J. N. R.

Appeal dismissed.

(CIVIL REVISIONAL JURISDICTION.)

REV. NO. 22 OF 1921.

GIRIJANANDA KALI

MITRA, Accused,

Petitioner,

v.

THE EMPEROR,

Opposite Party.

Criminal Procedure Code (Act V of 1898), sec.

(1) 16 C. W. N. 724 (1912).

(2) 16 C. L. J. 322 (1912).

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476—"In the course of" judicial proceeding, meaning of—Petition for return of documents filed before clerk of Court, if can be made the subject-matter of enquiry and order under the section.

After the disposal of two rent suits in the Court of the Munsif, the Petitioner, it was alleged, filed two petitions before the clerk in charge of rent suits in the Munsif's Court asking for the return of the documents filed by one B, whose interest had since been acquired by the Petitioner in the said rent suits. These petitions purported to bear the signature of the pleader of B who acted for him in the said rent suits, but it was alleged that this signature was forged. The Munsif after holding a preliminary enquiry made an order under sec. 476, Cr. P. C., directing the prosecution of the Petitioner for offences under secs. 463, 471, I. P. C. :

Held—That the petitions in question were not filed in the course of a judicial proceeding and the Munsif had no jurisdiction to make the order.

The words "committed before it" in sec. 476, Cr. P. C. are qualified by the words "in the course of a judicial proceeding."

This was a Rule granted on the 18th August 1921 against an order of the Munsif (Babu Kiran Ch. Mittra) of Basirhat, 1st Court, dated the 28th July 1921.

The facts of the case will appear from the order which was as follows :—

"From the preliminary enquiry made by me I am satisfied that this is a fit case in which the accused Girijananda Kali Mitra should be sent to the Criminal Court for committing offences under secs. 463 and 471, I. P. Code.

It transpires that on Saturday the 16th July last Girijananda Kali got two petitions Exs. 1, 2, written out by a Muhary Ahommadali Shah for return of certain documents (filed by one Bhiku Gazi in two rent suits Nos. 676 and 1168 of 1920).

Those petitions purport to have been signed by Babu Probodh Chandra Ghosh, a Pleader of this Court. Probodh Babu says that he did not sign those petitions inspite of the accused Girijananda Kali asking him to sign them. Probodh Babu was the Pleader of Bhiku Gazi whose interest is said to have been acquired by the accused. The accused was examined by me and he said that although Bhiku did not come to Court on 16th July 1921, he sent a man Nabiraddy or so to him (accused) for getting back the documents filed in the rent suits. The accused admits that he asked the Muhury to write out the petitions Exs. 1, 2 and that he also took those petitions to Probodh Babu for his signature and that Probodh Babu refused to sign them. Benoy Bhusan Sikdar our *amla* in charge of rent suits says that the accused produced before him the petitions Exs. 1 and 2 and wanted to take back the documents on behalf of Bhiku Gazi but as he suspected that the signatures were not like those of Probodh Babu he did not do anything before consulting Probodh Babu. The accused admits that he went to the office and requested Benoy *amla* to return the documents. The accused simply says that he did not forge the name of Probodh Babu and that he did not take those petitions to the *amla* in charge. I see no reason to disbelieve the *amla* in charge. Moreover considering the evidence of Mohoraddy Molla (peon), Khalikar Rohoman (peon), Ananda Sarkar (orderly) and Haran Mallik (Muhury), I hold that the accused filed those petitions in Court, used the Court seal and took away those petitions before they could be sent by the Peshkar to the Shehanabis who writes out the petition register. The permanent Peshkar was on casual leave on that day and another *amla* Norendra Babu was doing the pesh-work : as he was busy in noting orders passed by me in a large number of

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miscellaneous cases fixed for that date, he failed to notice what others present near him could notice. Thus in the result I order that this case be sent to the Sub-Divisional officer for enquiry or trial under sec. 476, Cr. P. Code. The accused to furnish bail-bond to the extent of Rs. 100 for his appearance before the Sub-Divisional Officer. Let a copy of this judgment be sent to the Sub-Divisional Officer for necessary action and another copy may be sent to the District Magistrate with a request that considering the fraud upon Court and forgery within Court precincts the Government Pleader or some responsible officer may be engaged to conduct the prosecution : one handwriting expert may also be asked to compare the signatures with the writing of the accused."

Babus Bir Bhusan Dutt and Hit Lal Guha for the Petitioner.

Babu Satindra Nath Mukherjee (for *Mr. Orr*) for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This Rule is directed against an order of the Munsif of Basirhat, first Court, passed under sec. 476 of the Code of Criminal Procedure sending the case against the Petitioner to the Sub-Divisional Officer for enquiry or trial for committing offences punishable under secs. 463 and 471, I. P. C. The facts so far as they are necessary for the decision of this Rule are as follows : The Petitioner is alleged to have presented two petitions before the Muhuri in charge of rent suits in the Munsif's Court asking for the return of the documents filed by one Bhiku Gazi in two rent suits. These two petitions purported to have been signed by Babu Probodh Chandra Ghose who was the Pleader of Bhiku Gazi in those rent suits. These signatures of the Pleader have been held by the Munsif to

be forgeries. The only point for our consideration is a purely technical one and that is whether the Munsif had jurisdiction to take action under sec. 476, Cr. P. C. Under that section, a Civil Court can only send for enquiry or trial cases of offences referred to in sec. 195, Cr. P. C., and committed before it or brought under its notice in the course of a judicial proceeding. We think we must read this section to mean that the words "committed before it" are qualified by the words "in the course of a judicial proceeding." Taking this view, it appears to us that it cannot be held that these petitions were filed in the course of a judicial proceeding. The rent suits in which the documents were filed had been finally disposed of and there was nothing pending before the Munsif—neither the original suits nor subsequent proceedings in execution. The definition of "judicial proceeding" is given in cl. (m) of sec. 4 of the Code as including any proceeding in the course of which evidence is or may be legally taken on oath. Having regard to the provisions of Or. XIII of the Code of Civil Procedure, it appears that no question can arise on an application for return of documents which would necessitate the taking of evidence on oath. On an application being made by a party, the documents are necessarily returned if the application is in the proper form and the act is purely ministerial. As we have said, in the present case, the petitions were filed not before the Munsif but before the Muhurir. Had the Muhurir reported that the applications were in proper form, orders would have been passed by the Court as a matter of course. Taking this view, we hold that there were no judicial proceeding before the Munsif at the time these petitions alleged to be forged were filed and that consequently the Munsif had no jurisdiction to take action under sec. 476, Cr. P.

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C. We accordingly set aside the order of the Munsif dated the 28th of July 1921 and quash any proceedings that may have been taken on the strength of that order.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 66 OF 1922.

WALMSLEY, J.
SUHRAWARDY, J.
1922,

Heard, 21, February
Judgment, 1, March.

BANWARI LAL RAM,
2nd party, Petitioner,
v.
PRONAB KRISHNA
MAJUMDAR, 1st party,
Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 144, scope of Jurisdiction of Magistrate to prohibit holding of hat on one's own land and on day other than the day on which old hat was held—Ex n. rt. order, propriety of passing—Speedy disposal of objection to order necessary.

The Petitioners started a new hat on their own property within a certain locality where existed an old hat belonging to the Opposite Party, but on a day different from that on which the old hat was held. The Magistrate acting on a police report made an order prohibiting "any person from going to, buy or sell in the said place." The Petitioners shifted their hat to another place and the Magistrate again made a similar order:

Held—That every person is ordinarily entitled to exercise all rights of ownership on his own property and the holding of a hat on one's property is not in itself a wrongful act. The Criminal Court assumes jurisdiction to interfere with the lawful exercise of a person's right to ownership when such exercise in its ulterior consequences and being directed primarily against the lawful exercise of another person's right of ownership is likely to cause a breach of the peace.

That inasmuch as the Petitioners claimed exclusive possession of the land on which they wanted to hold the hat and in-

tended to hold it on a day other than the day on which the hat of the Opposite Party assembled the Magistrate had no jurisdiction to make an order in the form in which it was made prohibiting the Petitioners from holding their hat on any day of the week and on every place within a large area.

That it is not proper for a Magistrate to pass an ex parte order under sec. 144, Cr. P. C. and when its propriety or legality is challenged to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matters ought to be disposed of quickly in order to avoid unnecessarily encroaching on the civil rights and liberty of the subject.

This was a Rule issued on the 24th January 1922 against the orders of the Sub-divisional Magistrate of Barhampur, dated the 30th December 1921, issuing a general injunction under sec. 144, Cr. P. C., upon the people residing within Rani-nagar, Domkul and Daulatabad Thanas, directing them from holding or attending a hat on the disputed land specified in the police report and calling upon both parties to show cause why they should not be proceeded against under sec. 107, Cr. P. C., and of the 4th January 1922 issuing another general injunction under sec. 144, Cr. P. C., directing the aforesaid people to refrain from holding or attending any hat within village and chak Harharia.

The facts of the case will appear from the judgment.

Babus Dasarathi Sanyal and Laht Mahon Sanyal for the Petitioner.

Babus Manmotho Nath Mukherjee and Probodh Chundra Chatterjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

SUHRWARDY, J.—This rule was issued

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against the orders, dated the 30th December 1921 and 4th January 1922, passed by the Sub-divisional Magistrate of Berhampur under sec. 144, Cr. P. C., on the grounds mentioned in the petition, viz., that the orders are *ultra vires*, illegal and beyond the scope of sec. 144, Cr. P. C.

The facts of the case are that there is an old *hat* at a village Islampur, belonging to the Opposite Party, which is held on every Monday, and attended by among others the people of chak Harharia. Some difference arose between the Opposite Party and the people of the chak, and these Petitioners started a *hat* in the chak which was held on Sunday, the 25th December 1921, at a place near the Local Board Road. It appears from the police report that on hearing that the new *hat* was being held, the Opposite Party sent their men to the place, and there was a serious fighting between the parties which resulted in the starting of criminal cases under sec. 147, I. P. C., on the 29th December 1921. The police reported the above facts to the Sub-divisional Magistrate and invited proper orders, whereupon the Sub-divisional Magistrate issued an order under sec. 144, Cr. P. C. in these terms:—

“Whereas I have been informed that there is an apprehension of a serious breach of the peace between the above-mentioned parties within the boundaries given below, I do hereby under sec. 144, Cr. P. C., pass this order of injunction prohibiting any person from going to, buy or sell in the said place, otherwise he should be dealt with according to law.”

The Petitioners then shifted the *hat* to a different plot of land but in the same village. The police again reported that the Petitioners, the second party, were holding the *hat* at another place and that “the first party is trying to prevent the sitting (holding) of the *hat* in the village

chak Harharia.” Thereupon the Magistrate passed another order on the 5th January 1922, in the following terms:—

“Whereas I have been informed that there is an apprehension of a breach of the peace between the above-mentioned parties regarding holding of a *hat* by the Opposite Party in chak Harharia as per boundary given below—It is hereby prohibited under sec. 144, Criminal Procedure Code, that no person should go to, sell or buy any articles in the chak Harharia, otherwise they will be dealt with according to law, dated this the 5th January 1922.”

In my opinion the orders complained of are such as could not have been passed under sec. 144, Cr. P. C. As has been observed in the case of *Rakhal Das Sinha v. King-Emperor* (1), there is a “clear distinction between interfering with rights of private proprietors, with whatever ulterior motive they may do acts which they have a right to do and the perpetration of wrongful acts by such proprietors. The law as regards preservation of public peace is based upon an apprehension that either certain person or persons are likely to commit breach of the peace by their own acts, or that they are likely to do wrongful acts which may occasion other people to commit breach of the peace.” These observations apply with particular force to the facts of the present case. Every person is ordinarily entitled to exercise all rights of ownership on his property, and the holding of a *hat* on one's own property is not in itself a wrongful act. The Criminal Court assumes jurisdiction to interfere with this lawful exercise of a person's right of ownership, when such exercise in its ulterior consequences, and being directed primarily against the lawful exercise of another person's right of ownership, is likely to cause a breach of the peace.

(1) 19 C. W. N. 248 (1912).

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In the present case no evidence has been gone into and we have to proceed on the materials disclosed by the record. The Petitioners claim exclusive possession of the land on which they want to hold the *hat*. They further intend to hold it on a day other than the day on which the *hat* of the Opposite Party assembles. Such being the case, my opinion is that the Magistrate has no jurisdiction to pass an order in the present form prohibiting the Petitioners from holding their *hat* on any day of the week and on any place within a large area.

Numerous cases have been cited on both sides, most of which are based on the peculiar facts of each case. The Opposite party relies on the Full Bench Ruling in *Bycuntram v. Meajan* (2). In that case it was argued that a Magistrate acting under sec. 144, Cr. P. C. has no jurisdiction to restrain a person from doing a lawful act on his property. The Full Bench held that a Magistrate has such a power where the doing of a lawful act may in his opinion occasion a breach of the peace. In that case the order passed was restraining a party from holding a *hat* on a particular day of the week. The same view has been adopted in all the cases that have since been decided, out of which special reference may be made to the case of *Nagendra Nath v. Rakhal Das* (3). In all the cases in which the order of a Magistrate under sec. 144 has been upheld, it was for restraining a party from holding a *hat* on a particular day. No authority has been placed before us in support of the contention that an order like those passed in the present case prohibiting a party from ever holding a *hat* at any place on his own property is competent under sec. 144, Cr. P. C. But there are authorities to the contrary condemning such an order. In

the case of *Rakhal Das v. King-Emperor* (1) noticed above, a rule was issued on the ground that "it is not within the jurisdiction of the Magistrate to prohibit the holding of the *hat* altogether; he can only give such directions as to dates etc., as will prevent obstruction, annoyance or disturbance to public tranquility temporarily." The learned Judges further directed that pending the disposal of the Rule, the Petitioners in that case would be allowed to open their *hat* on dates other than those on which the *hat* of the Opposite Party was held. In the course of their judgment in making the rule absolute on the grounds on which it was issued, they observed: "Now directing a man not to use his property in a lawful manner (for the establishment of a *hat* is a perfectly lawful act) cannot, in our opinion, come within the purview of this section. What the Magistrate ought to have ordered these people to do is not to obstruct or allow their servants in any way to obstruct the public or any other person" from attending the rival market if he wished to do so. The learned Judges further remarked "an injunction cannot be issued not to do a lawful act upon a man's own property." Though the last proposition is so broadly put what the learned Judges meant to say was that a Magistrate is not competent to prohibit the holding of a *hat* by a person on his own property unless he or his men by force or persuasion prevent people from attending the other *hat*. In the present case there is no allegation that the Petitioners or their men obstructed or attempted to obstruct anyone from attending the *hat* of the Opposite Party. According to the police report the breach of the peace was occasioned by the Opposite Party coming to the Petitioner's *hat* and interfering with the holding of it and that the further likelihood of a breach of the peace

(2) 18 W. R. Cr. 47; 10 B. L. R. 443 (1872).

(3) 23 C. W. N. 141 (1918).

(1) 19 C. W. N. 248 (1912).

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lies in the Opposite Party taking umbrage at the opening of a new *hat* close to theirs and interfering with it. For this state of things if any one was to blame it was the Opposite Party and I fail to see that there was any power in the Magistrate or any justification for issuing an injunction on the Petitioners against holding the *hat*. Further, the orders complained of virtually prohibit any buying or selling in the village because some one may object to it.

To the above effect is the case of *Bidhu Ranjan v. Romesh Chandra* (4), where the injunction issued under sec. 144. Cr. P. C., proscribed establishing a new *hat* within a quarter of a mile of an old *hat*, as "there was a probability of a breach of the peace over this matter." The learned Judges in discharging the order of the Magistrate observe: "We are of opinion that the object of sec. 144 is not that orders should be made proscribing the holding of *hats* indefinitely within a certain area for two months." They suggest that in such cases the proper way of preventing a breach of the peace is to proceed according to sec. 107, Cr. P. C. I think that in the present case also that suggestion should be adopted, as I find that the Magistrate is already considering the question of proceeding under that section.

I cannot leave this case without observing that it is not proper for a Magistrate to pass an *ex parte* order under sec. 144, Cr. P. C., and when its propriety or legality is challenged to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matters ought to be disposed of quickly in order to avoid unnecessarily encroaching on the civil rights and liberties of the subject.

The Rule is accordingly made absolute and the orders of the 30th December 1921,

(4) 11 O. W. N. 223 (1906).

and 4th January 1922, passed by the Sub-divisional Magistrate will stand discharged.

WALMSLEY, J.—I agree.

S. C. M.

[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

VISCOUNT CAVE.

LORD SHAW.

MR. AMEER ALI.

1921,

Heard, 23, 24 and

27, June.

Judgment, 18, July.

KRISHNAN *alias*

KUTHALI MOOTHAVAR

(styled Vallabhan

Chathan), Appellant,

v.

PERINGATI KUN-

HARANKUTTY HAJI,

Respondent.

Suit for recovery of possession—Proof of title by Plaintiff and of exercise of acts of possession during currency thereof—Onus on Defendant to prove adverse possession for statutory period—Qualities which make possession adverse—Effect of acts of possession by owner upon the character of trespasser's possession which is claimed to be adverse.

Where the original title is unknown and both parties in a suit for ejectment give evidence of possession the Court will be justified in deciding in favour of one party or the other by a comparison of the evidence, judged in the light of probabilities. Such possession has to be interpreted according to the fairest view of what the property itself (in this case forest land) was capable of in the way of possession and what upon a broad view would be considered an adequate assertion of title by sufficient occupation.

But where the Plaintiff has succeeded in proving a clear title the onus lies on the Defendant to prove adverse possession for the statutory period; and possession to be "adverse" must have all the qualities of adequacy, continuity and exclusiveness.

RADHAMONI DEBI v. THE COLLECTOR OF KHULNA (1) and THE SECRETARY OF STATE

(1) L. R. 27 I. A. 136, 140: s. c. 4 O. W. N. 597 (1900).

KRISHNAN *alias* KUTHALI MOOTHAVAR *v.* PERINGATI KUNHARANKUTTY HAJI.

FOR INDIA IN COUNCIL *v.* CHELIKANI RAMA RAO (2) *referred to.*

When the holder of title proves that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even though they might have failed to constitute adverse possession as against another, may be quite sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds.

This was an appeal from a decree, dated the 3rd December 1917, of the High Court of Judicature at Madras, which partly affirmed and partly reversed a decree, dated the 20th March 1916, of the Court of the temporary Subordinate Judge of Tellicherry in Original Suit No. 12 of 1913.

The dispute between the parties originally related to 31 hills in North Malabar District, known, according to the Plaintiff, as Pannikottur Cherikkal (hills 1 to 24) and Muthavidu Cherikkal (hills 25 to 31), but, according to the Defendants, collectively known as Pakkath Villiyari Muthavidu Cherikkal. The questions for consideration in this appeal were (1) whether the Appellant had any title to hills items 1 to 24, and if so (2) whether his suit to recover possession of the same was not barred by limitation.

On the 29th March 1912, the Appellant instituted the present suit against the Respondent and another in the District Court of North Malabar, for recovery of the 34 hills. He alleged in his plaint, *inter alia*, that the suit hills belonged to him in jenm, that, on the 30th December 1899, he had leased the said hills to one Ramanathan Chetty for 60 years, who got into possession by virtue of the lease; that

(2) L. R. 43 I. A. 192: s. c. I. L. R. 39 Mad. 617: 20 C. W. N. 1311 (1916).

the Defendants, on the 27th May 1900, trespassed on the hills items 28 and 32 of the Schedule; that, on a complaint by the Chetty's agent, the Respondent and others were convicted by the Magistrate, but that, on the 10th October 1900, the Appeal Court reversed the conviction on the ground that the matter was to be decided by a Civil Suit; that on the 5th December 1911, the said Chetty surrendered his lease to the Plaintiff; that the Defendants, even though they had no "true" possession of the remaining hills, asserted possession of the same and made certain entries thereon; and that the Defendants had no right to keep the same in possession adversely to the Plaintiff. He therefore prayed for a decree directing the Defendants to surrender to him the hills mentioned in the Schedule with mesne profits and costs.

The Respondent and the other Defendant (now deceased) in their written statements denied the Plaintiff's title to the suit hills, and alleged, *inter alia*, that the Plaintiff never had possession of the same. They asserted their own title and pleaded that the suit was barred by limitation.

On the 9th November 1912, the District Judge framed four issues, of which the following are material.

(2) Do the plaint hills belong in jenm to the Plaintiff's Sthanam, and are the Defendants in unlawful possession of the same?

(3) Is the suit barred by limitation?

The suit was subsequently transferred to the Court of the temporary Subordinate Judge of Tellicherry, who framed two additional issues on 19th January 1914 though they did not arise out of the pleadings in the case, and are not now material.

On the 20th March 1916, the Subordinate Judge, after recording evidence pro-

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nounced his judgment in the suit, in the course of which he found that the Plaintiff had not proved his title to Muthavidu (items 25 to 34), and that the Defendants had not proved their title to Pannikottur (items 1 to 24).

With regard to possession, the Subordinate Judge observed that the Defendants had no lawful possession of Pannikottur, but later on, however, he stated "That the Plaintiff has had possession of Pannikottur Cherikkal only through tenants, and now Plaintiff has direct possession of the same." As regards Muthavidu, he said, "I find that Plaintiff has not proved his title and possession within twelve years before suit. The oral evidence adduced by him is not of disinterested and independent witnesses." In the result he granted the Plaintiff a decree for possession of Pannikottur Cherikkal—items 1 to 24 of the Schedule—and dismissed the suit in respect of items 25 to 34.

Against the said decree, dated the 20th March 1916, both parties appealed to the High Court of Judicature at Madras.

On the 3rd December 1917, the High Court delivered its judgment in both the appeals. Abdur Rahim, J., in delivering the judgment of the Court, in which Oldfield, J., concurred, observed that the origin of the title of either party was obscure, and that it was not possible to come to any definite conclusion on the merits of the claim of either party so far as title was concerned. He further observed that "it would seem that at any rate in 1871 the Defendants' Tarwad obtained possession of the hills." On the question of possession, the learned Judges were of opinion that the evidence produced by the Plaintiff was not satisfactory, whereas that produced by the Defendants was of a reliable nature and more probable in the circumstances of the case. The

learned Judges came to the conclusion that "the Plaintiff had entirely failed to prove that he had possession of these hills since the date of the decree in the suit of 1864 and of Exbt. JJJ." The suit of 1864 was one for possession of these hills by the Defendants' Tarwad against a tenant for possession in which the Plaintiff's Tarwad was the 9th Defendant, and the suit was decreed. Exbt. JJJ. was a deed of assignment by the said tenant in 1871 in favour of the Defendants' Tarwad, releasing possession of the hills. The learned Judges also held that the Plaintiff's suit was barred by limitation as the Plaintiff had not been in possession of the hills for more than 12 years before the suit and the Defendants have been in possession of them during that period. In the result, the Appellant's appeal in respect of items 25 to 34 was dismissed and the Respondent's appeal in respect of items 1 to 24 was allowed. A decree was accordingly drawn up dismissing the Appellant's suit with costs.

Against the said decree of the High Court, dated the 3rd December 1917, the Appellant applied for leave to appeal to His Majesty in Council. On the 28th August 1918, the Appellant was granted the necessary certificate with respect to the decree relating to items 1 to 24 by which the decree of the lower Court was reversed, but he was refused leave to appeal with respect to the decree relating to items 25 to 34 by which the decree of the lower Court was affirmed, by the High Court.

The Appellant applied to His Majesty in Council for special leave to appeal against the decree relating to items 25 to 34, which was refused by His Majesty in Council by an Order, dated the 16th December 1920.

Messrs. DeGruyther, K. C. and Kenworthy Brown and Palat for the Appel-

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lant.—Referred to the Limitation Act, Arts. 142 and 144. *Radha Gobind v. Jugdis* (3), *The Secretary of State for India in Council v. Chelikani Rama Rao* (2).

Sir William Finlay, K. C. (with *Mr. K. V. L. Narasimham*) for the Respondent.—This is an action for possession and is based on the view that Defendants are in possession. The Appellants have argued as if title was clear in their favour and so it is necessary for Respondents to make out possession. But since 1870 there has never been any effective possession on their part. There has been only one attempt in 1900 which ended in a fracas.

Since 1870 we have been in possession.

[LORD SHAW.—When did your clients get a complete possession?]

In 1871. Refers to *Hemanta Kumari v. Jagadindra Nath* (4). Relies on the decree of 1864.

[LORD SHAW.—The 1867 suit would be a sort of interpretation suit.]

Possession against Kenhassan was decreed by the 1864 suit and is not affected by the 1867 suit.

Mr. K. V. L. Narasimham following.—1867 suit is declaratory. 1864 suit brings out possession and decree under this could not be disturbed. Or. 21, r. 35. Art. 144 cannot apply; Art. 142 applies. Burden of proof is on Plaintiff if he alleges possession and dispossession. *Nitrasur Singh v. Nund Lall* (5) and *The Secretary of State for India in Council v. Chelikani Rama Rao* (2) are different.

Mr. Kenworthy Brown.—If title is in me, I am safe upon the authorities in view of acts of possession on my client's part.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a decree dated the 3rd December 1917, of the High Court of Judicature at Madras, which allowed in part an appeal from a decree dated the 20th March 1916, of the Court of a temporary Subordinate Judge of Tellicherry. The suit was brought by the present Appellant to establish his title to thirty-four hills in the North Malabar District. The decree of the Subordinate Judge was in favour of the Respondent with regard to ten of the hills, comprising, roughly stated, the north and north-east portion of the group of thirty-four. No question is raised in this appeal with regard to those ten hills, it being conceded that the Defendant has a title thereto.

The still outstanding issue between the parties; however, is as to the remaining group of hills, twenty-four in number, which may be said in general terms to form the southern half of the entire group which was originally in suit and to be bounded on the south by the Peruvanna River. With regard to those twenty-four hills, the decree of the Subordinate Judge was in favour of the Plaintiff, while the judgment of the High Court favoured the Defendant. The Plaintiff has appealed to this Board.

The Appellant is the head or karnavan of a Nayar tarwad or family in Malabar, called on the record the Kuthali Nayar. The Defendant in the suit was, and the Respondent in the present appeal became on his death, the head or karnavan of a Moplah tarwad in the same district. Shortly put, the question in the appeal is: are the lands which are the subject of the appeal the property of the Kuthali, the Appellant's family, or of the Moplah, the Respondent's family.

Although the proceedings are voluminous, their Lordships desire to say at once

(2) L. R. 43 I. A. 192 at p. 203; s. c. I. L. R. 39 Mad. 617; 20 C. W. N. 1311 (1916).

(3) 7 C. L. R. 364, 367 (1880).

(4) 10 C. W. N. 630 (P. C.) (1906).

(5) 8 M. I. A. 199 (1880).

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that the appeal in their judgment must be settled by applying a well-known doctrine of law to the complex and somewhat contradictory mass of evidence as to the possession of these hills.

Both parties claim them. Both parties claim to have possessed them. And upon a balance of the evidence it has been found by the High Court that the Respondent's possession upon the whole outweighs that of the Appellant, and that accordingly the Respondent is entitled to prevail.

Upon this subject of possession much importance attaches to the nature of the property itself. It is forest land—apparently very little of it capable of, or at least up to the present subject to, cultivation—and growing here and there stretches of timber. It is quite clear that a property of this nature is far removed as a subject of definite possession from lands under continuous and permanent cultivation, compactly situated and capable of being remembered with identification as the lands held and occupied in articulate plots or under leases.

Their Lordships sympathize with the difficulties which confronted the Courts below, as to the possession of the property under appeal, and they agree with what is apparently the view of both Courts that such possession has to be interpreted according to the fairest view of what the property itself was capable of in the way of possession and what upon a broad view would be considered an adequate assertion of title by sufficient occupation. Along with this observation their Lordships desire further to remark that they are not certain that they would have been prepared to reverse—although no definite opinion is here given—the conclusion reached by the High Court had the case before the Board been one merely of a question of the balance of evidence as among rival possessors. How nebulous

the situation is may be gathered from these passages in the judgment of the High Court:—

“From 1871, the evidence as to possession consists mainly of certain leases either for cutting trees or of the usufruct generally of the hills, for none of the parties seem to have directly exercised any definite acts of possession. Besides these leases, the evidence relates to what is called *Punam* or *fugitive cultivation*. *Punam* cultivation is thus described in the Gazetteer of the Malabar District, Vol. 1, p. 220: ‘It is a most destructive form of cultivation, with ruinous effects upon forest growth. A patch of forest is cleared and burnt, trees too big to be burnt being girdled and left to die. A crop of hill rice, mixed with which dholl, millet and plantains are often grown, is raised, and the ground is then left fallow for some years, the cultivators, generally hill men, moving on to another patch to repeat the process.’ As regards *punam* cultivation, the evidence on either side cannot be said to be very satisfactory and from the nature of the leases granted for cutting trees acts of possession of that character would not by themselves be regarded as conclusive evidence in support of the case of either party.”

Their Lordships accept the general description of possession as here given.

But when the judgment proceeds,

“But such is the nature of the evidence of possession adduced in the case, and we have to find by comparison of the evidence on both sides, judged in the light of probabilities, who in fact is shown to have been in possession of the property”

their Lordships cannot apply the rule there laid down. For the Board is of opinion that in the competition of title to this ground the Appellant definitely prevails, and that any doctrine of balance where original title was unknown, cannot apply to this case. Upon that subject the High Court expresses itself to the effect that:—

“It is not now possible apart from these decrees (of 1864 and 1867) to come to any definite conclusion on the merits of the

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claim of either party so far as title is concerned."

It is thus necessary to consider these decrees, for one or other of them has been treated by the parties as the foundation of their respective titles.

In the year 1861 Kutti Pocker, head of the Moplah family, brought a suit for dispossession of one Kunhassan from the lands, on the ground that a lease of the same for the years from the year 1859 had expired. Kunhassan in defence stated, however, that the lands to which the suit referred were to a large extent over-stated, and that in particular the hills the property of which is now under appeal were possessed by him under a right conferred, not by the Moplah, but by the Kuthali family. In these circumstances the then head of the Kuthalis, one Achutan *alias* Achammadathil Nayar, was convened by a supplemental suit as Defendant. He was at that time the head of the Kuthali family, but for some reason not sufficiently explained he did not defend the action nor take any steps to protect the Kuthali family interest.

The suit proceeded for a period of about three years and was about to be brought to a close by decree, 13th February, 1867, when another suit (Original Suit No. 11 of 1867) was raised by Nuchiledathil Krishnan *alias* Kuthali Chathoth Nayar. It is said that this suit was brought only by a reversioner in the Kuthali rights, and this is true, but it must be noted, first, what was the reason for that litigation, and second, what was the true scope of the suit.

As to the reason, there can be no doubt. It is thus recited in the judgment of the 4th November 1868 :—

"Plaint recited that the two groups are the jemn property of the sthanam of Kuthali Nayar to which Plaintiff is entitled to succeed on the death of 1st and 3rd

Defendants, that 1st Defendant the present incumbent of the above sthanam having allowed 3rd Defendant to manage the sthanam and the latter by his extravagance dissipated the sthanam property, Plaintiff has already filed Suits Nos. 117 and 120 of 1863 to remove them from the management of the sthanam property, that the said Defendants have therefore colluded with 2nd Defendant and refused to adduce any proof in Suit No. 25 of 1864 in support of the sthanams' right to the thirty-four hills which the 2nd Defendant has fraudulently included in the suit as portions of his two hills; that if 1st and 3rd Defendants who possess only a life-interest in the sthanam property be allowed to ruin a portion of it by neglecting to defend the suit, a great injury will result to Plaintiff's right of reversion and that he therefore prays that a declaration protecting his right may be given under sec. 15 of the Civil Procedure Code.

If these facts, the substance of which was held to be proved, are accepted, it appears to be plain that the Courts were properly appealed to to prevent a decree being granted against the Kuthali family to its prejudice by reason of neglect amounting to malfeasance upon the part of its head.

Upon the second point, *viz.*, the scope of the suit, there can be no question. Its object was to exclude *inter alia* the lands which are the subject of this appeal from falling within the scope of the decree in the suit of 1864, by reason of this, that they belonged to the Kuthalis. This was the true issue in the 1867 case, and the last important point in regard to it is that that suit was fought out, and fought out by the proper contradictors, *viz.*, the Moplah family. That family was represented by the Defendants Nos. 4 and 5, *viz.*, Ibrayi and Amanath. Pocker, the head of the Moplahs, had just died, and Ibrayi and Amanath appeared in his stead and defended the 1867 suit, maintaining in opposition to the Plaintiffs therein, that

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the lands in question were in fact Moplah property.

In these circumstances it appears to their Lordships not only that the suit of the later year 1867 was one which definitely dealt with the question of property now under appeal, but that it would be unreasonable to endeavour to found rights under a decree of 1864 by ignoring the proceedings of 1867. In any view of the case it must be admitted that the later proceedings were at least of an interpretative character: they were directed to the avoidance of mistake as to the ambit or scope of the 1864 litigation, and to ignore them and to treat the 1867 proceedings either as if they had never been brought or were of no avail is in their Lordships' opinion contrary to sound principle. The description of the suit itself in the judgment of 1867 makes it clear that:—

"This suit is brought to procure a decree declaring that two cherikkals (groups) consisting of thirty-four hills are not included within the boundaries of 2nd Defendant's two hills called Pakkath Villiyari for which he has brought a Suit No. 25 of 1861 against 3rd Defendant and others and establishing Plaintiff's reversionary right to those thirty-four hills, valued at Rs. 1,500."

Putting all the proceedings, therefore, together, the question that remains for the Board on title is to see what is the scope of the judgment in the 1867 proceedings, which were conducted between these rival families and *in foro contentioso*.

Upon that subject the judgment in the Court of the Principal Sudder Amin of Tellicheri, of the 4th November 1868, is clear and is final. The learned Judge says that:—

"Upon a consideration of these circumstances I am of opinion that the Decree No. 25 of 1864 is not binding upon the Plaintiff"

"The next question," he adds, "is one of boundaries."

The learned Judge discusses that, and after referring to the report of a Commissioner who held a local investigation, he concludes:—

"Upon the above grounds I am of opinion that the middle stream in the Commissioner's plan represents the Alamb river mentioned in the Defendant's documents and that the twenty-four hills situated on the southern banks of that river constitute the Pannikottur group . . . For the foregoing reasons I declare that the Plaintiff (*i.e.*, the Kuthali family) is entitled to the reversion of the first twenty-four hills which are proper to be the jenm of Kuthali sthanam and reject his claim to the remaining hills (twenty-five to thirty-four)."

In the opinion of the Board it is thus definitely settled that the title to the twenty-four hills the property of which is under appeal is in the Kuthali family.

Their Lordships think that the High Court erred in not treating the case from this point of view. It is not a case of doubtful title, but of clear title. Had the High Court been of the opinion that the title of the Appellant was clear, it is very probable that they would have reached the result, on a review of the evidence and of the law about to be stated, that no contrary right to these properties has been acquired by the Moplah family by reason of possession. The rule stated by this Board in *Radhamoni Debi v. The Collector of Khulna* (1) seems to be very applicable to the present case. It is as follows:—

"It is necessary to remember that the onus is on the Appellant, and that what she has to make out is possession adverse to the competitor. That persons deriving from her any right they had have done acts of possession during the twelve years in controversy may be conceded and is indeed evidenced by the dispute ended

(1) L. R. 27 I. A. 136, 140: s. c. 4 C. W. N. 597 (1900).

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in the magistrate's order of 1885. But the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. The Appellant does not present a case of possession for the twelve years in dispute which has all or any of these qualities. The best attested cases of possession do not cover the whole period and apply to small portions of the ground."

The Board thinks that the learned temporary Subordinate Judge of Tellicheri approached the case correctly from this point of view, and so approaching it the Board, after full consideration, accepts his analysis of the evidence and is of opinion that possession upon the part of the Respondent of these hills has not been adequate "in continuity, in publicity, and in extent" so as to "show that it is possession adverse to the competitor." That competitor is the Appellant, and the foundation of his title is the judgment of 1868 which has just been cited.

Their Lordships cannot part with the case without referring to and following the doctrine of *onus probandi* in such cases, as laid down by this Board in *The Secretary of State for India in Council v. Chelikani Rama Rao* (2). Standing a title in "A," the alleged adverse possession of "B" must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves, as in their Lordships' view he does with some fulness prove in the present case, that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse posses-

sion as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the decree of the High Court set aside with costs, and the decree of the Subordinate Court restored. The Respondent will pay the costs of the appeal.

Solicitors: *Messrs. Chapman Walter & Shephard* for the Appellant.

Solicitor: *Mr. Douglas Grant* for the Respondent.

R. M. P.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 991 of 1920.

RANKIN, J.

1921,

9, August.

A. D. PICKFORD

v.

RAI BAHADUR JANAKI
NATH ROY.

Sheriff's Poundage, when payable—Whether it is payable when claim is paid up upon compromise after an attachment before judgment—High Court Rules, Ch. XXXVI, r. 77—28 Eliz. Ch. 4—"Levy," meaning of.

A filed a suit against B for about 8½ lacs and subsequently applied for attachment before judgment of certain moneys belonging to B lying with the Bank of Bengal and got an order for interim attachment which was effected by the Sheriff. Thereafter a settlement was arrived at and the order nisi was discharged and the interim attachment was by consent withdrawn, each party paying his own costs. The present suit was filed by the Sheriff of Calcutta claiming Rs. 21,900 as poundage due to him as Sheriff of Calcutta by reason of the interim attachment before judgment under the High Court Rules, Ch. XXXVI, r. 77:

(2) L. R. 43 J. A. 192; s. c. I. L. R. 39 Mad. 617; 20 C. W. N. 1311 (1916).

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Held—That the Sheriff was not entitled to any poundage under the said rule.

A claim to poundage by a Sheriff must be under the express terms of a Statute, Rule or Order. He has no common law right to reward for executing a writ.

WOODGATE v. KNATCHBULL (1) and GRAHAM v. GRILL (2) referred to.

R. 77 of Ch. XXXVI of the High Court Rules is directed to proceedings in which the Sheriff is employed about the levying of a sum of money in execution. The alternative part applies to such a proceeding in an event, viz., where the process is interrupted before completion but in a manner which produces the same or similar result. The rule has no application where there is an attachment before judgment but no execution.

The facts of the case as well as the arguments of Counsel will fully appear from the judgment.

Mr. Langford James, Counsel, for the Plaintiff.

Mr. N. N. Sircar and Mr. S. M. Bose (Jr.), Counsel, for the Defendant.

THE JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—In May 1919 the Defendant and another person (since deceased) brought in this Court a suit against one Raja Mohendra Ranjan Roy upon certain promissory notes claiming some 8½ lacs of rupees. The writ of summons was served, appearance was entered and on or about the 24th July the written statement was filed. Apart from orders for discovery which were made at the end of July and beginning of August nothing seems to have happened in the suit until the 17th November. On that date the Plaintiffs in the suit presented a petition

to the Court for attachment before judgment, alleging that on the 1st September 1919 the Defendant had obtained some 17 lacs of rupees upon mortgage of nearly all his property for the purpose of paying off his debts and of paying off this debt in particular. The petition further alleged that the Petitioners' debt had not yet been paid, that the Defendant in the suit had still to his credit some 15 lacs of rupees with the Bank of Bengal and that unless the Court exercised the power of attachment before judgment, this fund was likely to be dissipated. On this petition an order was made on the 17th November *ex parte* calling upon the Defendant in the suit to show cause why security should not be furnished for the Plaintiffs' claim, or why, in default, some 8½ lacs of rupees to the credit of the Defendant with the Bank of Bengal should not be attached until the final determination of the suit or other order. The order went on to direct that until cause should be shown as directed a writ of attachment should issue commanding the Sheriff to attach the money at the credit of the Defendant in the Bank of Bengal or so much thereof as was necessary to meet the Plaintiffs' claim. On the same day, the 17th November, a prohibitory order was issued out of this Court attaching, until cause should be shown to the said order of the 17th November, the money at the Bank. This order restrained the Bank of Bengal from parting with the fund as regards some 8½ lacs to any one and restrained the Defendant in the suit from receiving the same from the Bank. Between the 9th and the 11th December correspondence took place between the attorneys for the parties as a result of which a settlement was arranged. It was agreed that a cheque for the sum claimed should be handed over to the Plaintiffs' solicitors upon the order

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nisi being discharged by consent, that this cheque was not to be presented to the Bank until the order discharging the orders *nisi* and the interim attachment should have been served on the Bank. The Defendant in the suit was to give a cheque in payment of the costs of the suit but no order was to be required to that effect. As regards the costs of the application for attachment before judgment each party was to pay his own costs. In a letter dated the 10th December the Defendant's solicitors state that they are not to be liable to pay the Sheriff's poundage. This is replied to by the Plaintiffs' solicitors upon the 11th saying that they do not think there is any question of poundage but that they did not see why the Plaintiffs should have to pay, if there was any. On the 22nd December the parties appeared before the Court and obtained an order by consent whereby the order *nisi* of 17th November was discharged and it was ordered that the interim attachment thereby directed be withdrawn. On the same day the 22nd December, an office copy of that order was served on the Bank but no office copy was delivered to the Sheriff as required by Chap. XXV, r. 6 of the Rules of this Court. On the 23rd December the cheques given to the Plaintiffs' solicitors were presented to the Bank and were duly honoured. On the 5th January 1920 the Sheriff by a letter of that date made his claim upon the Plaintiffs in suit for pound-

tion and settlement of the Defendant's claim in Suit No. 1269 of 1919 of this Court after and by reason of an interim attachment before judgment in the plaint mentioned."

A claim to poundage by a Sheriff must be made under the express terms of a Statute, Rule or Order. He has no common law right to reward for executing a writ. [*Woodgate v. Knatchbull* (1) and *Graham v. Grill* (2)]. In this Court poundage is a charge authorised by the 22nd item of r. 77 of Chap. XXXVI of the Rules of Court. The provision is in these terms:—

"Poundage on sums levied by the Sheriff in execution or in the event of the claim being satisfied, compromised or settled, upon the amount of such satisfaction, compromise or settlement" . . . then follows the rate of charge.

The language of the Rule as regards the 22nd item illustrates the fact that some features of English legal procedure have become embedded in the English language. The phrase "sums levied in execution" belongs to the system under which a writ issued to the Sheriff commanding him to cause to be made of the goods and chattels of the Defendant a sum of money for which the Defendant has suffered judgment. Unless the course of execution is interrupted the Sheriff is authorised by the writ of *fi. fa.* to seize, to hold and to sell. In India under the Code of Civil Procedure execution proceeds first by attachment; after attachment an order has to be obtained from the Court and a proclamation issued before there can be a sale. The process being thus cut into parts, the first part—the attachment—can then more readily be looked at by itself. It can be and is made applicable before judgment, that is to cases where attach-

The plaint in the present suit was filed on the 18th May 1920 and it claims a sum of Rs. 21,900 as poundage due to the Sheriff in respect of the interim attachment. The grounds on the claim are put in the concise statement as follows:—

"The Plaintiff sues to recover Rs. 21,900 for the poundage due to him as the Sheriff of Calcutta on the satisfac-

(1) 2 T. R. 148 (1787),

(2) 2 M. & S. 294, 297 (1874).

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ment is required to preserve a fund or other property, to keep it *in medio* pending a decision. In such cases attachment, while it proceeds by the same means, according to the nature of the property, is not a stage or phase of a process for the enforcement of a judgment by the levying of a sum of money adjudged to be due. The language of Or. XXXVIII, of the Code distinguishes "attachment before judgment" from "attachment of property in execution of a decree." This distinction is not to be obliterated by any argument as to whether attachment before judgment is or is not strictly speaking a form of execution. Nor is it the less important as a distinction because of the fact that if the Court decides that security should be given, and if security is not given, and if, further, judgment goes against the Defendant, no second attachment will be required before an order for sale can be made.

The wording of the Rule begins by granting to the Sheriff poundage "on sums levied by the Sheriff in execution." So far it is doing exactly what was done by the Statute, 28 Eliz., Chap. 4 and it is keeping the old name for the old charge. It is maintaining also the principle of the old charge, *niz.*, that it is to be a payment upon results. If, however, the Rule had stopped there it would have left without provision a common and important class of case, well-known to have occasioned difficulty. Where an execution is in progress but is not completed, payment of the debt and costs may be made to the Sheriff. Or it may be made to the creditor. Or a compromise may be arranged to the satisfaction of the creditor. In such cases there is a problem of long standing as to whether the judgment-creditor who has so received the benefit of the execution can escape payment of poundage on the ground that the money

so received has not been "levied." This problem has raised questions as to what is involved by the word "levy" and these were dealt with in such cases as *Alchin v. Wells* (3), *Mortimore v. Cragg* (4), *Bissicks v. Bath Colliery Co.* (5), *Lee v. Dangar Grant & Co.* (6) and *In re, Thomas* (7). In the result these cases settled that "levy" meant "turning the goods into money;" that *prima facie* this involved sale as well as seizure; but that in cases of payment or of compromise after seizure and preventing sale, the words "shall so levy" mean "shall seize and thereby get the money." "It is sufficient if by reason of the seizure the money is obtained directly or indirectly." In this way the "merits" of the matter, the principle of payment upon the results, received due recognition but not without difficulty. Since 1888 these questions have been set at rest in England by an order under the Sheriffs Act of 1887 which will be found in *In re, Thomas* (8) at pp. 67-68.

I come now to the second or alternative part of the provision as to poundage in r. 77 of Chap. XXXVI. The alternative arises only "in the event of the claim being satisfied, compromised or settled." Mr. Langford James points out that the word "claim" is wider than "decretal amount" or "judgment debt." On this it may be observed that even if the word is intended in this context to apply more widely it may well be rather because of the Plaintiff's costs of execution than because of any intention to comprise a substantive claim not yet prosecuted to judgment. But in any case the question is what is "the claim"? In my opinion the words can only refer to that claim

(3) 5 T. R. 470 (1798).

(4) 3 C. P. D. 216 (1878).

(5) 2 Exch. Div. 459; 3 Exch. Div. 174 (1878).

(6) [1892] 1 Q. B. 231, 241.

(7) [1899] 1 Q. B. 480.

(8) [1899] 1 Q. B. 66 at pp. 67-68 (1898).

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which but for the satisfaction compromise or settlement would, presumably, have resulted in a sum of money being levied by the Sheriff in execution. "Poundage on sums levied by the Sheriff in execution or in the event of the claim being satisfied, compromised or settled," must, I think mean the claim in execution as contemplated by the first portion of the words. The rule does not give the Sheriff a commission upon the settlement of every man's claim or even upon the settlement of every claim made in a suit. So much is admitted. The definite article can only be intended with reference to the preceding words of the provision. The whole provision is directed to proceedings in which the Sheriff is employed about the levying of a sum of money in execution. The alternative part applies to such a proceeding in an event, *viz.*, where the process is interrupted before completion but in a manner which produces the same or a similar result. In such a case the debtor merely anticipates by means less distressing to himself the result of a coercive process already in mid career. He can safely be deemed to have paid, not only in the course of the execution, but under stress of the execution. It can safely be said of the Sheriff: "he seized and thereby got the money." No one can be heard to the contrary. This explains the most salient feature of the provisions of this Rule, *viz.*, that it certainly does not contemplate or allow an enquiry in any case as to whether the exertions of the Sheriff are or are not in fact the effective cause of the settlement.

On the other hand if the contention of the present Plaintiff is correct, how stands the matter? In the present case, judging from the written statement and from the strenuous affidavit filed on behalf of the Defendant in the suit I should, if I was entitled so to do, guess that the Defendant

had no real defence and that the attachment before judgment was the thing which brought him to his senses. But on the face of Rule 77 the right to poundage can depend upon no such enquiry. The contention must be and as I understand learned Counsel is that if for Plaintiff's benefit an attachment is effected for any purpose or at any stage of a suit, then any subsequent settlement of the claim in the suit gives rise to a right to poundage. In my opinion any such construction of the alternative part of the clause in question does some violence to its language and stretches the principle which underlies it. Why such a right should be introduced as a conditional alternative to the right given where a sum of money is levied in execution, it is difficult to see. If, on the other hand, the words are taken as intended simply to apply the principle of *Alchin v. Wells* (3) and *Mortimore v. Cragg* (4) they are given a meaning which is warranted by their context. Again where the only order in a suit is an order for interim attachment intended simply to preserve a fund until cause can be shown to an order *nisi*, *i.e.*, until it can be decided whether the Defendant should be ordered to give security, the position has no necessary analogy at all to the case of a judgment-debtor rescuing his chattels from sale in execution. The order *nisi* may be discharged; security may be given; the Defendant may succeed in his defence. If the inconvenience of the attachment produces in the Defendant a desire for peace and causes him to settle with the Plaintiff before judgment, he may or may not be in effect anticipating a result which the due course of law would demand or bring to pass. In any case he is not merely anticipating the result of a coercive process already autho-

(3) 5 T. R. 470 (1793).

(4) 3 C. P. D. 216 (1878).

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rized for the purpose of effecting that result. He is not paying under the Court's order and because the Court by its process has effectively compelled him to obedience. In addition it has to be remembered that the only property attached before judgment may be of small value though the claim in the suit amounts to lacs of rupees. The Defendant may for the most cogent and diverse of reasons desire to settle with his adversary. To attribute what the Plaintiff obtains upon a compromise before judgment to the fact that something—no matter what or of what value—was being held *in medio*: to regard the settlement, by a conclusive presumption, as the result of the labours of the Sheriff; to grant him poundage as though he had “caused it to be made”—is to make a charge on principles not hitherto recognised in connection with poundage. It converts pound into a new charge altogether. When judgment has passed and Defendant does not pay until execution has begun, whatsoever he pays may be regarded as collected by the Sheriff. Where there is no decree and no execution of a decree the fact that the Defendant has been compelled in effect to give security in case the Plaintiff's claim turns out to be well founded, does not necessarily mean that virtually or in truth the Sheriff has collected whatsoever the Plaintiff may get on a settlement. The question for me is whether the terms of r. 77 of Chap. XXXVI require me to hold that in such a case the Sheriff is in the same position as if execution of a decree had been in progress. I cannot think that they require or warrant this conclusion.

R. 45 of Chap. XVII of the Rules of Court makes rr. 15 to 25 of that chapter applicable *mutatis mutandis* to “warrants” of attachment before judgment. I fail to find anything in these rules that justifies any claim for poundage outside

the provisions of Chap. XXXVI, r. 77. I regard the question as depending in the end entirely on the correct construction of r. 77 as a charging provision. R. 20 of Chap. XVII refers to “the amount directed to be levied by such writ” and also to “poundage.” These references are inapplicable altogether to an attachment before judgment. The words “*mutatis mutandis*” in r. 45 stand in the way of any false analogy.

I regret if the result of this judgment should be that the Sheriff is not under the rules adequately remunerated for his work in connection with the carrying out of attachments before judgment, but in my opinion the suit must be dismissed with costs.

Messrs. Kesteven Gooding & Co.,
Solicitors for the Appellant.

Messrs. B. N. Basu & Co., Solicitors
for the Defendant.

M. N. K.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 2562 OF 1921.

BUCKLAND, J.	JETHA BHULCHAND and
1922,	anr.
24, February.	v.
	F. C. GRACE.

Calcutta Rent Act—Suit for ejectment of tenant—Conditions precedent to enable tenant to get advantage of the provisions of the statute—Non-payment of arrears and current rent in due time, effect of.

Where the benefit of the Rent Act is claimed the Defendant must show that he has paid arrears within three months of the Rent Act coming into force and subsequently paid his rent regularly within the time fixed in the contract with his landlord or in the absence of any such contract by the 15th day of the following month or in the event of the landlord refusing to accept rent by depositing it with the Rent Controller within a fortnight of

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its becoming due. Where such of these conditions as are applicable are not fulfilled any other plea that may be raised should not be considered. Subsequent acceptance of rent does not create a waiver so as to make the statute applicable.

Where there is an agreement to extend the time for payment before the rent actually becomes due under the lease then it might well be that the time within which under sec. 11 (5) rent has to be paid to the landlord is such extended date, but where the default has already taken place the subsequent acceptance of rent by the landlord does not take the matter out of the provisions of sec. 11, sub-sec. (5).

This was a suit, No. 2562 of 1921 instituted on the Original Side of the High Court.

The facts of the case will appear from the judgment.

Mr. S. N. Banerjee and Mr. S. M. Bose, Counsel, appeared for the Plaintiff.

Mr. S. C. Gupta and Mr. T. Chatterjee, Counsel, appeared for the Defendant.

The JUDGMENT OF THE COURT was as follows :—

BUCKLAND, J.—This is a suit for ejectment and for damages. The Defendant under a lease, dated 15th August 1918, was a tenant for three years of the upper floor of No. 24, Camac Street, from the 7th June 1918 at a monthly rental of Rs. 300. The lease expired: the Plaintiff required the Defendant to leave, but the Defendant is still in occupation of the premises

The only defence on behalf of the Defendant is a plea under the Rent Act as to whether or not the Plaintiff *bonâ fide* required the premises for his own occupation. But as has been pointed out more than once in cases in this Court, where the benefit of the Rent Act is claimed the Defendant must show that he has paid

arrears within three months of the Rent Act coming into force, and subsequently paid his rent regularly within the time fixed in the contract with his landlord, or, in the absence of any such contract, by the 15th day of the following month, or, in the event of the landlord refusing to accept rent, by depositing it with the Rent Controller within a fortnight of its becoming due. Where such of these conditions as are applicable are not fulfilled, it is mere waste of time to consider any other plea under the Calcutta Rent Act. A statement of the payments of rent by the Defendant to the Plaintiff has been admitted by learned Counsel for the Defendant and placed before me, and from that I see that the rent for September 1920 was not paid until the 18th January 1921. On the 1st March 1921 the rent for October, November and December was paid at one time, and the rent for January 1921 was not paid until the 7th April of that year. It is quite unnecessary to go further than this.

It is, however, contended that if the rent is accepted subsequently and after default there is a waiver and the section does not apply. I do not agree with this. Where there is an agreement to extend the time for payment before the rent actually becomes due under the lease, there it might well be that the time within which under sec. 11 (5) rent has to be paid to the landlord is such extended date, but where the default has already taken place I do not think that subsequent acceptance of rent by the landlord takes the matter out of the provisions of sec. 11, sub-sec. 5.

In these circumstances there is no defence in this case and there will have to be a decree for ejectment and an order for possession. Since the suit was filed, the Plaintiff has been paying without prejudice at the rate of Rs. 350 a month, and therefore a decree will be made against

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him at that rate which is not contested. According to the statement produced before me it appears that excluding the month of February 1922 a sum of Rs. 1,050 is due in respect of three months, therefore there will be a decree for Rs. 1,050 in respect of mesne profits up to and including the 31st January 1922. The Defendant will continue to pay at the same rate until he vacates the property, and he will also pay the costs of this suit on scale No. 2, including costs incurred on the 18th August. Interest on decree at 6 per cent.

Messrs. Pugh & Co., Solicitors for the Plaintiff.

Messrs. Chatterjee & Co., Solicitors for the Defendant.

S. C. M.

(CRIMINAL APPELLATE JURISDICTION.)

APP. NO. 174 OF 1921.

NEWBOULD, J.
SUHRAWARDY, J.
1921,
Heard, 25, August.
Judgment,
14, November.

ABDUL SALIM and
ors., Appellants,
v.
KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec. 196A—Sanction of Government if necessary for prosecution under sec. 120B/420, I. P. C., where the allegations of the prosecution support a case under sec. 120B/468, I. P. C.—Sec. 526, if applies in the case of an application to the Sessions Judge for time and for keeping the case in his own file—Sec. 239, legality of joint trial of several persons for various offences committed in pursuance of a criminal conspiracy—Acquittal on the conspiracy charge, effect of—Result of the trial, if can have any effect on the legality of the trial—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), sec. 120B, criminal conspiracy—Various offences committed in pursuance of such conspiracy, if to be treated as a single offence or separate offences—Sec. 109, necessity of sanction for prosecution for abetment to commit non-cognizable offences in pursuance of a criminal conspiracy—Evidence Act (I of 1872), secs. 159 and 160, refreshing memory from entries in a register kept by a clerk but which the witness

daily checked and signed—Retracted confession, admissibility in evidence—Charge to jury, to be considered as a whole in deciding misdirection.

During the war a large number of men having been required for marine work as scraggs, tindals, laskars etc., in Mesopotamia, a department called the Inland Water Transport (I. W. T.) Department, was created to carry on recruitment, and Chittagong was made a recruiting centre for "marine ratings," for service in Mesopotamia. In selecting recruits for "higher ratings" certificates of fitness were required and the men selected were paid one month's pay in advance and diet allowance. There were various brokers for the supply of recruits. The brokers subsequently formed a combination based on a system of rateable distribution of profits. Enquiries revealed the existence of a wide-spread conspiracy to secure appointments by deceiving the recruiting officer and his staff with forged certificates. Eventually ten persons were put on their trial on a charge of criminal conspiracy against them all and on separate charges of other offences against each of them individually. One of the accused was acquitted. Eight of the accused were convicted on the general charge of conspiracy under sec. 120B/420, I. P. C. and one of the accused was acquitted on this charge. Besides all the said nine accused were convicted on one or more of the charges framed against them individually. The recruiting officer while giving his evidence, refreshed his memory from certain entries in a register written by his clerk but daily checked and signed by himself:

Held—That although the allegations of the prosecution support a case of conspiracy to forge documents, for prosecution of which sanction under sec. 196A, Cr. P. C. is required, there is no reason why, because the accused might have been charged with an offence for the prosecu-

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tion of which the sanction of the Government is required, they should not be charged with and tried for offences in respect of which no sanction is required, e.g., conspiracy to cheat and cause delivery of property (sec. 120B/420. I. P. C.).

AMRITA LAL HAZRA v. EMPEROR (1) followed.

That an application to the Sessions Judge praying for time and for keeping the case in his own file instead of making it over to the Additional Sessions Judge, did not come within the purview of sec. 526, Cr. P. C. and the trial was not vitiated by the Sessions Judge refusing time.

That the accused having been charged with criminal conspiracy under sec. 120B, the various acts of cheating referred to in the charges and the schedule annexed thereto are not to be treated as separate offences but as having been set out as acts done in pursuance of the conspiracy. It was open to the prosecution to prove such acts in order that from them the existence of the conspiracy might be inferred. It may not have been necessary to set out these details in the charge, but their addition did not make the charges bad for misjoinder.

SUBRAHMANIA AYYAR v. KING-EMPEROR (2) discussed and distinguished.

That further the trial was not bad for the misjoinder of the charge of conspiracy with the other charges framed against the accused individually. Once a charge of conspiracy is framed, anything done in pursuance of the conspiracy can be tried at the trial for conspiracy, for the offence of conspiracy and offences committed in pursuance thereof form one and the same transaction.

(1) I. L. R. 42 Cal. 957 at p. 988: s. c. 19 C. W. N. 676 (1915).

(2) I. L. R. 28 I. A. 257: s. c. I. L. R. 25 Mad. 81; 5 C. W. N. 866 (1901).

In the case of SUPERINTENDENT AND REMEMBRANCE OF LEGAL AFFAIRS, BENGAL v. MON MOHAN RAY (3), HARSHA NATH CHATTERJEE v. EMPEROR (4) and AMRITA LAL HAZRA v. EMPEROR (1) followed.

That sec. 196A, Cr. P. C., only renders sanction necessary when the prosecution is for criminal conspiracy punishable under sec. 120B, I. P. C. It does not alter the former law that a prosecution for abetment by way of conspiracy punishable under sec. 109, I. P. C. requires no sanction. Therefore the individual charges of abetment to commit the non-cognizable offences in this case did not require sanction.

That the fact that an accused has been acquitted on the conspiracy charge, does not operate to show that the other offences with which he was charged were not part of the same transaction with the other offences charged at the trial and vitiate the trial. The legality of the joint trial depends on the accusation and not on the result of the trial.

That under the provisions of secs. 159 and 160 of the Evidence Act, the recruiting officer, while giving his evidence, was entitled to refresh his memory from the entries in the register written by his clerk and which he himself signed daily.

That a retracted confession is not inadmissible in evidence; it should be left to the jury to decide what value can be attached to it as against the maker.

KING-EMPEROR v. PRAMATHA NATH BAGCHI (5) distinguished.

That the charge to the jury must be con-

(1) I. L. R. 42 Cal. 957 at p. 988: s. c. 19 C. W. N. 676 (1915).

(3) 19 C. W. N. 672: s. c. 21 C. L. J. 195 (1914).

(4) I. L. R. 42 Cal. 1153: s. c. 21 C. L. J. 201 (1914).

(5) 30 C. L. J. 503 (1919).

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sidered as a whole in deciding whether there has been misdirection on the facts.

This was an appeal preferred on the 7th April 1921 against a conviction and sentence under secs. 120B/420, 417/109, 420/109, 466/109, etc., passed by the Additional Sessions Judge of Chittagong (Mr. Neogy) with the aid of a special jury, dated the 27th January 1921.

The facts will fully appear from the judgment.

Babu Dasarathi Sanyal and Maulavi Md. Nurul Hug Chaudhury for the Appellants.

Babus Manmatha Nath Mukherjee, Monindra Nath Banerjee and Bhudhar Das for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The eight Appellants and two others were tried before the Additional Sessions Judge of Chittagong and a special jury on a charge of criminal conspiracy against them all and on separate charges of other offences under the Indian Penal Code against each of them individually. One of these ten accused Makbul Ahmed was acquitted of all the charges framed against him. Eight of the remainder were convicted on the general charge of conspiracy under sec. 120B/420, I. P. C. including one Ahmed Kabir who has since died. The second Appellant Ahmed Mia was acquitted on this charge. All accused except Makbul Ahmed were convicted on one or more of the charges framed against them individually. In some cases the verdict was unanimous and in others by a majority of three to two. The Appellant Abdul Salim has been sentenced to five years' rigorous imprisonment under secs. 120B/420, I. P. C. The Appellant Ahmed Mian has been sentenced to two years' rigorous imprisonment under secs. 420/109, I. P. C. The Appellants Mahomed

Ismail *alias* Ismail Dovash, Osi Mian and Mahomed Ismail *alias* Kala Ismail have each been sentenced to four years' rigorous imprisonment under secs. 120B/420, I. P. C., and the Appellants Mohmed Nassim, Matiar Rahman and Yasin have each been sentenced to three years' rigorous imprisonment under secs. 120B/420, I. P. C. No separate sentences have been passed on any of the Appellants for the other offences of which they have been convicted.

The facts of the case are somewhat complicated but it is not necessary to set them out in full since in this appeal we cannot set aside the findings of the jury on the facts whether the verdict be unanimous or that of a majority. The main facts according to the case for the prosecution are as follows :—During the war a large number of men were required for marine work as serangs, findals, sukanis, laskars etc., in Mesopotamia. At first men were recruited in India for this purpose by the Royal India Marine (R. I. M.) Department at various centres throughout India. The demand for these men who were technically known as "Marine ratings" steadily increased and about the middle of August 1916 a new department, called the Inland Water Transport (I. W. T.) Department, was created to carry on this work of recruitment. The new department commenced work in October 1916. In February 1917, Chittagong was made one of the recruiting centres for "marine ratings" for service in Mesopotamia. The recruiting office in the Chittagong Port Office worked as a branch office of the Calcutta recruiting office but was financially independent. Mr. Chudhigh (P. W. No. 2), senior Harbour Master, was the recruiting officer for the Chittagong centre and as such selected men for marine service in Mesopotamia. Men getting over Rs. 20 per month were technically termed

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"Higher Ratings" and the others "Lower Ratings." In selecting recruits for the higher ratings, Mr. Chudhigh made it a rule that all candidates except those known to him should produce certificates or testimonials as to their fitness before they were finally selected. The men after their final selection were paid one month's pay in advance and diet allowance. They were then sent to Calcutta with a "watchman" to be made over to the Technical Recruiting Officer who despatched them to Mesopotamia through the I. W. T. Officers in Bombay. This "watchman" was a servant of one Abdul Rahaman Dobasi who had entered into an agreement with the Secretary of State for India on the 7th February 1917, for the supply of the recruits to serve as "marine ratings" in Mesopotamia. Abdul Rahaman was in the position of a sole agent and was entitled to get a commission on the number of men recruited through the Chittagong office whether he himself brought them in or not. But until the men recruited at Chittagong were made over to the Head Office at Calcutta, Abdul Rahaman was responsible for the money advanced to them. At first Ismail Dovash (Appellant No. 3) was Abdul Rahman's "watchman" and besides performing his duties as watchman used to bring in men for recruitment. For some reason the Port Office authorities about the middle of the year 1917 refused to allow Ismail Dovash to enter that office and he then began to bring in recruits through Matiar Rahaman and Ahmad Mian (Appellants Nos. 7 and 2) and others. As a result of advertisement by Abdul Rahaman other persons also began to bring in recruits. These middle men or *dalals* got no commission or remuneration from Government.

Mr. Chudhigh took good care to bring to the notice of the candidates for recruit-

ment and of these *dalals* that certificates of competency and general fitness were absolutely necessary for recruitment in the "Higher Ratings." The certificates which were accepted were of two kinds known as shipping office certificates and Basrah certificates. In the present case we are only concerned with the Basrah certificates. These were certificates granted to men who had already served in Mesopotamia.

Among the *dalals* who brought in recruits were nine of the accused excluding Abdul Salim (Appellant No. 1). Until July or August 1918 these *dalals* worked separately, each on his own account, except Ismail Dovash and those who worked on his behalf. This rivalry of interest gave rise to friction with the result that the business of each suffered more or less and in August 1918 the *dalals* made up their mutual differences and formed a combination based on a system of rateable distribution of profits at some fixed periods. At about the same time information was received from the Military Authorities at Basrah by the Government of India which led to an enquiry by the Criminal Investigation Department of Bengal being ordered. This enquiry revealed the existence of a wide-spread conspiracy to secure appointments in the higher ratings by deceiving the Recruiting Officer and his staff with forged certificates. The association of *dalals* at Chittagong hired one house and a room in another house there to carry on their business. In that room the *dalals* used to assemble and receive candidates for marine service. The Appellants Abdul Salim with one Penheiro, since deceased, used to meet the *dalals* there and receive orders for the certificates to be forged. The forged certificates were prepared at the house of Abdul Salim by him or by Penheiro or others. Abdul Salim was

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paid for preparing or procuring these forged certificates with a portion of the money received by the recruits as advance pay and diet allowance at the time of their final selection. The *dalals* also got a share of this money which was divided amongst them at certain intervals by the Appellant Ismail Dovash.

The above are the more salient features of the case which are necessary to be stated before considering the points of law urged on behalf of the Appellants.

The first point argued on behalf of the Appellants is that the trial is void because an application to the Sessions Judge under sec. 526, Cr. P. C. to allow time to move the High Court was refused. This contention fails because no application under this section of the Code was in fact made. While the case was on the file of the Sessions Judge Mr. Seaton, an application was made to him to keep the case on his own file. He refused this application as frivolous and rightly held that sec. 526, Cr. P. C. did not apply to such a case. He then transferred the case to the Additional Sessions Judge for trial. If the Appellants had good grounds to object to the trial of the case by this officer they could have applied to him to adjourn the case to enable them to move this Court but this they did not do.

The second ground on which the legality of the trial has been attacked is that the allegations of the prosecution support a case of conspiracy to forge documents and that a prosecution for such an offence requires sanction under sec. 196A of the Code of Criminal Procedure. We can see no reason why because the Appellants might have been charged with an offence for the prosecution of which the sanction of the Government is required, they should not be charged with, and tried for, offences in respect of which no sanction is required. A similar objection was taken in the case

of *Amrita Lal Hazra v. Emperor* (1) and was overruled as untenable.

The third ground on which objection has been taken to the legality of the trial is that there has been misjoinder of charges. The charges framed counting each head of charge as a separate charge total thirty-seven. There is first a charge with one head charging all the ten Appellants "that you between the 1st September 1918 and the 27th November 1918 at Chittagong and other places in British India did agree with one another and with seven other named persons and with other persons unknown, to do and to cause to be done, an illegal act, to wit the commission of the offence of cheating by deceiving the Recruiting Officer for Marine Rating at Chittagong and his staff with forged certificates of ability, and by statements and conduct at or about the time of recruitment, and thereby fraudulently and dishonestly inducing them, to deliver to the recruits concerned their respective advance pay for one month and diet allowance at the rate of 8 as. each, and you were then parties to a criminal conspiracy, and that in pursuance of the said conspiracy, the said Recruiting Officer and his staff were deceived by 22 Exhibits marked in the case (the numbers of which are stated) and by statement and conduct during the production of the said exhibits, and were thereby fraudulently and dishonestly induced to deliver to the recruits mentioned in the schedule given on the reverse the sums quoted therein respectively against their names: and you thereby committed an offence punishable under sec. 120B read with sec. 420 of the Indian Penal Code." The schedule on the reverse of this charge contains the names of 22 recruits with the amount of

(1) I. L. R. 42 Cal. 957 at p. 988: s. c. 19 C. W. N. 676 (1915).

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one month's advance pay and diet allowance paid to each of them.

Before considering the remaining charges we will first consider the objection that has been raised to this main charge. It is contended that this charge is bad since it is not a charge of a single offence but really of 22 different offences; that each separate act of deceit in respect of each of the 22 recruits named in the schedule is a separate offence. In support of this contention reliance is placed on the well-known decision of the Judicial Committee of the Privy Council, *Subrahmanya Ayyar v. King-Emperor* (2). It is contended that this charge is open to the same objection as the first count of the charge in that case and the reason given in the judgments of three of the learned Judges of the Madras High Court, whose decision was accepted by the Judicial Committee, are applicable to this case. There would be great force in this contention if the law were the same now as it was when that case was decided. Then conspiracy to commit an offence (except a conspiracy to wage war) was punishable only as the abetment of an offence. Consequently a person joining in conspiracy in pursuance of which several offences were committed could only be charged with the abetment of those offences and the abetment of each offence had to be charged separately. But now that sec. 120B has been added to the Indian Penal Code, conspiracy has become a substantive offence. This has the effect of bringing the law as to conspiracy in India into line with the English Law. The main arguments in the judgments of the three learned Judges of the Madras High Court, who held the first count in *Subrahmanya Ayyar's* case (2) to be bad, were based on the difference between the English and Indian Law and

the fact that conspiracy could only be charged as a form of abetment. Now that the law has been altered these arguments lose their force. In the present case the accused were charged with the offence of conspiracy and the acts of cheating referred to in the charge and the schedule are not charged as offences but were set out as acts done in pursuance of the conspiracy. It was open to the prosecution to prove such acts in order that from them the existence of the conspiracy might be inferred. It may not have been necessary to set out these details in the charge but their addition did not make the charge bad for misjoinder.

It was also contended that the trial was bad for the misjoinder of this charge of conspiracy with the other charges framed against the accused individually. Separate charge sheets with two, three or four heads have been drawn up against each of the accused. Except in the case of Osi Mia (accused No. 4) heads of charges of abetment of offences punishable under secs. 417, 420 and 466, I. P. C., have been framed against each accused. Six of these nine accused have also been charged with abetment of an offence punishable under sec. 471, I. P. C. Each of these sets of charges relate to the fraudulent recruitment of one of the persons named in the main conspiracy charge. The charges against Ahmed Mia (accused No. 2) may be taken as an example. He is charged first with having between 1st September 1918 and 25th day of November in pursuance of the Criminal conspiracy already charged abetted Aminul Huq in the commission of the offence of cheating, the said offence having been committed by the said Aminul Huq by deceiving the Recruiting Officer for Marine Ratings, Chittagong, and his staff with forged certificate of *sukani* (Exbt. 889, and by statement and conduct at or about

(2) L. R. 28 I. A. 257; s. c. I. L. R. 25 Mad. 61; 5 C. W. N. 866 (1901).

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the time of recruitment and thereby intentionally inducing him or them, so deceived, to appoint him (Aminul Huq) as *sukani* which he or they would not have done if not so deceived, and which act was likely to cause damage or harm, in mind, reputation and property, and the said offence of cheating having been committed in consequence of his abetment he committed an offence punishable under sec. 417 read with sec. 109, I. P. C. He is charged secondly in similar terms with having abetted Aminul Huq in the commission of the offence of cheating under sec. 420, I. P. C., with the same forged certificate and thereby dishonestly and fraudulently inducing the Recruiting Officer or his staff, so deceived, to pay Rs. 45 (one month's advance pay as *sukani*) plus /8/ as (*khoraki* or diet allowance), the said money being the property of Government.

He is charged thirdly with having between the 1st September and 5th November 1918 in pursuance of the criminal conspiracy already charged abetted some unknown person or persons in the commission of the offence of forgery of the certificate of Aminul Huq as *sukani* (Exbt. 839) purporting to have been made by a public servant in his official capacity.

Fourthly he is charged with having on the 5th November 1918 abetted Aminul Huq in the commission of the offence of using as genuine a forged document punishable under secs. 466 and 471, I. P. C., the said offence having been committed by the said Aminul Huq, by fraudulently and dishonestly using as genuine the forged certificate of himself as *sukani* (Exbt. 839) before the Recruiting Officer and his staff and which he (Aminul Huq) knew to be a forged document. The charges under secs. 417, 420, 466 and 471 read with sec. 109, I. P. C., that have been framed

against the other eight accused are in similar terms. In the case of the first two accused, Abdul Salim and Ahmed Mia, the charges relate to the same recruit Aminul Huq. In the other seven different recruits are named in each set of charges. Osi Mia (accused No. 4) is charged, firstly, that he between the 1st September and the 27th November 1918, in pursuance of the criminal conspiracy stated in the main charge, abetted some unknown person or persons in the commission of the offence of forgery of a document, to wit the certificate of Ali Miah as *sukani* (Exhbt. 969) purporting to have been made by a public servant in his official capacity and punishable under sec. 466, I. P. C., and the said offence having been committed by the said unknown person or persons in consequence of his abetment, he thereby committed an offence punishable under sec. 466 read with sec. 109, I. P. C. He is secondly charged that he, on or about the 27th November 1918 at Halisahar P. S. Double Moorings in pursuance of the criminal conspiracy had in his possession five documents described in the schedule given on the reverse (Exhbits. 965, 966, 975, 959 and 990) knowing them to be forged and intending that they should fraudulently and dishonestly be used as genuine, the said documents being of one of the descriptions mentioned in sec. 466, I. P. C., *viz.*, purporting to have been made by public servants in their official capacity and he thereby committed an offence punishable under sec. 474, I. P. C. None of these five documents are the subject of any of the other charges against individual accused nor do the names of the persons which appear on these documents appear in the schedule to the general conspiracy charge. One more head of charge remains to be mentioned. Ahmed Mia, the first accused, in addition to the charges

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under secs. 417, 420 and 466 read with sec. 109, I. P. C., is fourthly charged with the substantive offence of having been in possession of 10 forged documents—this charge being in similar terms to that framed against Osi Mia. None of these ten documents set out in the schedule are the subject of any other charge and only one name, Abdul Aziz, appears both in this schedule and in the schedule to the conspiracy charge.

It is urged on behalf of the Appellants that each of these ten sets of charges relates to entirely separate transactions for which the Appellants could not be tried jointly. It is also urged that the charges of abetment of cheating and abetment of forgery under one head of charges are also separate transactions since in the cheating charges the person abetted is named whilst in the forgery charges he is described as a person unknown. There can be no doubt that these ten accused could not have been tried at one trial on the charges framed against them individually if there had not been also the charge against them all of conspiracy punishable under sec. 120B read with sec. 420 I. P. C. It is contended on behalf of the prosecution that once a charge of conspiracy is framed anything done in pursuance of the conspiracy can be tried at the trial for conspiracy. This contention is supported by authority of decisions of this Court. In the case of *Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Ray* (3) it was held that the offence of conspiracy and offences committed in pursuance of that conspiracy formed one and the same transaction and could be jointly tried. It was also so held in *Harsha Nath Chatterjee v. Emperor* (4) and both these

cases were cited and approved in *Amrita Lal Hazra v. Emperor* (1). These decisions fully support the contention raised on behalf of the Crown and we hold that there was no misjoinder of charges in the present case that would render the trial illegal.

It is also urged even if this misjoinder did not render the trial illegal, the Court had discretion under sec. 239, Cr. P. C., to try the accused separately and this discretion was improperly exercised. But even if this be regarded as an irregularity it cannot be held to have occasioned a failure of justice.

There is not the same objection to the joinder of a number of charges in a conspiracy trial that there might be in other cases since even if they had not been charged, the offences alleged to have been committed in pursuance of the conspiracy could have been proved to support the charge of conspiracy. This being so, we do not think that there was even an irregularity or an improper exercise of discretion in putting in the form of charges the specific acts specially relied on as against each individual accused to show that they joined in the conspiracy.

Objection was also taken to the individual charges of abetment to commit non-cognizable offences on the ground that the abetment sought to be proved was abetment by conspiracy and therefore sanction of the Local Government to the initiation of proceedings was necessary under sec. 196A, Cr. P. C. On behalf of the Crown it is not conceded that those charges of abetment rest on conspiracy and it is pointed out that there is evidence to prove abetment by instigation. But even if the abetment were by conspiracy, sec. 196A, Cr. P. C., only renders sanction necessary when the prosecution is for criminal conspiracy

(3) 19 C. W. N. 672 s. c. 21 C. L. J. 196
1914

(4) I. L. R. 42 Cal. 1153 : s. c. 21 C. L. J.
201 (1914).

(1) I. L. R. 42 Cal. 957 at p. 983 : s. c. 19 C.
W. N. 676 (1915).

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punishable under sec. 120B, I. P. C. It does not alter the former law that a prosecution for abetment by way of conspiracy punishable under sec. 109, I. P. C., requires no sanction.

Another objection on the ground of misjoinder was based on the acquittal of the Appellant Ahmed Mia on the conspiracy charge. It is urged that this shows that the other offences with which he was charged were not part of the same transaction with the other offences charged at the trial. The answer to this objection is to be found in the wording of sec. 239, Cr. P. C. It begins "When more persons than one are accused." That is to say the legality of the joint trial depends on the accusation and not on the result of the trial. The charge of conspiracy against this Appellant was a real accusation and not a mere excuse for trying him with the others. The learned Sessions Judge has recorded that he cannot account for the verdict of not guilty against this accused under sec. 120B/420, I. P. C.

In addition to the above-mentioned objection to the legality of the trial, objections were also taken on the ground of wrongful admission of evidence. The first of these relates to a portion of Mr. Chudbigh's evidence. In deposing as to the names of the brokers who produced certain certificates alleged to be forged Mr. Chudbigh refreshed his memory by referring to entries made not by himself but by his clerk. The evidence as to the circumstances under which these entries were made is to the following effect. Mr. Chudbigh and his clerk sat in the same office room and the *dalals* used to come there with recruits. In the case of higher ratings Mr. Chudbigh would ask for the recruit's certificate and question him about his capacity. The recruit and the broker would then go to the clerk who would re-

cord the name of the recruit and the broker, and other details. After the day's selection and after the clerk recorded the names in the register Mr. Chudbigh counted them and signed his name. We hold that these facts were sufficient to make the provisions of secs. 159 and 160 of the Evidence Act applicable and that Mr. Chudbigh was rightly allowed to refresh his memory by referring to these entries. In the leading text book on this Act three classes of cases covered by these two sections are described and the present case is of the third class: "When it (the writing) brings to the mind of the witness neither any recollection of the facts mentioned in it nor any recollection of the writing itself but nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing which he knows to be genuine." Mr. Chudbigh admitted in cross-examination that he did not himself keep any note of the names of the brokers and that he did not care to know their names. The writing therefore could not bring to his recollection the fact that a particular broker identified a particular recruit. But on a reference to the register he could swear to such a fact. We therefore hold that the learned Sessions Judge was right in rejecting as he did the petition of objection to the admission of this evidence.

It was contended that the retracted confession of the Appellant Abdul Salim should have been held to have been inadmissible. In support of this contention reliance is placed on the case of *King-Emperor v. Pramatha Nath Bagchi* (5). The only point of resemblance between the facts of that case and the present case is that Abdul Salim's confession was recorded late at night. That alone is not sufficient ground for holding that a confession was not voluntarily made. It is not

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necessary to discuss the point at length. We think the learned Sessions Judge was right in letting in this confession and should have left it to the jury to decide what value could be attached to it as against the maker. He was, however, unnecessarily favourable to this Appellant since he told the jury the value of a retracted confession was almost *nil* even against the maker of it.

We find no substance in the contention that evidence of the result of the police enquiry was wrongly admitted because evidence was given that the accused were arrested in consequence of the police enquiry. The Criminal Investigation Department Inspector, Surendra Nath Lahiri (P. W. No. 33), was examined to explain the delay and had to give some account of the investigation between October 1918 and the submission of the charge sheet in September 1919. We do not find that he deposed to any fact that was not admissible against the accused.

In summing up the voluminous evidence to the jury the learned Sessions Judge has put the case to them with perfect fairness. Our attention has been drawn to some points favourable to the accused or adverse to the prosecution that have not been referred to in the charge and to other points which might have been put differently. It is not to be expected that a Judge should comment on every point that could be possibly argued in favour of the accused. It is sufficient if, as in this case, the Judge deals with the more important points and does not unduly press on the jury his own views on questions of fact. We have considered carefully the evidence as to points of fact said to have been improperly dealt with in the charge and we are satisfied that there has been no misdirection as regards them. For instance it is pointed out that the jury were not told that the

enlistment registers were not found till the fourth search of the office. But the point is of no real importance. The so-called search was not a search in the ordinary sense of the word. These registers were not concealed but could have been taken at an earlier stage of the investigation but apparently their importance was not recognised at first.

Then as regards the evidence of the head clerk, the jury were plainly told that he was an accomplice and were properly directed as to the necessity of corroboration of his evidence. It was not necessary to repeat this direction every time any reference was made to his evidence. It would serve no useful purpose to refer to every point in the evidence to which our attention has been drawn. In deciding whether there has been misdirection on the facts, the charge to the jury must be considered as a whole and we are satisfied that there has been no misdirection in this respect.

We hold therefore that no ground has been established which would justify our interference with the verdict of the jury. The sentences passed are appropriate to the offences of which the Appellants have been convicted.

We accordingly dismiss this appeal.

J. N. R.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

VISCOUNT HALDANE

LORD PHILLIMORE.

SIR JOHN EDGE.

SIR ROBERT STOUT.

1921,

Heard, 16, June.

Judgment, 5, July.

MAHARAJA KESHO

PRASAD SINGH,

Appellant,

v.

SIV SARAN LAI,

Respondent.

Ekrarnama, construction—Stipulation to pay a pension to manager on retirement from service—Clause in ekrarnama that the principal's heirs should continue pension after principal's death whether a recommendation or a binding promise—

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Privy Council—Costs—Irrelevant document printed by successful Appellant.

B, after appointing S as manager of her estate, by ekrarnama stipulated to provide B with a certain pensionary allowance in the event of his resigning the service. The ekrarnama concluded with this clause: "*The heirs and representatives of mine and the administrators of the Raj Regasat Dumraon (of which she was in possession as life-tenant) should fully comply with the terms of this deed*":

Held—That these words were only a recommendation by the executant to the two parties respectively named to pay the pension and not a binding promise that they should pay it after her death.

The successful Appellant was deprived of the cost of printing in the paper-book documents which were irrelevant for the disposal of the appeal.

This was an appeal by special leave of His Majesty in Council against a judgment* and decree, dated the 27th July 1917, of the High Court of Judicature at Patna, reversing a judgment and decree, dated the 19th May 1914, of the Court of the Subordinate Judge, Second Court, at Arrah.

The suit in which the said decrees were made was brought by the Respondent claiming a certain sum of money, alleged to be due to him as pension under an ekrarnama, dated the 15th June 1906, which was executed by the late Maharani Beni Prasad Kuer, who was then in possession of the Dumraon Raj properties. The Court of first instance dismissed the suit, but the High Court decreed it.

The facts leading up to the litigation may be briefly stated as follows:—The Dumraon Raj is an ancient ancestral impartible Raj which descends to a single male heir according to the rule of lineal primogeniture. Another custom of the

Raj family is that females are excluded from succession. The husband of the said Maharani Maharaja Sir Radha Prasad Singh Bahadur, K.C.I.E., who was, at one time, the proprietor of the Raj, died on the 5th May 1894, leaving him surviving the said Maharani and a daughter, but no male issue. He left a Will, dated the 17th December 1890, of which probate was obtained in due course. In the Will he described what constituted the Raj property, and in view of the family custom whereby females were excluded from succession, he gave his widow an interest in the Raj properties under certain circumstances. It conferred a power to adopt a son already given to the Maharani by a deed-poll, dated the 12th August 1889. The testator gave several legacies and made provision for his daughter. The clause giving interest to his widow was as follows:—

"In case I should die without leaving any son or sons born to me in my lifetime or in due course after my death, or should such son or sons die in the lifetime of my wife without attaining his or their majority and without leaving male issue, then I give, devise and bequeath the whole of my property aforesaid to my wife for the term of her natural life, and I declare that the gift herein contained shall take effect and inure for the benefit of my wife, whether I leave a son adopted by me or not, and shall continue for her benefit, whether she gives effect to the power of adoption hereinbefore mentioned or not, but it shall be subject to her making all proper provisions for the maintenance, support and education of the son to be adopted by me, or should I not adopt one or such son die of the son or sons to be adopted by her under the power aforesaid, and from and after her death, I give, devise and bequeath all my property aforesaid to the son to be adopted by me, or

* Reported: (1918) Pat. 86.

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should I leave no son adopted by me or such adopted son die, as mentioned in the power aforesaid, to the son to be adopted by me (? my) wife under such power and his heirs absolutely."

On the death of her husband, the Maharani obtained possession of the Raj properties, which were of considerable value. In May 1902, the then manager of the Raj having resigned, she appointed the present Respondent as the manager at a salary of Rs. 1,200 per month. The Respondent was a vakil and was then practising at Arrah, where he had been in practice for twenty-six years. In 1904, the Respondent's salary was raised to Rs. 1,500 per month. Besides his salary he had free board and residence, conveyances, and also travelling allowance and other perquisites.

On the 15th June 1906, the Maharani executed the said *ekrarnama*, which is as follows:—

"I am Sri Maharani Beni Prasad Kuer, widow of Maharaja Sir Radha Prasad Singh Bahadur, K.C.I.E., *guddinashin* and *malik* of the Dumraon *raj reyasat* pargana Bhojpur, District Shahabad, by caste Ujjain Kshatri, by occupation a Zamindar.

"As, in 1902, it became necessary for me to appoint a manager for the management of the Dumraon *raj reyasat* and Munshi Siv Saran Lal, B. L., vakil of the Calcutta High Court, who was at the time practising as a pleader at Arrah, a well-known pleader of the Arrah District, had a good practice and was also the retained pleader of the Dumraon *raj reyasat* for a long time, willingly and immediately accepted the post of manager with my approval, and he having left practising as a pleader, commenced to work in the *reyasat*. Therefore, in order that the said Munshi may not at any time, hereafter, sustain loss for leaving the service, I

think it proper and just that should the said Munshi leave his this service for any reason, or if under any other circumstances, reasonable or unreasonable, he may have to leave this service according to his own wishes or against his wishes, then the said Munshi shall get monthly Rs. 500, which comes to Rs. 6,000 annually for life, by way of pension from the date of resignation from the Dumraon *raj reyasat*. And I hope that if perchance after granting this pension he (the said Munshi) again desires to resume his practice as a pleader, then he shall get sufficient compensation for the loss he might sustain for leaving his profession for a considerable period and that he will pass his old age comfortably. It is desirable that the heirs and representatives of mine, the successor and the administrators to the Dumraon *raj reyasat* Estate, shall fully comply with the terms of this document. Therefore, after fully considering and understanding the matter, I have executed this document in the form of *ekrarnama*, so that it may be of use when required."

On the 13th December 1907, the Maharani died, leaving her surviving her said daughter, who had married and was known as Her Highness Ujjeinin Maharani of Rewa. According to the custom of the family, the Appellant, as the heir of the late Maharani, became entitled to the possession of all the Raj properties, but it was alleged that on the day before her death, the deceased Maharani had adopted one Maharaj Kumar Sri Newas Prasad Singh. The Court of Wards, therefore, took possession of all the Raj properties on behalf of the alleged adopted son, who was a minor, but the Appellant challenged the validity of the adoption on various grounds. In March 1908, the Respondent ceased to be manager of the Raj. On the 5th February 1909, the Appellant brought a suit in the Court of the Subordinate

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Judge of Arrah to have the alleged adoption declared invalid and for possession of the Raj properties. On the 12th August 1910, this suit was decreed. By this decree it was ordered that he was entitled to recover possession of all the properties appertaining to the Dumraon Raj; that the Court of Wards representing the alleged adopted son should deliver the possession of the same to the Appellant; that the Court of Wards should render an account of all it took possession of, and its management; and that the Appellant was entitled to all the profits accrued during the period he was kept out of possession.

The alleged adopted son under the guardianship of the Court of Wards appealed to the High Court at Calcutta, but the parties entered into a compromise, and on the 17th May 1912, the High Court passed a decree in terms of the compromise. The effect of the compromise was that the Appellant was to have the Raj properties, but that the order of the Court of first instance as to the accountability of the Court of Wards and its liability for mesne profits for the period of the Appellant's dispossession was set aside; and that the Appellant was to pay the alleged adopted son a sum of 10 lacs of rupees in certain instalments. As the result of this litigation, the Appellant recovered possession from the Court of Wards of all the properties appertaining to the Dumraon Raj.

On the 3rd August 1912, the Respondent instituted the present suit against the Appellant, who was Defendant in the Court of the Subordinate Judge, Second Court, Arrah. The Respondent had also impleaded the said alleged adopted son as Defendant 2, and the Maharani's daughter, Her Highness the Maharani of Rewa as Defendant 3, the former, on the ground that he had received or was to receive 10 lacs of rupees out of the Dumraon Raj

properties, and the latter because she was the heiress of the late Maharani of all her personal properties, and the Plaintiff claimed that he was entitled to be paid his pension out of such properties. Both Courts in India, however, dismissed the suit against both of them and they were not parties to the present appeal. In his plaint, the Respondent alleged that he ceased to be the manager on the 17th March 1908; that the Court of Wards paid him his pension down to the 18th September 1911, when the estate was handed over to the Appellant; that the Appellant had denied any liability and refused to pay the pension, and that a sum of Rs. 5,445 was due to him on account of the pension and interest up to the last day of July 1912, that the Respondent accepted the managership according to the terms offered by the Maharani, that when the Respondent mentioned to her the risk which he was undergoing "she gave him favourable and hopeful assurances," and that later on when "the affairs were all settled to her satisfaction and the improvements in the management of the estate became quite perceptible, the Plaintiff reminded the Maharani of her former assurances referred to above, and she, conscious of the situation of the Plaintiff and of the risks which he had already undergone in absenting himself so long from his commanding practice for her sake and to safeguard him from any loss that he may be put to in future and also being pleased with the success of his management and appreciating the value of his services and desirous and anxious to secure the retention of the same for the future management of her estate, and on consideration of other facts which may be in her mind to compensate the Plaintiff, allowed him a pension of Rs. 500 per month for his life in case he had to give up the present post which he was occu-

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pying, either voluntarily or involuntarily, and executed a registered document, dated the 15th June 1906. to this effect." He contended that the *ekrarnama* was for legal necessity and for the benefit of the Raj, and that "whatever may be the position of the Maharani, whether she was in possession of the Raj as a life-tenant or as an owner of an impartible estate or as a Hindu widow, or as an executrix, or as a manager, or as a trespasser, or as a trustee, the Plaintiff was entitled to get his pension: Firstly, from the general assets in the hands of the Defendants Nos. 1 and 2; secondly, from the savings of the estate arrears or uncollected rent the debts due to the estate at the time of her death, and from income of the estate held in suspense in the Maharani's or any other person's hands; thirdly, from her personal properties and her *stridhan*; and fourthly, from all kinds of property which the late Maharani was in possession of and which had now come into the hands of the Defendants."

The Plaintiff, on those allegations, prayed for a decree for Rs. 5,445 and consequential reliefs.

The Appellant filed his written statement stating that he was not the Maharani's heir and pleading that the *ekrarnama* was invalid for want of consideration or on the ground of the consideration being wholly or in part immoral and against public policy, that it was not binding upon him personally or upon the Raj properties. He denied that there were any assets in his hands representing the Maharani's estate or her savings out of income, but he submitted that if there were they also were not liable to satisfy the Respondent's claim under the agreement.

On the pleadings, the Subordinate Judge settled seventeen issues, of which the following are material to this report:—

(6) Is the agreement supported by any

consideration? Is the consideration valid?

(7) Is this agreement beneficial to the estate, or highly improvident? Is it binding upon Defendant No. 1?

(9) Is the agreement legal and valid?

(10) Had the Maharani any personal property? Has the Defendant No. 1 come into possession of any such property? Is such property liable to the Plaintiff's claim?

(11) Is the Plaintiff entitled to recover this amount of pension claimed from (1) arrears of uncollected rent, (2) debts due to the estate at the time of the Maharani's death, (3) any other income, if any, due to the Maharani, with regard to which she did not expressly indicate any intention as to whether it was to be treated as her personal property or whether it was to be treated as part of the corpus of the estate; (4) from general assets in the hands of Defendant No. 1, that is, all kinds of property which the late Maharani was in possession of and which have now come into the hands of Defendant No. 1?

On the 9th May 1914, the Subordinate Judge, after recording the oral and documentary evidence adduced by the parties, delivered judgment in favour of the Appellant, and passed a decree dismissing the suit with costs. The learned Subordinate Judge held that the grant of the pension was not an improvident act, but that it was not for legal necessity or for the benefit of the Raj, that the *ekrarnama* was not binding upon the Raj in the hands of the Appellant, that if the Maharani had a widow's estate the Respondent would not be entitled to recover the amount of the pension from the properties Nos. 1, 2 and 3 of Issue No. 11, that the Maharani had a life-interest in the Raj, that many properties acquired by her had been incorporated in the Raj and not treated as

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her separate property, that the Respondent would have been entitled to recover the pension from the *stridhan* of the Maharani and from properties Nos. 1, 2 and 3 of Issue No. 11, which had come into the hands of the Appellant, if the *ekrarnama* had contained a contract to pay the pension out of those properties, and that the true construction of the *ekrarnama* was that it contained only an undertaking that the pension would be paid out of the Raj property; and that there was no undertaking on the part of the Maharani personally to pay the pension or out of the properties Nos. 1, 2 and 3 of Issue No. 11. On the question of consideration, he held that the Respondent accepted the post without any condition or promise of reward or pension, that the grant of pension was purely a voluntary act of the Maharani without any consideration, that the consideration stated in the *ekrarnama*, viz., the necessity to guard against possible future losses was fictitious.

Against the said decree of the Subordinate Judge the Respondent appealed to the High Court of Judicature at Patna, and on the 27th July 1917, that Court delivered judgment allowing the appeal with costs in both Courts. The learned Judges who heard the appeal held that there was no legal necessity to give the Respondent a pension and the *ekrarnama* did not bind the Raj in the hands of the Appellant, that the Maharani acquired several properties out of the income received by her, that such acquisitions were managed along with the Raj, and if she had held the estate of a Hindu widow there would have been a presumption that she intended these acquisitions to accrue to and form part of the Raj, but that the Maharani was a tenant for life and therefore the presumption did not arise, and that the Appellant had come into possession of property both

movable and immovable which the late Maharani might have disposed of if she pleased. As to the construction of the *ekrarnama* the learned Judges were of opinion that the Subordinate Judge had proceeded on a mistranslation thereof. They gave their own translation, and held on such translation that the Maharani intended to hold herself personally liable for the pension and that her acquisitions were answerable for her engagements. With regard to the question of consideration, they held that that consideration was that stated in the *ekrarnama*, that it was good consideration, and that it had not been shown that the consideration for the *ekrarnama* was either wholly or in part immoral or contrary to public policy. In the result they ordered that the Respondent's suit be decreed against the Appellant for the principal sum claimed with interest at six per cent. per annum from the end of each month till realization, and that the decree was to be executed only against the property of the Maharani in the Appellant's hands which had not been duly administered by him.

A formal decree, dated 27th July 1917, was accordingly drawn up.

Against the said decree of the High Court the Appellant obtained special leave to appeal to His Majesty in Council.

Mr. L. DeGruyther, K. C. (with Mr. J. M. Parikh) for the Appellant.—The Courts have held that the lady entered into a personal agreement that this should be paid.

The High Court have held that this personal covenant could be exercised not only against her but also against her representatives after her death. *Narotam Das v. Sheo Pargosh Singh* (1) was relied on for the proposition that anyone who intermeddles with the estate of a deceased

(1) L. R. 11 I. A. 82; s. c. I. L. R. 10 Cal. 740 (1884).

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person is responsible. Also *Khitish Chandra v. Radhika Mohan* (2), *Karimuddin v. Gobind Krishna* (3) and *Narayana Sami Pellai v. Esa Abbaya Sait* (4) and para. 305 of Mayne, as to whether the widow's assets could be followed. Cites *Bhagbutti Deyi v. Chowdhuri Bhola Nath Thakur* (5) and *Magunta Veeraraghava v. Magunta Kota Reddi* (6).

Mr. A. M. Dunne, K. C. (with Mr. *Bhagwandin Dubé*) for the Respondent called on to argue what consideration there was, said Maharani gave a general undertaking that he should not suffer.

[LORD PHILLIMORE.—There is no fresh contract.]

This document was an express promise and registered and similar to a case where a servant's wages are raised. Consideration is the continuance in service. Refers to secs. 265 and 266, Indian Succession Act. Any person who interferes with estate of deceased makes himself liable.

[LORD PHILLIMORE.—We will consider the question of consideration only now.]

Their LORDSHIPS' JUDGMENT was delivered by

SIR ROBERT STOUT.—This is an appeal by Maharaja Kesho Prasad Singh against a decree of the High Court of Judicature at Patna. The High Court reversed the decree of the Subordinate Judge of the Second Court at Arrah, which had dismissed the suit with costs. The suit was to recover Rs. 5,445 and the basis of the claim rests on an *ekrarnama* given by Maharani Beni Prasad Kuer, widow of Raja Sri Radha Prasad Singh Bahadur, K.C.I.E., *gaddinashin* and proprietress of

Raj Reyasat Dumraon (Dumraon Estate) in Pergana Bhojpur, District Shahabad, by-caste an Ujjain Chhatri and by occupation a Zamindar.

The Dumraon Raj is impartible and the estate is an important one and one of considerable extent. The family of the Maharaja trace their pedigree back for many centuries. The widow before-named managed the estate after the death of her husband; it had been devised to her for the term of her life by the Will of her husband.

A great number of questions was raised before the Subordinate Court, and no less than seventeen issues were framed. These issues were issues of law and fact. In the High Court these issues were reviewed, and a decree was made for the payment of the principal sum claimed with interest at six per cent. per annum, from the end of each month till realisation; that the decree was to be executed only against the property of the Maharani in the Appellant's hands which had not been duly administered by him.

According, therefore, to this decree, the liability of the Appellant was only as an administrator of the estate of the Maharani. The case has, however, been argued, and the Respondent has claimed that he is entitled to his claim against the Appellant on one of two grounds, that is to say, either against him as an administrator *de son tort* of the estate of the Maharani or as the owner of the Dumraon estate.

The case of the Respondent rests on the *ekrarnama*, and it was contended that this document binds the administrator of the Maharani's estate and also the owner of the Dumraon Estate.

The Respondent was a pleader of the Courts, and had had conversation with the Maharani about becoming the manager of the estate. At one or more of the interviews, his statement is that she said that if he gave up his practice in Court, and

(2) I. L. R. 35 Cal. 276 (1907).

(3) I. L. R. 31 All. 497: s. c. 13 C. W. N. 1117 (P. C.) (1909).

(4) I. L. R. 28 Mad. 351 (1905).

(5) L. R. 2 I. A. 256: s. c. I. L. R. 1 Cal. 104; 24 W. R. 168 (1875).

(6) 3 Mad. L. W. 422 (1916).

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became the manager of the estate, she would see that he should not be the loser by so doing. There is no mention of such a promise in the contract of employment. This was evidenced by the letter sent by the Maharani to the Respondent, and dated the 29th May 1902. It reads as follows :—

“ Urgent.

“ From—

Maharani Beni Prasad Kuer Deyi Debi,

“ To—

Munshi Siv Saran Lal.

(May God keep you in peace.)

“ After expressing my desire to meet you I have to say that as Mr. Charles Fox, the manager, has resigned his post, I think it necessary that some competent man should live at my place and help me, so I write to you that you will please live at my place and execute the orders which I may issue to you, and will pay you Rs. 1,200 per month as salary.

“ The 29th May 1902.”

The Respondent entered on his work as manager, and on the 15th June 1906. the *ekrarnama* was executed. The draft of this document was, before signature by the Maharani, seen by the Respondent, and he seems to have made no objection to its terms. The Judge of the Subordinate Court and the Official Court Translator agree as to the translation of this *ekrarnama*, but the Judges in the High Court were of opinion that it was wrongly translated in part by the Official Translator and the Subordinate Judge. The part objected to, reads in the translation adopted by the Subordinate Judge as follows :—

“ Therefore, in order that the said Munshi may not at any time hereafter sustain loss for leaving the service, I think it proper and just that should the said Munshi leave this service for any reason, or if under any other circumstances reasonable or unreasonable, he may have to leave this service, according to his own wishes or against his wishes, then the said Munshi shall get monthly Rs. 500, which comes to Rs. 6,000 annually for life, by way

of pension, from the date of resignation from the Dumraon *raj reyasat*. And I hope that, if perchance, after granting this pension, he (the said Munshi) again desires to resume his practice as a Pleader then he shall get sufficient compensation for the loss he might sustain for leaving his profession for a considerable period and that he will pass his old age comfortably. It is desirable that the heirs and representatives of mine, the successor and the administrators to the Dumraon *raj reyasat* Estate shall fully comply with the terms of this document ”

The translation adopted by the High Court of this part of the document reads as follows :—

“ I. therefore, in order to safeguard against the loss which the said Munshi may sustain, if perchance he vacates this post for any reason in future, I think it just and proper that if in future the said Munshi gives up this service for any reason or he has to resign the service according to his wishes or against his wishes for any other reason, and under any circumstances, justifiable or unjustifiable he, the said Munshi, shall get Rs. 500 (rupees five hundred) monthly which amounts to Rs. 6,000 (rupees six thousand) annually, as pension for life from the date he resigns the post of manager of *raj reyasat* Dumraon, and I hope that by allowing this (torn) in perchance he, according to his desire, reverts to the profession of pleader-ship, he shall get to some extent compensation for the loss he may sustain for leaving his profession after (? for) a long time, and he will pass his old age in comfort. The heirs and representatives of me, the executant, and the Gaddinashin and administrators of *raj reyasat* Dumraon should fully comply with the (terms of) this deed.”

There does not seem much difference in the language, so far as the creation of a liability on the part of the administrator of the estate of the Maharani is concerned, between the two translations. The Respondent rests his case on the translation accepted by the High Court. The question, therefore, is : Do the words used in the accepted translation show that the

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Maharani agreed or contracted with the Respondent that, after her death, her executor or administrator should pay the pension named?

The *ekrarnama* provides that the Respondent is to get Rs. 500 monthly, for life, from the date he resigns his post as manager, and it goes on to say that the Maharani hopes that by allowing this sum, he will pass his old age in comfort: but then comes the next, and important, sentence, as to who is to pay this, and the words already quoted show that there are two different parties mentioned, *viz.*, first, her heirs and representatives, and, secondly, the owner or administrators of the Raj Dumraon Estate, and the *ekrarnama* says that these parties "should fully comply with the terms of this deed." Are these words a binding promise to pay such a pension, or are they only a recommendation by the lady to two different parties to comply with the deed, *i.e.*, to pay the pension? If it had been intended to provide that the pension was to be a right of the Respondent to obtain this money, the words are surely insufficient to effect such an intention. In the accepted translation, the words are that they "should fully comply" with the terms of the deed. She did not treat, therefore, the *ekrarnama* as an ordinary contract. It has to be noticed that the work which the Respondent did was work for the estate, not personal work for the Maharani. Why then should her personal estate be bound to pay a pension to this servant of the estate, namely, the Respondent?

Their Lordships are of opinion that the *ekrarnama* is not in terms a contract binding the executor or administrators of the Maharani to pay the pension, nor can it be said that it is a binding contract, on the owner or administrators of the Raj Dumraon Estate to pay such a pension. Being of this opinion, it is unnecessary to con-

sider whether the Appellant was ever the administrator of the estate or the other questions raised in the appeal.

Their Lordships are of opinion that the appeal must be allowed with costs, both here and below, and that the decree of the Subordinate Judge dismissing the suit be restored. They agree with the opinion expressed by the Judges of the High Court, that in the Court below a mass of irrelevant matter was introduced, and that two documents specified have been printed that were irrelevant. The cost of printing these documents (*i.e.* p. 274 to p. 348 and p. 351 to p. 481 in the printed record) must be borne by the Appellant, and the Registrar of the Privy Council should disallow all costs of, and incidental to, these irrelevant documents when taxing the costs of the appeal incurred in England. Their Lordships will humbly advise His Majesty accordingly.

Solicitor: *Mr. Edward Dalgado* for the Appellant.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Respondent.

R. M. P.

[PRIVY COUNCIL.]

[APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

VISCOUNT HALDANE.]

VISCOUNT CAVE.

LORD DUNEDIN.

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

1922,

Heard, 2, February.

Judgment,

27, February.

Civil Procedure Code (Act V of 1908), Or. 47, r. 1—Review, grounds for admitting applications for—Previous decision, error in, if "sufficient reason" for review.

R. 1 of Or. 47 of the Civil Procedure

CHHAJJU RAM,
Appellant,
v.
NAKI and ors.,
Respondents.

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Code must be read as in itself definitive of the limits within which review is permitted, and reference to practice under former and different statutes is misleading.

The words "any other sufficient reason" in Or. 47, r. 1, mean a reason sufficient on grounds at least analogous to those specified immediately previously, that is to say, to excusable failure to bring to the notice of the Court new and important matters or error on the face of the record.

Upon an application for review the Court cannot proceed to deal with the case on the merits as if on an appeal.

This was an appeal from two judgments and a decree of the Chief Court of the Punjab (11th December 1918) which affirmed a judgment and decree of the Subordinate Judge of Hissar (13th August 1914).

The suit was instituted by the Plaintiffs (Respondents) to pre-empt the sale of lands made by the vendor Mrs. Forbes in favour of the Appellant.

The latter contended that the Plaintiffs were suing on behalf of others who had no right to pre-empt but the Subordinate Judge who tried the suit held that this contention had not been made out and decreed the suit. Against this decision the Appellant appealed to the Chief Court of the Punjab and a Bench of that Court consisting of Scott Smith and Leslie Jones, JJ., reversed the judgment of the Subordinate Judge and allowed the appeal (3rd November 1917).

The Plaintiffs then applied for a review of this judgment and their application was heard by a Division Bench of the Chief Court consisting of Wilberforce and Scott Smith, JJ., who held on the 22nd July 1918 that the previous Bench "had proceeded on an incorrect exposition of the

law" and directed "the appeal to go before the Bench for their decision."

The appeal was thereupon heard by a further Bench of the Chief Court consisting of Wilberforce and Le Rossignol, JJ., who delivered judgment on the 11th December 1918 and agreeing with the findings of the Subordinate Judge they dismissed the Defendant's appeal.

The Defendant now appealed against the judgments of the Chief Court, dated the 22nd July 1918 and the 11th December 1918.

[The hearing of the appeal was commenced on January 31st before a Board consisting of Viscount Haldane, Lord Phillimore and Mr. Ameer Ali but owing to the importance of the questions raised a Full Board was constituted to hear the appeal.]

Sir G. R. Lowndes, K. C. and Dubé for the Appellant.

There are two main points :—

(1) Can the Review Court overrule a previous judgment of the Appeal Court?

(2) If so—were they right?

The provisions of the Code dealing with review are sec. 114 and Or. 47 of the Code of Civil Procedure, 1908.

The application for review was made to two Judges only, one of whom was the same as before.

They practically had a complete re-hearing of the suit which is outside their powers on review; moreover there is no authority to justify a new Judge sitting.

Under Or. 47, r. 5 of the Code the same Judges must sit, and if one of the Original Bench is absent the other should sit alone.

See *Aubhoy Churn Mohunt v. Shamont Lochun Mohunt* (4).

In Or. 47 the words "or for any other sufficient reason" must be words "*ejusdem generis*" to the classes already mentioned.

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Sandringham v. Greach (5), *R. v. Cleworth* (6) and *Tillmans & Co. v. S. S. Knutsford* (7).

If you construe these words "*ejusdem generis*" it is clearly impossible to re-open all the issues on review.

In this Order the common quality which justifies review is mistake—some accidental slip or omission.

The Indian cases on the subject are as follows :—

Under Bengal Regulation 26 of 1814, sec. 4. *Maharaj Moheshur Singh v. Bengal Government* (8).

Under Act VIII of 1859, secs. 376 and 378. *Nusseerooddeen Khan v. Indurnarain* (3), *Nobo Kishore Mookerjee v. Shib Prosad Pattuck* (9), *Ko Poh v. Moung Toy* (10), *Mt. Montoora v. Ablak Roy* (11), *Juggobundhoo Bose v. J. P. Wise* (12), *Chintamani Paul v. Peary Mohun Mookerjee* (13), *J. P. Wise v. Huro Lal Girce Gossain* (14), *Judab Ram Deb v. Ram Lal Mudduck* (15), *Koleemooddeen Mundul v. Heerun Mundul* (16), *Sheik Ellem v. Muhomed Basheer* (17), *Banee Madhub v. Kalce Churn Singh Roy* (18), *Shaikh Muncerooddeen v. Kadir Buksh* (19), *Roy Meghraj v. Becjoy Gobind Burrall* (2),

Ellem v. Basheer (17), *Raman v. Karunatha Tharakan* (20), *Mahadeva Rayar v. Sappani* (21) and *Reasut Hossein v. Hadjee Abdoolah* (22).

Under Act X of 1877, sec. 623. *Sheo Ratan v. Lappu Kuar* (23).

Under Act XIV of 1882, sec. 623. *Vellaya v. Jaganatha* (24), *Amir Hasan v. Ahmad Ali* (25), *Gopal Chandra Lahiri v. Solomon* (26), *Gungapershad Sahu v. Maharani Bibi* (27), *Re Sharup Chand Mala v. Pat Dasee* (28), *Muhammad Yusuf Khan v. Abdul Rahman Khan* (29), *Sulleman Hussein v. The New Oriental Bank Corporation, Ltd.* (30) and *Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao* (31).

The Act of 1859 is much wider than the present Civil Procedure Code.

If a review were inadmissible under the 1850 Act, *a fortiori* it would be inadmissible under the present Act.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—This appeal is brought from two judgments of the Chief Court of the Punjab and a decree following on them, which affirmed a decree of the Subordinate Judge of Hissar. In the

(2) 1 L. R. 1 Cal. 197: s. c. 23 W. R. 438 (1875).

(3) 5 W. R. 93 (F. B.) (1866).

(5) 7 B. & C. at p. 100.

(6) 4 Bost & Smith at p. 932.

(7) L. R. [1908] 2 K. B. 385 at p. 401.

(8) 7 M. I. A. 283 at p. 304; 3 W. R. P. C. 45 (1859).

(9) 9 W. R. 161 (1868).

(10) 10 W. R. 143 (1868).

(11) 11 W. R. 197 (1869).

(12) 12 W. R. 410 (1869).

(13) 15 W. R. 1; 6 B. L. R. 128 (F. B.) (1870).

(14) 16 W. R. 150 (1871).

(15) 19 W. R. 189 (1873).

(16) 24 W. R. 186 (1875).

(17) 1 L. R. 1 Cal. 184: s. c. 24 W. R. 382 (1875).

(18) 24 W. R. 387 (1875).

(19) 24 W. R. 410 (1875).

(17) 1 L. R. 1 Cal. 184: s. c. 24 W. R. 382 (1875).

(20) 1 L. R. 2 Mad. 10 (1876).

(21) 1 L. R. 1 Mad. 396 (1878).

(22) L. R. 3 I. A. 221: s. c. 1 L. R. 2 Cal. 131 (1876).

(23) 1 L. R. 5 All. 14 (1882).

(24) 1 L. R. 7 Mad. 307 (1883).

(25) 1 L. R. 9 All. 36 (1886).

(26) 1 L. R. 13 Cal. 62 (1886).

(27) L. R. 12 I. A. 47 at p. 51: s. c. 1 L. R. 11 Cal. 379 (1884).

(28) 1 L. R. 14 Cal. 627 (1887).

(29) L. R. 16 I. A. 104: s. c. 1 L. R. 16 Cal. 749 (1889).

(30) 1 L. R. 15 Bom. 267, 274 (1890).

(31) L. R. 27 I. A. 205: s. c. 4 C. W. N. 725 (1900).

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litigation out of which the appeal arises the Respondents were Plaintiffs. They claimed to have validly exercised a right of pre-emption over certain lands which the Respondent Mrs. Forbes, who was made a Defendant only formally, had sold to the Appellant. Into the details of the transaction it is not necessary to enter at great length, for their Lordships are of opinion that the case must be disposed of on a principle governing procedure which will appear presently. It is sufficient to state that Mrs. Forbes sold to the Appellant her proprietary rights in the subject-matter of the suit, two villages called Mauza Kagsar and Mauza Jamni Kera, by a deed of sale on the 2nd October 1912. The price Rs. 42,000 was paid, and the Appellant took possession. Shortly afterwards the Respondents other than Mrs. Forbes sued the Appellant to set aside the sale and for a decree for possession of the former of the two mauzas on payment of Rs. 15,000. They claimed that they were Gaur Brahmans by caste, and were occupancy tenants of that village and members of an agricultural tribe of the village within the meaning of the Alienation of Land Act, XIII of 1900 of the Punjab. They further alleged that no formal notice or information had been given to them of the proposed sale of the village, which sale had been completed secretly and collusively and that they were entitled to a right of pre-emption. Among other defences raised by the Appellant was this, that in reality the Plaintiff Respondents were suing on behalf of third persons who had no right to purchase the village, and that in consequence no such right of pre-emption could be asserted on the part of the persons suing.

The learned Subordinate Judge tried a number of issues in the suit, which raised, among others, the question whether the Plaintiffs were suing for their own benefit

and had a right of pre-emption. In the end he found in favour of the Plaintiffs on all the material issues, including those raising the questions just referred to. The present Appellant then appealed to the Chief Court of the Punjab. A Division Bench of that Court, consisting of Scott Smith and Leslie Jones, J.J., reversed the judgment of the Subordinate Judge, holding that the Plaintiffs' claim for pre-emption was really one on behalf of third persons who had no such right. They had allowed, as an additional ground of appeal, the contention to be brought before them that the suit had been instituted in the interests of third persons who were non-agriculturalists and had on that account no right of pre-emption, and had given leave to the Defendant to adduce further evidence on the point, including the records of certain proceedings. In the result they allowed the appeal, holding that because the Plaintiffs were not suing for themselves alone, but for themselves in conjunction with other persons, their claim to pre-emption was not maintainable. The Plaintiffs then applied, under Or. 47, r. 1, of the Code of Civil Procedure, 1908, for a review of the judgment of the Division Bench, on the ground that the Division Bench ought not to have admitted the additional ground of appeal, and that the learned Judges were misled into holding that the facts found by them disentitled the Plaintiffs to a decree.

The application for review came before the same Chief Court, not constituted as before but differently. At the second hearing the Division Bench was made up of Wilberforce, J., another Judge of the Chief Court, and Scott Smith, J., who had sat at the previous hearing. These learned Judges held that the previous Division Bench was right in admitting the additional evidence, especially as no objection had been taken by the Plaintiffs to its ad-

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mission, and that that Bench did right in considering it. But the second Division Bench thus newly constituted then proceeded to deal on the merits with the judgment brought before them under the Code for review, treating the view of the law taken by the previous Division Bench as matter that was open to them as if on an appeal. They held that the previous decision of the case had "proceeded upon an incorrect exposition of the law." Accepting on this ground the application for review, they directed the "appeal to go before the Bench for their decision." In accordance with this direction the case was heard by a Division of the Chief Court constituted of Wilberforce, J., and another Judge who had not previously heard it, Le Rossignol, J. These learned Judges considered certain other grounds of appeal which had not been decided by Scott Smith and Leslie Jones, JJ., being immaterial in the view which they had taken. They decided these points adversely to the Appellants and then followed the decision of Wilberforce and Scott Smith, JJ., at the second hearing by the Chief Court, and dismissed the appeal.

It will be observed that the question with which their Lordships have to deal is one concerned not with appeal to a Court of Appeal, but with review by the Court which had already disposed of the case. In England it is only under strictly limited circumstances that an application for such a review can be entertained. In India, however, provision has for long past been made by legislation for review in addition to appeal. But as the right is the creation of Indian statute law, it is necessary to see what such statutory law really allows. The law applicable to the present case is laid down by Or. 47, r. 1, of the Code of Civil Procedure, 1908. This Rule is enacted in the following terms:—

"Any person considering himself aggrieved,

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred (b) by a decree or order from which no appeal is hereby allowed, or (c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

By r. 5 of the same order it is provided that—

"Where the Judge or Judges, or any one of the Judges who passed the decree or made the order a review of which is applied for, continues or continue attached to the Court at the time when an application for the review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same."

Their Lordships observe that Wilberforce, J., was not one of the Judges who passed the decree or made the order reviewed. They understand that Leslie Jones, J., was precluded by absence from sitting. But this circumstance makes no difference to what is prescribed by r. 5. It is clear that Wilberforce, J., was precluded by the language from hearing the application, and this in itself would be a fatal objection to the judgment in review. The Court of Review had to be composed of Scott Smith, J., alone, a circumstance not without importance for the larger considerations which follow.

But larger considerations present themselves. The Order re-enacts with im-

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portant variations legislation on the subject of review which has been in operation for a long time past.

If their Lordships felt themselves at liberty to construe the language of Or. 47 of the Code of Civil Procedure, 1908 without reference to its history and to the decisions upon it, their task would not appear to be a difficult one. For it is obvious that the Code contemplates procedure by way of review by the Court which has already given judgment as being different from that by way of appeal to a Court of Appeal. The three cases in which alone mere review is permitted are those of new material overlooked by excusable misfortune, mistake or error apparent on the face of the record, or "any other sufficient reason." The first two alternatives do not apply in the present case, and the expression "sufficient," if this were all, would naturally be read as meaning sufficiency of a kind analogous to the two already specified, that is to say, to excusable failure to bring to the notice of the Court new and important matters, or error on the face of the record. But before adopting this restricted construction of the expression "sufficient," it is necessary to have in mind in the first place, that the provision as to review was not introduced into the Code for the first time in 1908, but appears there as a modification of previous provision made in earlier legislation: and, in the second place, that the extent of the power of a Court in India to review its own decree under successive forms of legislative provision has been the subject of a good deal of judicial interpretation, not, however, in all cases harmonious. That the power given by the Indian Code is different from the very restricted power which exists in England appears plain from the decision in *Charles Bright and Co. v. seller* (1), where the Court of Appeal dis-

cussed the history of the procedure in England and explained its limits.

Turning first to the earlier forms assumed in Indian legislation on the matter in question, their Lordships observe that the Bengal Reg. XXVI, of 1814, by sec. 2, confers on the Courts there mentioned a power of review analogous to that under consideration, excepting that the expression "otherwise requisite for the ends of justice" is added, an expression which may have been regarded as enlarging the scope of the word "sufficient," used as it was in much the same way as in the present Code. The expression "requisite for the ends of justice" is again introduced in sec. 8 of the Code of Civil Procedure of 1859. But in the Code of 1877 the language is varied, and the law is enacted in substantially the more restricted words in which it is enacted in the Code of 1908. Upon the construction of the language used from time to time by the legislature, there has been much divergence of judicial opinion. For example, even on the wider words in the Code of 1859, the High Court at Calcutta in the case of *Roy Meghraj v. Bcejoy Gobind Burrall* (2) adopted the restricted construction, and laid down emphatically that there could be no re-hearing for the purpose of seeing whether a different conclusion on the merits should be adopted. On the other hand, in *Nusseerooddeen Khan v. Indurnarain Chowdhry* (3) the majority of the Court appear to have considered that the wider meaning should be attributed to the language.

Their Lordships have examined numerous authorities, and they have found much conflict of judicial opinion on the point referred to. There is plainly no such preponderance of view in either direction as to render it clear that there is any settled

(2) I. L. R. 1 Cal. 197: s. c. 23 W. R. 438 (1875).

(3) 5 W. R. 93 (F. B.), (1866).

(1) [1904] 1 K. B. 6.

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course of decision which they are under obligation to follow. Some of the decisions in the earlier cases may have been influenced by the wider form of expression then in force, and these decisions may have had weight with the learned Judges who, in cases turning on the subsequent Code, had regarded the intention of the legislature as remaining unaltered. But their Lordships are unable to assume that the language used in the Codes of 1877 and 1908 is intended to leave open the questions which were raised on the language used in the earlier legislation. They think that r. 1 of Or. XLVII must be read as in itself definitive of the limits within which review is to-day permitted, and that reference to practice under former and different statutes is misleading. So construing it they interpret the words "any other sufficient reason" as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. Such an interpretation excludes from the power of review conferred the course taken by the second and third Division Bench, composed of Wilberforce, J., and Scott Smith, J., and by Wilberforce, J., and Le Rossignol, J., respectively. The result is that the judgments given by these two Division Benches ought to be set aside, and that of the Bench of the Chief Court composed of Scott Smith, J., and Leslie Jones, J., restored, so that the suit will stand dismissed. The Respondent-Plaintiffs must pay the costs here and in the Courts below.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors : Messrs. T. L. Wilson & Co. for the Appellant.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 49 of 1920

IN

APPEAL FROM APPELLATE DECREE

No. 1580 of 1918.

MOOKERJEE, J. ISAN CHANDRA BAKSHI,
PANTON, J. Plaintiff, Appellant,

1921,

v.

Heard, 20, July. SAFATULLA SIKDAR
Judgment, and ors., Defendants,

18, August.

Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 159, 161, 167—Title and interest acquired by adverse possession in part of lands of defaulting tenure or holding, if incumbrance which must be annulled under sec. 167.

The word "incumbrance" as used in secs. 159, 161 of the Bengal Tenancy Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding and such incumbrance cannot be annulled in any manner other than what is provided in sec. 167.

At the time when the Bengal Tenancy Act was passed the term "incumbrance" had a well recognised meaning in connection with provisions in statutes in pari materia; and since the Bengal Tenancy Act came into operation the word "incumbrance" has been interpreted to include a statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding.

This was an appeal under sec. 15 of the Letters Patent dated the 10th June 1921 from a decision of the Hon'ble Mr. Justice Newbould, dated the 11th May 1920, affirming that of Babu Bipin Chandra Chatterjee, Subordinate Judge, Jessore, dated the 8th May 1918, reversing that of Babu Nagendra Nath Basu, Munsif, Narail, dated the 17th February 1917.

ISAN CHANDRA BAKSHI v. SAFATULLA SIKDAR.

The judgment of Newbould, J., was as follows :—

NEWBOULD, J.—This appeal arises out of a suit for recovery of possession of a certain land after establishment of title. Plaintiff's case was that the land in suit appertained to an occupancy holding held by one Biswambhar at a rental of Rs. 6-14-0. This holding was sold in execution of a decree for rent and was purchased by one Prosonno Chunder Bhattacharja in 1900. It was held by Prosonno and, after his death, by his widow Swarnamoyi until 1913 when the superior landlord of the holding purchased it in execution of a rent decree against Swarnamoyi. This landlord then settled the land of this holding with the Plaintiff. The Defendants seem to have set up different cases at different times, but their final case appears to be that the land in question appertained not to Biswambhar's holding of Rs. 6-14 but to another holding belonging to Biswambhar and Gobinda of Rs. 9-9-4 held by them directly under the Raja of Dighapatia who is the landlord above the tenure-holders under whom the Rs. 6-14 *jama* was held. The first Court held that the land appertained to the holding of Rs. 6-14 as alleged by the Plaintiff and decreed the suit. The lower Appellate Court, without disputing that finding, held that the Defendant No. 8 and the other Defendants who claimed through him had been in possession of the land for over twelve years and had created an incumbrance within the meaning of sec. 161 of the Bengal Tenancy Act and that the suit was not maintainable so long as that incumbrance was not annulled. The facts are rather hard to follow; but apparently Biswambhar and Gobinda mortgaged their interest in the *jama* of Rs. 9-4-0 to one Abinash who purchased that interest in execution of a mortgage decree on 21st May 1896. After

that purchase Abinash paid rent to the tenure-holders of the landlord who are spoken of as the Sinha Roys and though they received rent they did not recognize him as a tenant. It is not explained why Abinash whose title-deed gave him a right to the holding of Rs. 9-4-0 under the Raja of Dighapatia should have paid rent to the Sinha Roys. Then after that in 1898 Abinash transferred his rights by a deed of sale to Harinath—the Defendant No. 8. It is found that the *maliks*, i.e., the Sinha Roys were aware of Abinash's purchase, that Abinash and his under-raiyat Harinath were actually in possession of the land through the tenants—the sons of Janmejy for more than twelve years and that Prosonno and his widow were never in possession of the land in suit. It is contended that, as Janmejy was an under-raiyat of Biswambhar of the land of Rs. 6-14 *jama*, the possession of his sons as under-raiyats of Harinath could not have been adverse. But, since under-raiyati interest is not heritable, the possession by the sons of Janmejy cannot be treated as a continuation of Janmejy's possession. I think the lower Appellate Court was right in holding that this possession by Harinath and those claiming under him from the time of the purchase by Prosonno and for more than twelve years afterwards gave Harinath a title by adverse possession which amounted to an incumbrance within the meaning of sec. 161 of the Bengal Tenancy Act. It is contended by the learned Pleader for the Appellant that such an interest claimed by adverse possession is not an incumbrance; but he admits that it has been repeatedly so held by different Benches of this Court. Sitting as a single Judge, even if I accepted his argument, I would be bound to follow those decisions and could not, as a Divisional Bench could, refer the point for decision to a Full Bench. I hold that, on the facts found, the suit

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was rightly dismissed, and dismiss this appeal with costs.

Babu Surendra Chandra Sen [with him *Babus Hemendra Ch. Sen* and *Surendra Nath Basu* (Sr.)] for the Appellant.

Babus Basanta Kumar Bose and *Sitaran Banerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal under cl. 15 of the Letters Patent from the judgment of Mr. Justice Newbould in an appeal from Appellate decree in a suit for recovery of possession of land on declaration of title. The Plaintiff claimed the disputed land as included in an occupancy holding, held by one Biswambhar Baksi at an annual rent of Rs. 6-4-0 under the Sinha Roys who were tenure-holders under the Raja of Dighapatia. The occupancy holding was sold in 1900 in execution of a decree for arrears of rent, when it was purchased by one Prosonno Chunder Bhattacharja. His representatives made default in the payment of rent, and the occupancy holding was again sold in execution of a decree for arrears of rent on the 23rd April 1913, when it was purchased by the landlords themselves. The Plaintiff took settlement from the landlords on the 24th February 1915, but was unable to obtain possession of the disputed area. The result was the institution of this suit on the 10th January 1916. The Defendants resisted the claim on the ground, that the tract in suit never formed part of the occupancy holding held by Biswambhar Baksi under the Sinha Roys and was in reality included in a tenancy held by Biswambhar Baksi and Gobinda Baksi at an annual rent of Rs. 9-4-0 payable directly to the Raja of Dighapatia. The question consequently arose, whether the disputed land was included in the tenancy of Rs. 6-4-0 held by Biswambhar Baksi under the Sinha Roys

or in the tenancy of Rs. 9-4-0 held by Biswambhar Baksi and Gobinda Baksi under the Raja of Dighapatia. The trial Court answered this question in favour of Plaintiff and decreed the suit. On appeal the Subordinate Judge did not determine this question, but held that, on the assumption that the land was included in the tenancy of Rs. 6-4-0 held by Biswambhar Baksi under the Sinha Roys, the Defendants and their predecessors had acquired a title by adverse possession which constituted an incumbrance and could have been but had not been annulled by the grantor of the Plaintiff under sec. 167 of the Bengal Tenancy Act read with sec. 159. The Subordinate Judge found upon the evidence that on the 21st May 1896, one Abinash Chandra Bhattacharyya, in execution of a mortgage decree held by him against Biswambhar Baksi and Gobinda Baksi, purchased their tenancy of Rs. 9-4-0 under the Raja of Dighapatia, that on the 29th November 1898, the purchaser transferred the tenancy to Harinath Mookerjee (one of the Defendants in this suit), and, that since the mortgage sale of 1896, Abinash and thereafter Harinath had been in possession of the disputed land as included in the tenancy of Rs. 9-4-0. The Subordinate Judge further found that neither Prosonno Chunder Bhattacharja nor his successors-in-interest ever possessed the land as included in the tenancy of Rs. 6-4-0 held by Biswambhar Baksi under the Sinha Roys. On these findings, the Subordinate Judge held that the Defendant has acquired a good title by adverse possession from 1900 when Prosonno Chunder Bhattacharja became the purchaser at a rent sale till the 23rd April 1913, when the grantors of the Plaintiff purchased at another rent sale. The question thus emerged for consideration, whether the statutory title by adverse possession acquired by the Defend-

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ants against the tenant for whose default the holding of Rs. 6-4-0 was brought to sale, was an incumbrance within the meaning of sec. 159 of the Bengal Tenancy Act which the purchaser at the rent sale was competent and bound to annul in the prescribed method, namely, in the manner directed in sec. 167. The Subordinate Judge answered this question in the affirmative, and his view has been approved by Mr. Justice Newbould as supported by a long line of decisions in this Court.

The term "encumbrance" was not introduced for the first time in the Bengal Tenancy Act, but, as was pointed out in *Gocool Bagdi v. Debendra Nath* (1), had been repeatedly used by the Indian Legislature in a well-recognised sense in the statutory provisions of our land law and revenue law. In *Lakmir Khan v. Collector of Rajshahi* (2), sec. 27 of the Revenue Sale Law, 1841, which provided that a purchaser of an estate sold for the recovery of arrears of revenue due thereon would acquire the estate free from all incumbrances imposed thereupon after the time of settlement, was interpreted to signify that the interest acquired by an adverse possession was an encumbrance. The same phraseology was reproduced in sec. 26 of the Revenue Sale Law, 1845, and was similarly interpreted in *Ramsanker v. Bijoy Gobind* (3). Sec. 37 of the Revenue Sale Law, 1859, reproduces the same phraseology and has been repeatedly construed in the same sense, *Golakmani v. Hara Chandra* (4), *Thakurdas v. Nabin-kisen* (5), *Narayan v. Taylor* (6), *Karim Khan v. Broja Nath* (7) and *Maizuddi v.*

Issan Chandra (8). A similar question has arisen upon the construction of sec. 11 of the Patni Regulation, 1819, and it has been frequently held that the interest acquired by a trespasser, who has been in adverse possession of part of the lands of the *taluk* for the statutory period is an incumbrance that has accrued upon it by the act of the defaulting *putnidar*; *Khantamoni v. Bijoychand* (9), *Gopendra v. Molakaddam* (10), *Naffer Chandra v. Rajendra Lal* (11), *Prodyot Coomax v. Gopi Krishna* (12) and *Kalikanand v. Bipradas* (13). When we turn to sec. 16 of the sales of Under Tenure Act, 1865, we meet with a similar provision which has been construed in a like manner; *Askur v. Wasuck* (14). The same principle was applied by Sir Barnes Peacock, C. J., in the case of sales under sec. 105 of the Bengal Rent Law, 1859; *Woomesh Chandra v. Rajnarain* (15). A similar view has been adopted with reference to secs. 70 and 71 of the Assam Land and Revenue Regulation, 1886; *Mohamed Nasim v. Kasinath* (16) and *Musuzah Bibi v. Brojendra Kishore* (17). This is supported by the decision of the Judicial Committee in *Surja Kanta v. Sarat Chandra* (18), where it was ruled that the period of limitation for adverse possession against the purchaser at a sale for arrears under the Revenue Sale Law, 1859, only commences to run from the date of the sale. It is thus

(1) 14 C. L. J. 136 (1911).

(2) [1851] Beng. S. D. A. 116.

(3) [1852] Beng. S. D. A. 324.

(4) 8 W. R. 62 (1867).

(5) 15 W. R. 553 (1871).

(6) 1. L. R. 4 Cal. 103 (1878).

(7) 1. L. R. 22 Cal. 244 (1894).

(8) 15 C. W. N. 706: s. c. 13 C. L. J. 293 (1910).

(9) 1. L. R. 19 Cal. 787 (1892).

(10) 1. L. R. 21 Cal. 702 (1894).

(11) 1. L. R. 25 Cal. 167 (1897).

(12) 11 C. L. J. 209 (1910).

(13) 19 C. W. N. 18: s. c. 21 C. L. J. 265 (1914).

(14) 22 W. R. 418 (1874).

(15) 10 W. R. 15 (1868).

(16) 1. L. R. 26 Cal. 194 (1898).

(17) 20 C. L. J. 210 (1914).

(18) 18 C. W. N. 1281: s. c. 20 C. L. J. 563 (P. C.) (1914).

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undeniable that at the time when the Bengal Tenancy Act was passed, the term "incumbrance" had a well-recognised meaning in connection with provisions in statutes in *pari materia*. It is equally incontestable that since the Bengal Tenancy Act came into operation, the word "incumbrance" as used in secs. 159 and 161 has been interpreted to include a statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding; *Karim Khan v. Brojo Nath* (7), *Maizuddi v. Issan* (8), *Gocool v. Debendra* (1), *Munsale Ali v. Arsadullah* (19), *Satish Chandra v. Munjamati* (20), *Bhusan Chandra v. Srikanla* (21) and *Manmotha Nath v. Anath Bandhu* (22). We have been pressed to hold, however, that the view which has obtained in this Court for well-nigh seventy years as to the meaning of the term "incumbrance" is erroneous and is not logically reconcilable with the position maintained in *Kalanand v. Sarafat* (23), *Rahimuddi v. Nalini* (24), *Baikuntha Nath v. Basanta Kumari* (25), *After Ali v. Brajendra Kishore* (26), *Jitendra Kumar v. Mohendra Chandra* (27) and *Mahim v. Peary Lal* (28), namely, that the adverse possessor, when his title has ripened by prescription, becomes in essence a co-owner of the estate, tenure or holding, as the case may be, and his interest cannot

logically be deemed an incumbrance on the ownership. It need not be disputed that the matter, were it *res integra*, would be open to serious argument, as indeed is indicated by the observation of Lord Phillimore in *Bipradas v. Kamini Kumar* (29), where the Judicial Committee affirmed the decision in *Kalikanand v. Bipradas* (13). But in the well-known words of Mr. Justice Holmes (Common Law, p. 1), the life of the law is not logic but experience. As pointed out by Blackburn, J., in *Mr. Docks v. Cameron* (30), where an Act of Parliament has received a judicial construction, putting a certain meaning on its words, and the legislature in a subsequent Act in *pari materia* uses the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew had been put upon the same words before, and unless there is something to rebut that presumption, the Act should be so construed, even if they were such that they might originally have been construed otherwise. To the same effect are the observations of Sir John Jervis, C. J., in *Ruckmabaya v. Lullobhoy* (31) and of James, L. J. in *Exp. Campbell* (32). We are further of opinion that the case before us belongs to that class where the Court should be reluctant to dissent from the view expressed in long established decided cases and thereby not only to unsettle the law but also to endanger the security of property and title—dangers which are not associated with changes brought about by legislative intervention; *Young v. Robertson* (33), *Mediana v. Comet* (34) and *Kreglinger v. New Pata-*

(1) 14 C. L. J. 136 (1911).

(7) I. L. R. 22 Cal. 244 (1894).

(8) 15 C. W. N. 706 : s. c. 13 C. L. J. 293 (1910).

(19) 16 C. L. J. 539 (1912).

(20) 17 C. W. N. 340 (1912).

(21) I. L. R. 45 Cal. 756 : s. c. 21 C. W. N. 155; 23 C. L. J. 485 (1916).

(22) 25 C. W. N. 106 (1919).

(23) 12 C. W. N. 528 (1908).

(24) 13 C. W. N. 407 (1909).

(25) 23 C. L. J. 151 (1915).

(26) 24 C. L. J. 60 (1915).

(27) 24 C. L. J. 62 (1914).

(28) 25 C. L. J. 99 (1916).

(13) 19 C. W. N. 18 : s. c. 21 C. L. J. 265 (1914).

(29) Since reported : 26 C. W. N. 465 (1921).

(30) 11 H. L. O. 443 (480) (1865).

(31) 5 M. I. A. 234, 250 (1862).

(32) L. R. 5 Ch. App. 708 (1870).

(33) 4 Macq. H. L. C. 314, 345 (1862).

(34) [1900] A. C. 113.

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gonia Meat Co. (35). We hold accordingly in concurrence with Mr. Justice Newbould that the word incumbrance as used in secs. 159 and 161 of the Bengal Tenancy Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding and that such incumbrance cannot be annulled in any manner other than what is provided in sec. 167.

The result is that the decree made by Mr. Justice Newbould is affirmed and this appeal dismissed with costs.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER

No. 377 of 1920.

WOODROFFE, J.	RATAN LAL BISWAS,
B. B. GHOSH, J.	Judgment-debtor,
1922,	Appellant,
Heard, 11 and	v.
12, January.	ISAN CHANDRA PAL
Judgment,	CHOWDHRY, Decree-
12, January.	holder, Respondent.

Two compromise rent decrees both providing for satisfaction by sale of the tenure—Second decree, if may be executed against tenant personally, when the tenure was sold in execution of the first decree—Sale, subject to directions in the second decree.

Two compromise rent decrees provided that the landlord should satisfy his claim for rent by sale of the tenure. Under the first decree the property was sold and purchased by the decree-holder and the decree-holder next applied for personal execution of the second decree:

Held—That the executing Court cannot go behind the decree and must give effect, if possible, to both the decrees. The second decree having been passed before the sale of the property, the sale was subject to the directions contained in the second decree. The first decree for rent,

being a special rent decree passed on a contract between the parties, was not an ordinary rent decree under the Bengal Tenancy Act under which all encumbrances would be avoided. The decree-holder therefore must proceed first of all against the property as the decree itself directed.

This was an appeal preferred on the 16th November 1920 against an order of Amrita Lal Mukerjee, Esq., District Judge of Zillah Nadia, dated the 6th August 1920, affirming an order of Babu Kamini Kumer Dutt, Munsif at Krishnagar, dated the 31st March 1920.

The facts of the case will appear from the judgment.

Babu Panchanan Ghose for the Appellant

Babus Amarendra Nath Bose and Radhica Ranjan Guha for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

In this case there were two rent decrees, both of which provided that the landlord should proceed to enforce his claim for rent by sale of the tenure. Under the first decree the property was sold and purchased by the decree-holder. The landlord Respondent now asks for personal execution of the second decree. The answer of the Appellant is that he cannot have such personal execution because there was a contract that the property should be proceeded against first which contract was embodied in the decree. The reply of the Respondent in effect is this, that he is not obliged to follow the directions given in the second decree as regards proceeding against the property first because the property had already been sold under the first decree. The answer to this contention I think is that we cannot go behind the decree and we must give effect if possible to both the decrees. The second decree was passed

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before the sale of the property. It must we think, be taken that the sale was subject to the directions contained in the second decree. Moreover it was pointed out during the course of the agreement that though the first decree was a decree for rent, it was not an ordinary rent decree under the Bengal Tenancy Act under which all encumbrances would be avoided but it was a special rent decree which was passed on a contract between the parties. We are therefore of opinion that the appeal succeeds and that the Respondent must proceed first of all against the property as the decree itself directs.

The Appellant is entitled to his costs in all the Courts. The hearing fee in this appeal is assessed at three gold mohurs.

J. N. R. *Appeal allowed.*

[CIVIL REVISIONAL JURISDICTION.]

REV. NO. 615 OF 1921.

GREAVES, J. 1922, 27, January.	BEACHARAM LAHIRI, Plaintiff, Petitioner, . v. SUDEBI DAS, Defendant, Opposite Party.
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Legal Practitioners Act (XVIII of 1879), sec. 28—Pleader's suit for fees upon oral agreement, if maintainable.

Where a suit by a Pleader for fees against his client is based on an agreement he cannot succeed unless the agreement is both in writing signed by the party to be charged and filed as provided in sec. 28 of the Legal Practitioners Act. Consequently no suit upon an oral agreement can succeed, under the section.

ISHAN CH. KAR v. RAM CHARAN PAL (4),
SHIB KISHORE GHOSE v. MANIK CHANDRA
NATH (1), RAGHUNATH SARAN SINGH v.
SRI RAM (2) and SARAT CHANDRA RAY

(1) 21 C. L. J. 618 (1915).

(2) I. L. R. 28 All. 764 (1906).

(4) 20 C. L. J. 445 (1914).

CHOWDHURY v. CHANDI CHARAN MITRA (3)
referred to.

This was a Rule granted against an order of the Small Cause Court Judge, Krishnagar, Nadia (in S. C. C. Suit No. 48 of 1921).

The facts appear sufficiently from the judgment.

Babus Brojolal Chuckerbutty and Jatin-dra Mohan Chowdhury (Sr.) for the Petitioner.

Babu Mrityunjoy Chatterjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This Rule was granted at the instance of the Plaintiff under the provisions of sec. 25 of the Provincial Small Cause Courts Act. The Plaintiff's suit was based upon an oral agreement whereby, he says, the Defendant engaged him as Pleader and agreed to pay reasonable and proper fees for the work done. The claim of the Plaintiff extends to a claim for compensation for the termination of his services and it would therefore appear, although it is not actually stated, that the agreement relied on was one for employment of the Plaintiff during the entire course of the work for which he was employed. The Subordinate Judge has rejected the claim on the ground that the suit cannot succeed by virtue of the provisions of sec. 28 of the Legal Practitioners Act. Sec. 28 provides that no agreement entered into by a Pleader respecting the amount and manner of payment for services is to be valid unless it is made in writing signed by the persons to be charged and filed in the District Court or in some other Court within fifteen days from the date on which it is executed. But it is urged before me on behalf of the Plaintiff that the agreement in question

(3) 7 C. W. N. 300 (1904).

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does not fall within the provisions of sec. 28 because it is said that as the agreement was only to pay reasonable and proper fees no amount was fixed within the meaning of the word "amount" in sec. 28, and the learned Vakil for the Plaintiff further contends that the agreement was not an agreement at all because the Plaintiff is only suing for fees that he was entitled to, I suppose he means under sec. 27, although it would not appear that these fees or, at any rate, all of them fall within the purview of sec. 27.

So far as the second point is concerned, I do not think it is now open to the Plaintiff to say that the agreement was not, in fact, an agreement. He has pleaded it in para. 4 of his plaint as an agreement and the case was argued and decided on that footing.

So far as the other point is concerned, the Plaintiff has relied upon the case of *Sib Kishore Ghose v. Manik Chandra Nath* (1) as an authority for the argument that where there is no fixed and definite amount the agreement is not within the provisions of sec. 28. But it seems to me that that case is not an authority for the proposition for which the Plaintiff contends because as is pointed out in the judgment, there was, in fact, no agreement alleged and consequently if no agreement was alleged there was nothing to attract the provisions of sec. 28. I think, therefore, that *Sib Kishore Ghose v. Manik Chandra Nath* (1) does not support the Plaintiff's contention. Then, on behalf of the Defendant, I was referred to the case of *Raghunath Saran Singh v. Sri Ram* (2). That was a Full Bench case and the suit was based on an oral promise to pay full legal fees and to engage the Plaintiff as Pleader on behalf of the Defendant. The Allahabad Court held that this agreement

was barred by the provisions of sec. 28 and Mr. Justice Richardson as he then was, states at p. 769 that in his view sec. 28 was intended to provide that all special agreements between a Pleader and his client should be in writing, signed and filed according to the provisions of the section. It seems to me that if that case was rightly decided it covers the Plaintiff's contention in the present application. There was no stated amount fixed in the agreement alleged and if the Plaintiff's contention is right that would take him out of the provisions of sec. 28; but in spite of that it was held that sec. 28 was a bar. In *Sarat Chandra Ray Chowdhury v. Chandi Charan Mitra* (3) to which I was referred, as also in the case in *Shib Kishore Ghose v. Manik Chandra Nath* (1) already referred to, there was no agreement. Consequently clearly the cases there did not fall within the provisions of sec. 28. I was also referred to the case of *Ishan Chandra Kar v. Ram Charan Pal* (4). It seems to me that that case decides that a suit by a Pleader for fees based upon an alleged oral agreement, as here, cannot succeed because it is not a valid agreement, as it is a special agreement and any special agreement is to be in writing under the provisions of sec. 28. I think that the true rule is that where a suit by a Pleader for fees against his client is based on an agreement he cannot succeed unless the agreement is both in writing, signed by the party to be charged and filed as provided in the section. Consequently no suit upon an oral agreement can succeed by virtue of the provisions of sec. 28.

That being so, I think the Rule must be discharged with costs. I assess the hearing fee at one gold mohur.

S. C. C.

(1) 21 C. L. J. 618 (1915).

(2) I. L. R. 28 All. 764 (1906).

(1) 21 C. L. J. 618 (1915).

(3) 7 C. W. N. 300 (1904)*

(4) 20 C. L. J. 445 (1914).

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 385 OF 1921.

BASANTA CHARAN
SINHA, Petitioner,
v.
1922, RAJANI MOHAN CHAT-
20, February. TERJI, Opposite
Party.

Calcutta Rent Act (III, B. C., of 1920), sec. 4, sub-sec. 3, cl. 4—Lease for three years with option in tenant to renew for another such period, if a lease for five years and upwards—Civil Procedure Code (Act V of 1908), sec. 115—Proper case for revision by High Court.

Shortly before the passing of the Rent Act the Petitioner entered into an agreement with the Opposite Party for a lease of certain premises at a stipulated rent for three years with option in the Petitioner to renew it for a further period of three years. After the passing of the Rent Act, an application was made to the Rent Controller for fixing a standard rent. This was refused on the ground that the lease was one for five years and upwards :

Held—That the fact that there was option for renewal for a further period of three years after the expiration of the first three years did not make the lease one for five years and upwards within the meaning of sec. 4, sub-sec. 3.

That the Rent Controller refused to exercise jurisdiction vested in him by law and the High Court could properly interfere in revision.

This was a Rule granted on the 10th June 1921 against an order of the Rent Controller (B. D. Banerjee, Esq.), dated the 25th April 1921.

The facts of the case will appear from the judgment.

Babu Nagendra Nath Ghose and Mr. J. W. Chippendale for the Petitioner.

Babus Dwarka Nath Chakravarty and Hira Lal Chakravarty for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule was granted at the instance of the Petitioner calling upon the Opposite Party and the Rent Controller under the Calcutta Rent Act to show cause why the order of the Rent Controller, dated the 25th April 1921 should not be set aside. The material facts are shortly as follows :—The Petitioner on or about the 2nd January 1920, entered into an agreement with the trustee of the late Baboolal Agarwalla for a lease of premises No. 10, Creek Lane, for a period of three years from the 16th January 1920 with an option in the Petitioner to renew his tenancy for a further period of three years at the expiration of the first three years. Correspondence passed but no agreement was actually signed nor has any lease been actually executed. Under the agreement of the 2nd January the Petitioner entered into possession of the premises. Under this agreement rent was payable at the rate of Rs. 400 a month, the previous rental of the premises having been Rs. 150 a month. The Petitioner paid at the rate of Rs. 400 for a short period, but upon the Rent Act coming into force on the 5th May 1920, he claimed to pay rent only at the rate of Rs. 150 a month plus an additional ten per cent. The trustees refused to accept rent at this rate and accordingly at the instance of the Petitioner an application was made to the Rent Controller to fix a standard rent. On the 25th April 1921 the Rent Controller made the order complained of in which he said that the lease was for a period of six years having regard to the fact that there was an option for renewal.

The only point therefore which arises in the Rule is whether the Rent Controller is right in holding under the circumstances that this was a lease entered into before the commencement of the Act for a period of five years or upwards.

The Opposite Party contends that upon

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the true construction of the lease and of the provisions of sec. 4, sub-sec. 3, of the Rent Act, the Rent Controller was right in holding that this was a lease for a period of five years and upwards within the meaning of cl. 4, sub-sec. 3. It is further contended on behalf of the Opposite Party that this case does not fall within the provisions of sec. 115 of the Code of Civil Procedure, inasmuch as even if the Rent Controller was wrong, all that he has done is to wrongly construe the provisions of sec. 4, sub-sec. 3, and that this does not give this Court jurisdiction to interfere under the provisions of sec. 115. So far as the first point is concerned we think that the demise was clearly for a period of three years and the fact that there was option for renewal for a further period of three years after the expiration of the first three years, does not make it a lease for five years and upwards within the meaning of sec. 4, sub-sec. 3. So far as the second point is concerned it seems to us that what the Rent Controller has done is to refuse to exercise the jurisdiction conferred upon him by the Calcutta Rent Act, and accordingly this is a proper case for the interference of the Court under the provisions of sec. 115. We should add that we have read the explanation furnished by the Rent Controller.

In the result the Rule is made absolute with costs, the hearing fee being assessed at three gold mohurs.

S. C. M. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 252 OF 1922.

WALMSLEY, J.
SUHRAWARDY, J

1922,
12, April.

RASIK LAL DAS,
Accused, Petitioner,

v.
THE EMPEROR,
Opposite Party.

Calcutta Police Act (IV, B. C., of 1866), sec. 54A

— Possession of goods stolen or fraudulently obtained

The Petitioner was convicted under sec. 54A of the Calcutta Police Act for having in his possession certain second-hand articles of clothing:

Held—That for the purpose of sec. 54A of the Police Act, it is obligatory on the prosecution to show that there is reason to believe that the goods had been stolen or fraudulently obtained and the mere fact that the articles in question were recovered from the house of the accused does not warrant the conclusion that they had been stolen or fraudulently obtained and in this view the conviction was bad.

This was a Rule issued on the 27th March 1922 against an order of the Honorary Presidency Magistrate of Calcutta (Mr. R. H. Rustomjee), dated the 23rd March 1922.

The Petitioner was sent up by the Calcutta Police for trial under sec. 54A of the Calcutta Police Act for having in his possession some second-hand articles of clothing, namely, 23 ties, 3 pairs of gloves, 2 scarfs, 2 braces, 1 pair of stocking and 1 night cap. He was convicted and sentenced to undergo three months' rigorous imprisonment.

The judgment of the Magistrate was as follows:—

"The Police authorities of Muchiparra Thannah charge Rasik Lal Das with having in his possession on 9th March 1922 in his house at McLeod Street a number of hats, ties, braces and such like things suspected to be stolen and for which he could give no satisfactory account as to their possession. Cases of theft having been reported to the Thannah, Elai Buksh and Sheik Bechu were arrested on suspicion but were not sent up as nothing was found in their possession. They said the accused had such things in his house and on a search most of the goods as produced

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in Court was found in his house. An enquiry was made but nothing was found to free the accused from the guilt. The defence witnesses go to show that about 50 or 60 of them—all dealers in second-hand goods—bought from a sale at No. 2, Lower Circular Road, a lot of such things but none could identify any one thing in Court. One Deweven went so far as to say that a lady sold some of these hats to him. He cannot give her name nor has he given any receipt to her for money paid or made any entry in his *khatta* book. None of the defence witnesses have in any way helped to make the offence any bit less. The police through Sub-Inspector Karrim have conducted the case ably and deserve credit for the clever manner in which everything has been threshed out. The question is whether the evidence of the D. W. is to be believed. The Court holds it is worth nothing. The accused and all his witnesses are dealers in such goods, live near each other and come from the same district. The Court further holds that the prosecution have got a clear case against the accused who has failed to show how he became possessed of the goods. He is found guilty and is sentenced to three (3) months' rigorous imprisonment, sec. 54A, Act IV of 1866.

Mr. J. W. Chippendale and Babu Jatin-dra Mohon Mukerjee for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The Petitioner RasiK Lal Das has been convicted under sec. 54A of the Calcutta Police Act and sentenced to undergo three months' rigorous imprisonment. According to the Police Officer, P. W. 1, there were found in the house of the accused 23 ties, 3 pairs of gloves, 2 scarfs, 2 braces, 1 pair of stocking and 1 night cap. There is no evidence as to the condition of these things. The case

for the accused is that they are old, worn-out things such as are to be found with *bikriwallas* and are of no further use. For the purpose of sec. 54A of the Police Act, it is obligatory on the prosecution to show that there is reason to believe that the goods had been stolen or fraudulently obtained. It appears to me in this case that the mere evidence of the Sub-Inspector that second-hand articles of clothing were recovered from the house of the accused would hardly warrant us in saying that there is reason to believe that the articles found in the possession of the accused had been stolen or fraudulently obtained. There must necessarily be a great deal of property of this kind disposed of in Calcutta and I think without further evidence we ought to hold that the first condition necessary for a conviction under sec. 54A of the Police Act has not been established. That being so, I think the Petitioner is entitled to an acquittal. The Rule must, therefore, be made absolute and an order passed directing that the Petitioner be discharged from his bail. The articles may be returned to the Petitioner.

SUHRAWARDY, J.—I agree.

S. C. M. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD BUCKMASTER.

LORD ATKINSON.

LORD CARSON.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1921,

Heard, 8 and

9, December.

1922,

Judgment, 31, January.

T. B. RAMACHAN-
DRA RAO and

anr., Appellants,
v.

A. N. S. RAMA-
CHANDRA RAO and
ors., Respondents.

Res judicata—Question as to whether donee under a deed of settlement had absolute or life estate decided in proceeding under sec. 32 of Land Acquisition Act (I of 1894)—Decision, if may be

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reopened in regular suit—Res judicata, general principle of, not limited by Civil Procedure Code (Act V of 1908), sec. 11—Land Acquisition Act (I of 1894), sec. 54—"Award," if includes decision on disputed question as to disposition of compensation money—Gift by Hindu to wife whether limited or absolute—Principle of construction.

Under a deed of settlement executed by one R, one half of certain properties was given to his adopted son and the remaining half was given to his two wives who were to take the same half and half. One of these properties having been acquired by Government a question arose in a proceeding under sec. 32 of Act I of 1894 between the adopted son and one of the wives, as to whether the latter was absolutely entitled to her share of the compensation money or whether the same was to be invested, she having no right to alienate her interest in the property under the deed of settlement. The High Court, when the matter came up before it, held that by the deed of settlement the wife was intended to have a widow's estate only in the property devised. Subsequently the wife having bequeathed her properties to Respondent by Will, the representatives of the adopted son instituted a suit against the claimants under the Will alleging that she had a limited estate under the deed of settlement and had no power to dispose of the properties by Will:

Held—That it was not open to the Courts in this suit to review the decision of the High Court, in the proceeding under sec. 32 of Act I of 1894, that the lady had only a limited estate in the property without power of alienation.

It is not competent for the Court, in the case of the same question arising between the parties, to review a previous decision no longer open to appeal given by another Court having jurisdiction to try the second case.

This principle is of general application and is not limited by the specific words of sec. 11 of the Civil Procedure Code; so that the fact that the decision in question was not obtained in a "former suit" did not make any difference.

The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute, and the Defendants in the suit could not be heard to say that in view of the comparatively small value of the property involved in the proceeding under sec. 32 of Act I of 1894 it was not thought worth the while to appeal from the decision of the High Court in that proceeding.

HOOK v. ADMINISTRATOR-GENERAL OF BENGAL (8) and BADAR BEE v. HABIB AMERICAN NOORDIN (7) relied on.

The "award" as constituted by the Land Acquisition Act is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment amongst persons whose interests are not in dispute. A dispute between interested people as to the extent of their interest forms no part of the "award." The determination of such a dispute in the High Court was a decree and appealable as such to the Privy Council.

RANGOON BOTATOUNG COMPANY, LTD. v. THE COLLECTOR, RANGOON (4), SREEMATI TRINAYANI DASSI v. KRISHNA LAL DE (5) and BALARAM BHARAMARATAR RAY v. SHAM SUNDER NARENDRA (6) commented on.

It is not accurate to say that under the Hindu law, in the case of a gift of immoveable property to a Hindu widow, she has no power to alienate unless such power has

(4) L. R. 39 I. A. 187; s. c. 16 C. W. N. 961 (1912).

(5) 17 C. W. N. 935n (1910).

(6) I. L. R. 23 Cal. 526 (1890).

(7) L. R. [1909] A. C. 623.

(8) L. R. 48 I. A. 187; s. c. I. L. R. 48 Cal. 499; 25 C. W. N. 417 (1921).

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been expressly conferred, and it is possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including the power to alienate, without such express declaration—and the decisions of the Privy Council in SURAJMANI v. RABI NATH OJHA (1) and BHIDAS SHIVDAS v. BAI GULAB (3) do no more than affirm this proposition.

This was an appeal from a decree of the High Court, Madras, dated the 8th October 1918, which reversed a decree of the Subordinate Judge of Tanjore, dated the 29th October 1917.

There were two main questions for determination in the appeal:—

(1) As to whether on the true construction of a deed of settlement, dated the 6th August 1858 one Thulja Boyce, a Hindu widow, took a life estate or an absolute estate so that in the latter case she could convey to the Respondent.

(2) As to whether the principle of *res judicata* applied as between the parties.

The facts of the case may be shortly stated as follows:—

One Ramajee Bavajee Pandit was the owner of the suit properties amongst others. He died on the 10th August 1858. He had two wives Kamatchi and Thulja, but no issue. On the 6th August 1858, he took a boy (the father of the present Appellant) in adoption and on the same day executed a settlement deed. In this document after reciting the fact of the adoption, and providing for certain bequests and annuities he gave the following directions:—

“Out of the remaining property after deducting the above, my adopted son to whom I have given the name of Bavajee Pandit, shall be entitled to enjoy one half

of the property. Out of the remaining half of the property these two persons, namely, (my) senior wife Sowbhagiavathy Kamatchi and junior wife Sowbhagiavathy Thulja shall take half and half.”

On the 19th July 1860, the senior widow Kamatchi as guardian of the adopted son Bavajee Ramajee Pandit, executed a *kararname* by which the suit properties were given to Thulja Boyce for her one-fourth share to be enjoyed by her according to the directions mentioned in the settlement deed of 1858.

In 1871, Kamatchi's quarter share under the deed of 1858 was separated from that of the adopted son and was put in her possession. Some of these properties were usufructually mortgaged in 1880 to Thulja Boyce by Kamatchi Boyce to satisfy a decretal claim against her. Thulja Boyce enjoyed the said properties till the death of Kamatchi Boyce in 1889, and delivered possession of the same to Bavajee Ramajee.

In 1894, 1 acre and 74 cents of land in the possession of Thulja Boyce was acquired by Government. In the Land Acquisition proceedings the question as to what estate the widow Thulja Boyce took under the deed of 1858 was raised, and the High Court held, “there being no indication of intention to give a large estate we must assume that the husband intended that a widow's estate only should pass.”

On the 10th June 1911, Thulja Boyce executed a Will in favour of the 1st Respondent.

Again, on the 11th January 1916, Thulja executed another Will in favour of the 1st Respondent, bequeathing all her movable and immovable properties to him.

Thulja died on or about the 2nd April 1916.

The adopted son Bavajee Ramajee Pandit also died leaving two sons, the pre-

(1) L. R. 35 I. A. 17: s. c. I. L. R. 30 All. 84; 12 C. W. N. 231 (1907).

(3) L. R. 49 I. A. 1: s. c. 26 C. W. N. 129 (1921).

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sent Appellant and his brother Jevanna Row (now deceased).

On the 12th July 1916, the surviving Appellant and his brother Jevanna Row instituted the present suit in the Court of the Subordinate Judge of Tanjore against the Respondents for recovery of possession of the suit properties with future mesne profits and costs.

The Subordinate Judge found that Thulja had only a limited estate and no power to dispose of the properties by Will. On the question of *res judicata*, he held that the extent of Thulja's interest with regard to properties the subject-matter of the Land Acquisition proceedings had already been adjudicated upon in those proceedings.

On appeal the decree of the Subordinate Judge was set aside by the High Court of Madras except in regard to the property comprised in the Land Acquisition proceedings.

From this decree the Appellant appealed to His Majesty in Council.

Mr. DeGruyther, K. C. (with him Mr. Narasimham) for the Appellants.—There is no doubt that it is possible for a Hindu widow to take an absolute estate.

This proposition is fully discussed in the recent cases before the Board. *Mussamat Sasiman Chowdhurain v. S. N. Chowdhury* (2) and *Bhaidas Shivdas v. Bai Gulab* (3) applying the principles laid down in *Radha Prosad Mullick v. Ranimoni Dassi* (9).

In the present case there was an ordinary gift by husband to wife which created no heritable estate.

If the gift is construed as "*stridhan*"

the immoveables are inalienable. *Hari Lal v. Bai Rewa* (10) and *Motilal Mithalal v. Advocate-General of Bombay* (11).

Reference was also made to:—

Mayne's Hindu Law, para. 664. Vyavastha Chandrika, Vol. II, p. 510. *Hirabai v. Lakshmibai* (12), *Caralapathi Cunniah v. Cota Nammalvariah* (13), *Jamna Das v. Ramautar Pande* (14), *Atul Krishna Sircar v. Sanyasi Churn Sircar* (15) and *Koonjbehari Dhur v. Premchand Dutt* (16).

On the question of *res judicata*:—

The construction of this grant in favour of Thulja Boyee was before the Court in the Land Acquisition proceedings in 1894 and was then adjudicated upon by the Court.

It is now *res judicata* and cannot be reopened

Reference was also made to the following:—

Land Acquisition Act, I of 1894, secs. 30 and 53. *Mahadevi v. Neelamani* (17), *Sri Braja Kisora Debu Garu v. Sri Kandana Devi Palta Mahadevi Garu* (18), *Secretary of State for India in Council v. India General Steam Navigation and Railway Company, Limited* (19), *Ram Kirpal Shukul v. Rup Kuari* (20), *Hook v. Administrator-General of Bengal* (8), *Sheopursan Singh v. Ramnandan Singh*

(8) L. R. 48 I. A. 187; s. c. I. L. R. 48 Cal. 499; 26 C. W. N. 915 (1921).

(10) I. L. R. 21 Bom. 376 (1895).

(11) I. L. R. 35 Bom. 280 (1910).

(12) I. L. R. 11 Bom. 573 (1897).

(13) I. L. R. 33 Mad. 91 (1909).

(14) I. L. R. 27 All. 364 (1904).

(15) I. L. R. 32 Cal. 1051; s. c. 9 C. W. N. 784 (1905).

(16) I. L. R. 5 Cal. 684 (1880).

(17) I. L. R. 20 Mad. 269 (1896).

(18) I. L. R. 22 Mad. 431 (P. C.) (1899).

(19) L. R. 36 I. A. 200; s. c. 14 C. W. N. 134 (1909).

(20) L. R. 11 I. A. 37; s. c. I. L. R. 6 All. 269 (1883).

(2) L. R. 49 I. A. 25; s. c. 26 C. W. N. 425 (1921).

(3) L. R. 49 I. A. 1; s. c. 26 C. W. N. 129 (1921).

(9) L. R. 35 I. A. 118; s. c. 12 C. W. N. 729 (1908).

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(21), *Rangoon Botatoung Coy., Ltd. v. The Collector, Rangoon* (4), *Badar Bee v. Habib Merican Noordin* (7) and *Ram Chunder Singh v. Madho Kumari* (22).

Mr. Dubé for the Respondents.—The High Court has held that the principle of "*res judicata*" applies to certain of the properties but I do not admit the correctness of that decision. The doctrine of "*res judicata*" is inapplicable for several reasons. (1) The proceedings under the Land Acquisition Act are of a summary nature, and the main question in those proceedings relates to the amount of the award, *vide* the pre-amble. Such proceedings terminate in an award. In case of dispute as to apportionment of the amount awarded, reference is made to the Court which proceeds to investigate it and makes an order under sec. 32 of the Act, but such orders are not necessarily judicial decisions. The money is invested in the purchase of other lands to be held under the like title and conditions of ownership. Reference was made to the various sections of the Act. (2) Proceedings under the Land Acquisition Act are not a suit within the meaning of sec. 11 of the Code of Civil Procedure, 1908. (*Vide* Messrs. Woodroffe and Ameer Ali's Civil Procedure Code, p. 103). (3) There is no appeal to His Majesty in Council from a decision of the High Court under sec. 54 of the Land Acquisition Act. There is only one appeal allowed by the Act and that is to the High Court. *Rangoon Botatoung Coy., Ltd. v. The Collector, Rangoon* (4) and *The Special Officer, Salsette Building Sites v. Dasabhai Bezanji Motiwala* (23).

(4) L. R. 39 I. A. 197 : s. c. 16 C. W. N. 961 (1912).

(7) L. R. [1909] A. C. 615.

(21) L. R. 43 I. A. 91 : s. c. 20 C. W. N. 738 (1916).

(22) I. L. R. 12 Cal. 484 (1885).

(23) 17 C. W. N. 421 (P. C.) (1913).

Since these pronouncements of the Board there has not been a single appeal in a proceeding under the Land Acquisition Act.

[LORD BUCKMASTER.—The case of *Rangoon Botatoung Coy., Ltd. v. The Collector, Rangoon* (4) decided that there was no appeal from an award, but there may be an appeal to the Board from a decree made under such proceedings.]

Mr. Dubé.—All orders or decisions made in proceedings under that Act culminate in an award or form part of an award. All the High Courts in India have taken that view. A decision made under sec. 32 of that Act is part of an award.

Reference was made to the following :—

Mahadevi v. Neelamani (17), *Sheo Rattan Rai v. Mohri* (24), *Dirgaj Deo v. Kali Charan Singh* (25), *Mulambath Kunhammad v. Acharath Parakat Kathiri Kutli* (26), *Shiva Rao v. Nagappa* (27) and *Srimaty Trinayani Dassi v. Krishna Lal* (5).

It is inconceivable that in a case where no appeal lies to the King in Council the decision should be held to operate as *res judicata*. The value of the property in dispute in the Land Acquisition case was very small, and a suit with reference to it could have been brought in the lowest Civil Court, namely, that of a Munsif. *Ran Bahadur Singh v. Lucho Koer* (28).

The cases cited on behalf of the Appellants, *Ram Kirpal Shukhl v. Rup Kuari* (20) and *Hook v. Administrator*

(4) L. R. 39 I. A. 197 : s. c. 16 C. W. N. 961 (1912).

(5) 17 C. W. N. 925n (1910).

(17) I. L. R. 20 Mad. 269 (1896).

(20) L. R. 11 I. A. 37 : s. c. I. L. R. 6 All. 269 (1883).

(24) I. L. R. 21 All. 354 (1899).

(25) I. L. R. 34 Cal. 466 (1907).

(26) 31 Mad. L. J. 827 at pp. 832, 834 (1916).

(27) I. L. R. 29 Mad. 117 (1905).

(28) L. R. 12 I. A. 23 at p. 36 : s. c. I. L. R. 11 Cal. 301 (1884).

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General of Bengal (8) are distinguishable. They refer to decisions in the same suit, the former in execution proceedings and the latter in a subsequent stage of the same action.

[SIR LAWRENCE JENKINS refers to *Ram Chunder Singh v. Madho Kumari* (22).]

Mr. Dubé.—In that case the decision which was held to operate as *res judicata* was not pronounced in summary proceedings under the Land Acquisition Act, but in a civil suit tried in the regular way.

English decisions, such as *Badar Bee v. Habib Merican Noordin* (7) and *Pearce v. Marriott* (29) are inapplicable to the Indian procedure.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—On the 6th August 1858, Ramajee Bavajee Pandit, who died on the 10th August 1858, executed a deed of settlement of all his moveable and immoveable properties. It is prefaced by a statement that he had adopted Panchapikes, the second son of Mahasubd Rajaram, and after various gifts and dispositions which are not material, it continued in these terms:—

"Out of the remaining property, after deducting the above, my adopted son, to whom I have given the name of Bavajee Pandit, shall be entitled to and enjoy half of the property. Out of the remaining half of the property these two persons, namely, (my) senior wife Sowbhagiavathy Kamatchi and junior wife Sowbhagiavathy Thulja shall take half and half."

In 1894 one acre and 74 cent. of the land so given, and then in the possession of Thulja Boyee, was acquired by the

Government. The usual proceedings for determining the amount of compensation appear to have taken place, and no dispute arose as to the award, but a question did arise as between Ramajee Bavajee Pandit, the adopted son, and the widow as to the character and extent of the estate that she took under the Will. If she took absolutely, the money could be divided forthwith; but if she took a limited interest, her share would have to be invested. It was consequently necessary that this dispute should be determined in order that the compensation monies should be properly dealt with. Sec. 31, sub-sec. 2. of the Land Acquisition Act, 1894, expressly contemplates this position, for after referring in sub-sec. 1 to the payment of the compensation by the Collector to the persons interested, sub-sec. 2 provides that "if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under sec. 18 would be submitted." Sec. 18 does not define the Court; this is done by sec. 3, sub-sec. D, which provides that a Court means a principal Civil Court of original jurisdiction, unless a special judicial officer within specified limits has been appointed to perform the functions of the Court under the Act. Sec. 32 further provides that when money has been deposited in Court under sub-sec. 2 of sec. 31, and it appears that the land whereof the same was awarded belonged to any person who had no power to alienate, the Court shall order the money to be invested as therein mentioned. Now the dispute between Bavajee and the widow was plain upon the face of the document. It depended upon whether the deed had conferred an absolute herit-

(7) L. R. [1909] A. C. 615 at p. 623.

(8) L. R. 48 C. L. 187; a. c. I. L. R. 48 Cal. 498; 25 C. W. N. 915 (1921).

(22) I. L. R. 12 Cal. 434 (1885).

(29) L. R. [1893] 22 Ch. D. 182.

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able and alienable estate upon the widow, or whether she took either a limited Hindu widow's estate or a heritable estate which she was incapable of alienating. What the actual proceedings were that ensued between them is not plain, but they must have come before the District Court of Tanjore, for the grounds of appeal from the order of that Court are before their Lordships, and from these it appears that the District Judge had held that the widow had an absolute estate. From this decision Bavajee brought the appeal to the High Court of Judicature at Madras. Judgment was delivered by the High Court on the 13th July 1897, by Sir Arthur Collins, C. J., and Mr. Justice Shephard. Their judgment is short, and, as it throws considerable light upon the whole proceedings, it is desirable that it should be reproduced in full. It is as follows :—

“The first question is what estate the widow Thulja Boyee took under the gift of 1858. We cannot agree with the District Judge that the law is ‘unsettled on the question of such gifts. There being no indication of intention to give a large estate, we must assume that the husband intended that a widow's estate only should pass. This being so it is quite clear that secs. 31 and 32 of the Act apply. The order must be set aside as the parties are not agreed as to the mode in which the money should be invested.

“We must direct the District Judge to pass order under the provisions of sec. 32. Each party to bear his own costs of this appeal.”

On the 10th June 1911, and again on the 11th January 1916, Thulja Boyee executed Wills and bequeathed all her moveable and immoveable properties to the first Respondent; she died on the 2nd April 1916. The adopted son, Bavajee Ramajee Pandit, also died at a date subsequent to the decision of the High Court, but the exact time is not

stated, nor is it material, and the present Appellant and his brother Jeevanna Rao, now deceased, were his two sons. On the 12th July 1916, they instituted the suit out of which these proceedings have arisen against the claimants under Thulja's Will, alleging that she had only a limited estate under the deed of settlement, and that she had no power to dispose of the properties by Will. The learned Subordinate Judge decided in their favour, but this decision was reversed by the High Court, from whose decree the present appeal has been brought. Both the judgments of the Subordinate Judge and the High Court depended upon the true effect of the deed of settlement, but for reasons which their Lordships will shortly explain, they do not think that this question was open to either of the Courts.

Their Lordships do not, therefore, propose to embark upon the consideration of what the effect of the deed of gift in favour of Thulja Boyee might be correctly determined to be, but as some misapprehension appears to exist as to the effect of certain decisions of the Board, and notably one in *Mussammat Surajmani v. Rabi Nath Ojha* (1), their Lordships think it desirable to remove this doubt, lest error should creep into the administration of the law in India with regard to the rights of a Hindu widow. In the case referred to, *Mussammat Surajmani v. Rabi Nath Ojha* (1), when originally heard before the High Court it had been stated that under the Hindu law in the case of a gift of immoveable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to

(1) L. R. 35 I. A. 17; s. c. I. L. R. 30 All. 84; 12 C. W. N. 231 (1907).

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convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration. In that case it is true that there is some comparison drawn between the gift to a widow and a gift to a person not under disability, but that was not the foundation of the decision, which depended entirely upon the wide meaning attributed to the words in which the gift to the widow was clothed. More recent decisions of this Board [in *Mussummat Sasiman Choudhurain v. Shib Narayan Chowdhury* (2) and *Bhaidas Shivdas v. Bai Gulab* (at present unreported) (3)] do nothing but repeat this same proposition in other words. The importance of preventing confusion due to the contrasting of different phrases used in distinct cases to express the same idea has led their Lordships to make this explanation, but the points argued as to the effect of the gift in the present case are not now open to consideration, for in their Lordship's opinion the decision given on the 13th July 1897, by the High Court at Madras is a clear and complete determination as between the parties to that suit and those claiming under them which the present litigants cannot dispute.

It is urged on behalf of the Respondents that the judgment cannot be so regarded because it arose out of proceedings under the Land Acquisition Act, 1894, and for the purpose of their arguments they rely upon the case of *Rangoon Botatoung Company, Limited v. The Collector, Rangoon* (4). There appears to be some misapprehension in the Courts in India as to the effect of this authority which it is desir-

able should be removed. Under the Land Acquisition Act there are two perfectly separate and distinct forms of procedure contemplated. The first is that necessary for fixing the amount of the compensation and this is described as being an award. By sec. 54 an appeal from that award or of any part of the award is given to the High Court. The case in *Rangoon Botatoung Company, Limited v. The Collector, Rangoon* (4) decided that in those circumstances the appeal so given was the only one open to the parties, and that even if appealed against, the award still retained its characteristics and was incapable of further appeal. The argument which succeeded in that case emphasizes the distinction between an award and a decree, and the judgment mentions this in terms by stating that the Appellants, although admitted to the High Court, could not have the right to carry an award made under an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree, of the High Court made in course of its original jurisdiction. The manifest inconvenience that would attend any such proceeding is also pointed out, but neither this judgment nor any other judgment of this Board affects the question of an appeal on the totally different proceedings that arise when there is a dispute as between the persons claiming compensation involving, as it does in this case, a difficult question of title. When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end; the duty of the Collector in case of dispute as to the relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their

(2) Since reported: L. R. 49 I. A. 25: s. c. 26 C. W. N. 425 (1921).

(3) Since reported: L. R. 49 I. A. 1: s. c. 26 C. W. N. 129 (1921).

(4) L. R. 39 I. A. 197: s. c. 16 C. W. N. 961 (1912).

(4) L. R. 39 I. A. 197: s. c. 16 C. W. N. 961 (1912).

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right and title to the property may be. That is exactly what occurred in the present case. How the proceedings were commenced is a matter that is not material provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board. It is true that in the case of *Sreemati Trinayani Dassi v. Krishna Lal De* (5), following an earlier case, *Balaram Bharamatar Ray v. Sham Sunder Narendra* (6), it was decided that an order under sec. 32 may appropriately be deemed as an integral part of the award made by the Court, but their Lordships regard this as a misapprehension as to the meaning of the award. The award as constituted by statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under sec. 31 (2) the functions of the award have ceased; and all that is left is a dispute between interested people as to the extent of their interest. Such dispute forms no part of the award, and it would indeed be strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal which would be wholly taken away when the piece of land was represented by a sum of money paid into Court. There has in the present case been a clear decision upon the very point now in dispute which cannot be re-opened. The High Court appear only to have regarded the matter as concluded to the extent of the compensation money, but that is not the true

view of what occurred, for as pointed out in *Bardar Bec v. Habib Merican Noordin* (7), it is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision, no longer open to appeal, given by another Court having jurisdiction to try the second case. If the decision was wrong, it ought to have been appealed from in due time. Nor in such circumstances can the interested parties be heard to say that the value of the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were admissible, there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute. It has been suggested that the decision was not in a former suit, but whether this were so or not makes no difference, for it has been recently pointed out by this Board in *Hook v. Administrator-General of Bengal* (8), that the principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code in this respect. Their Lordships will therefore humbly advise His Majesty that the decree appealed from be reversed, and the decree of the Subordinate Judge restored with costs here and in the Courts below.

Solicitor: *Mr. Douglas Grant* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Respondents.

G. D. M.

(7) L. R. [1909] A. C. 615 at 623.

(8) L. R. 48 I. A. 187; s. c. I. L. R. 48 Cal. 499; 25 C. W. N. 915 (1921).

(5) 17 C. W. N. 935n (1910).

(6) I. L. R. 23 Cal. 526 (1890).

PRIVY COUNCIL.

[APPEALS FROM BENGAL.]

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1919,

31, October.

MOHUNT BHUG-

WAN RAMANUJ

DAS, Appellant,

v.

RAMKRISHNA

BOSE and anr.,

Respondents.

Limitation Act (XV of 1877), Sch. II, Art. 139—Lease of endowed land for a term by Mohunt—No rent paid for over 12 years after the expiry of lease—Successor of Mohunt, if may sue to recover possession.

The mohunt of a math granted a lease of land belonging to the math for a term which expired in 1880. It was found that no rent was ever paid since the expiration of the lease, more than 12 years after which the succeeding mohunt sued to recover the land from the successors of the lessee:

Held—That the High Court was right in holding that the suit was barred under Art. 139 of Sch. II of the Limitation Act of 1877.

This was an appeal from a judgment and decree of the Calcutta High Court (Fletcher and Richardson, J.J.), dated the 15th July 1915, affirming on review a previous judgment of the said Court passed on 28th May 1915, whereby the said Court reversed the decision of the Subordinate Judge of Cuttack, dated the 28th March 1902, and dismissed the suit of the Plaintiff.

The Plaintiff, the mohunt of a math brought this suit in 1911 to recover possession of over 42 acres of land in the town of Puri upon declaration of Plaintiff's title, on the allegation that the disputed land was *lakheraj bahali amrita morahi* land of Dakhin Parah, a math of which the Plaintiff was the mohunt, and that the Defendants had got no title to it. The Defendants *inter alia* pleaded that the suit was barred by limitation. It appears that one Sriram Dutta held the disputed land as a

tenant under the math, that one Radha Mohan Bose purchased the tenancy right in the *benami* of Bishnupriya Dasi on 23rd September 1862, and that thereafter Bishnupriya executed a *kabuliyat* also as *benamdar* of Radha Mohan for 18 years in favour of the then Mohunt Chaturbhuj Das from 1270 to 1288 B. S.; and that the Defendants were persons who claimed through the said Radha Mohan Bose. The Plaintiff alleged that after the expiry of the lease the Defendants were in possession under a verbal lease or arrangement entered into between Hurry Bullubh Bose, uncle of the Defendants, and a predecessor of the Plaintiff. The trial Court disbelieved the said story of the verbal arrangement or lease alleged by the Plaintiff and found that since the termination of the lease in favour of Bishnupriya in 1880, Bishnupriya or the Defendants or Radha Mohan or his sons never paid any rent to the math. The trial Court accordingly held that Plaintiff's, the present mohunt's, claim to recover possession of the land was barred by Art. 139 of Sch. II of the Limitation Act of 1877. The trial Court was however of opinion that as by the *kabuliyat* executed by Bishnupriya, the title of the math to the land was admitted and proved, the Plaintiff was entitled to a decree declaring the title of the math to the land in suit.

An appeal against the decision of the Subordinate Judge to the High Court was heard in the first instance *ex parte* and the following judgment was delivered on 28th May 1915:—

FLETCHER, J.—This is an appeal from a decision of the learned Subordinate Judge of Cuttack, dated the 28th March 1912. The Defendants are the Appellants before us. The Plaintiff brought this suit to recover possession of certain lands from the Defendants. One of the issues raised in the case was whether the suit was barred by limitation. The learn-

MOHUNT BHUGWAN RAMANUJ DAS v. RAMKRISHNA BOSE.

ed Judge found that the suit was barred by limitation; but he considered that as the title was originally in the Plaintiff, he ought to give the Plaintiff relief by way of making a declaration of title in his favour. Against that decision, the present Defendants have appealed to this Court. From the facts found by the learned Judge of the Court below, it is clear that the case is barred by limitation. The learned Judge also found so. The Defendants' ancestor had a lease of this property, which expired more than 12 years ago. At any rate, the learned Judge has found that no fresh agreement was entered into between the parties nor was there any evidence from which it could be inferred that there was a new tenancy. The question, therefore, arises, "Does Art. 139 of the Second Schedule to the Indian Limitation Act apply to a case like this?" The decisions of this Court are that Art. 139 does apply. A tenancy by sufferance by a tenant holding over whose lease has expired, does not apply in this country. That has been held in the case of *Madan Mohan Gossain v. Kumar Rameshwar Malia* (1). A similar view has been adopted by the Bombay High Court in the case of *Chandri v. Daji Bhau* (2). The result, therefore, is that the present suit is, as the learned Subordinate Judge says, clearly barred by limitation. The learned Judge, however, has considered that in a case of this nature, when the suit is barred, the title still remains vested in the Plaintiff. That obviously is not so: under sec. 28 of the Indian Limitation Act, it is expressly provided that at the expiration of the period prescribed by the Act for limitation of suits, not only is the remedy barred but the right is gone. That is quite clear. That being so, the statute has operated to

revoke the estate that was originally vested in the Plaintiff, and to confer a statutory estate upon the Defendants. In that view, the judgment appealed from cannot be supported. The present appeal must, therefore, be allowed and the Plaintiff's suit dismissed with costs both in this Court as well as in the lower Court. The hearing-fee will be according to the scale of the Court on the value of the suit.

Nobody appearing in support of the cross-appeal it is dismissed.

RICHARDSON, J.—I agree.

Subsequently an application for review of the judgment having been granted, the appeal was re-heard in the presence of both parties and the following judgment was delivered on 15th July 1915:—

FLETCHER, J.—The point that we dealt with on the last occasion was a point of law arising on the findings of fact made by the learned Subordinate Judge in his judgment. On that occasion, Sir Rash Behari Ghose on behalf of the Appellants accepted the findings of fact made by the learned Subordinate Judge, and argued that the learned Judge had arrived at a wrong conclusion on a point of law. We accepted the argument put forward by Sir Rash Behari, and decreed the appeal. On the appeal coming on before us for re-hearing, both sides agree that, on the findings of fact made by the learned Judge of the Court below, his judgment cannot stand. But the learned Counsel for the Plaintiff, Respondent, has asked us to dissent from the findings of fact made by the learned Subordinate Judge, on which his judgment is based. The Defendants who are the Appellants before us, claim through their grand-father who had got a lease of the property for 18 years in the *benami* of Bishnupriya. That lease expired in 1880. The story put forward by the Plaintiff is that there was a verbal lease

(1) 7 C. L. J. 615 (1907).

(2) I. L. R. 24 Bom. 504 (1900).

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or arrangement between one Hari Ballav Bose and the former Mohunt Hayagriha in the year 1287. The evidence shows that the late Mohunt Hayagriha was gathered to his fathers before the date of the lease. An attempt was made by some of the Plaintiff's witnesses to place this verbal arrangement at an earlier date before the death of Hayagriha. That was the case which the Plaintiff invited the learned Judge to express his opinion on, and when that case failed as false the learned Judge clearly and rightly refused to enter into a consideration of the case that this man Hari Ballav had entered into some arrangement other than that set up, resulting in his possession of the property as a licensee. In that, I think, the learned Subordinate Judge was quite right. The documentary evidence read to us leaves no doubt in my mind that Hari Ballav was connected with the property solely as a relative or guardian of the two present Defendants. The documentary evidence seems to me to be conclusive on that. This story about the verbal lease to Hari Ballav or his entering into possession of the property as a licensee in his own right, I am satisfied, is wholly untrue. On the evidence, I am clearly of opinion that the learned Subordinate Judge came to a correct conclusion. That being so, the learned Judge was right when he held that the suit was barred by limitation. We pointed out in our former judgment that on that finding the learned Judge was not entitled to give to the Plaintiff the relief that he has given. For the second time, I must express my dissent from the result arrived at by the learned Judge of the Court below. The appeal must, therefore, be decreed and the Plaintiff's suit dismissed with costs in both Courts.

RICHARDSON, J.—I agree.

The Plaintiffs thereupon preferred the present appeal to His Majesty in Council.

Messrs. L. DeGruyther, K. C. and Dubé for the Appellant.

Sir William Garth for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—In the opinion of their Lordships, no reason has been shown for disturbing the judgment of the High Court. The question of fact is concluded by the concurrent findings of the Courts below.

Their Lordships will humbly advise His Majesty that the appeal stand dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2561 of 1919.

<p>CHATTERJEA, J. PANTON, J. 1922, 13, January.</p>	}	<p>RAKHAL CHANDRA GHOSE and ors., Plaintiffs, Appellants, v. DURGADAS SAMANTA and ors., Defendants, Respondents.</p>
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Limitation Act (IX of 1908), Art. 142, applicability of, in a suit for recovery of possession of land, upon allegation of dispossession—The onus of proving possession within twelve years of suit, on Plaintiff—Onus of proving adverse possession for 12 years, if lies on Defendant when Plaintiff's title is proved—Cases where the presumption about possession following title arises—Diluviated, waste or jungle land, law as to, if different.

Plaintiff sued for recovery of possession of a certain land on declaration of his title thereto. The Plaintiff and the Defendant were putnidars under two separate Touzis, both the Touzis being situate in the same village. The Plaintiff claimed the land as appertaining to his Touzi while the Defendant claimed it as part of his Touzi. The lower Appellate Court found title with the Plaintiff but that he had failed to prove possession within 12 years of suit

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and accordingly held that the suit was barred by limitation:

Held—That the case was governed by Art. 142 of the Limitation Act.

Where the Plaintiff while in possession has been dispossessed and is out of possession at the date of the suit, the onus is upon him to prove that he was in possession and was dispossessed within 12 years of the suit.

MOHARAJA KOOWAR NITRASUR SINGH v. NUND LAL SINGH (1), RAJAH SAHEB PERILAD SEIN v. MOHARAJA RAJENDRA KISHORE (2), BEER CHUNDER JOOBRAJ v. THE DEPUTY COLLECTOR OF BHOOLOAH (3) and other cases discussed and followed.

KARAN SINGH v. PAKAR ALI KHAN (7), RADHA GOBINDA ROY v. INGLIS (8) and other cases distinguished.

In cases under Art. 142 of the Limitation Act, although the Plaintiff's title is proved, the onus is not upon the Defendant to show that the Plaintiff lost his title by adverse possession on the part of the Defendant.

Possession is not necessarily the same thing as actual user. The nature of the possession to be proved by the Plaintiff, and the evidence of its continuance must depend upon the character and condition of the land in dispute. Where the land is incapable of actual enjoyment, as in the case of dilution by rivers, if the Plaintiff shows his possession down to the time of dilution, his possession is presumed to continue so long as the lands continue to be submerged.

In cases where the land is not incapable of enjoyment, but may produce some pro-

fit though trifling in amount and only of occasional occurrence, as is so often the case with jungle land, all that can be required is that the Plaintiff should show such acts of ownership as are natural under the existing condition of the land and in such cases when he has done this his possession is presumed to continue so long as the state of the land remains unchanged unless he is shown to have been dispossessed.

In waste as well as jungle lands possession may be exercised by grazing cattle, putting up boundary marks or fences and the like.

The cases of diluviated lands or jungle or waste lands are thus no exception to the general rule that a Plaintiff who is dispossessed and brings a suit for recovery of possession must show that he was in possession within 12 years of the suit.

MONOMOCHAN ROY v. MATHURA MOHAN ROY (16), RAJ KUMAR ROY v. GOBIND CHANDRA ROY (17), MAHOMAD ALI v. KHAJA ABDUL (11) and other cases referred to and discussed.

In the case of jungle or waste lands if the Plaintiff proves his title, there is a presumption of possession in his favour, where having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the Plaintiff asserts that he exercised acts of ownership and adduces evidence in support thereof, which is disbelieved by the Court, he cannot turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption, and is inconsistent with it.

(1) 8 M. I. A. 199 (1860).

(2) 12 M. I. A. 292, 337 (1869).

(3) 18 W. R. P. C. 23 (1870).

(7) L. R. 9 I. A. 99; s. c. I. L. R. 5 All. 1 (1882).

(8) 7 C. L. R. 364 (1880).

(11) I. L. R. 9 Cal. 744, 750 (F. B.) (1883).

(16) I. L. R. 7 Cal. 225 (1881).

(17) L. R. 19 I. A. 140; s. c. I. L. R. 19 Cal. 660 (1892).

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The presumption that possession follows title can be raised where the evidence is equally strong on both sides, and cannot be called in aid to give weight to evidence unworthy of credit.

RUNJEET RAM PANDEY v. GOBORDHAN RAM PANDEY (20), DHARAM SINGH v. HAR PROSAD (21) and several other cases discussed and followed.

This was an appeal against the decree of P. C. De, Esq., District Judge of Zillah Birbhum, dated the 4th of September 1919, affirming the decree of Babu Hiralal Mukherjee, Munsif, 1st Court at Bolpur, dated the 30th of January 1919.

The facts will appear from the judgment.

Babus Jogesh Chandra Roy and Sarat Chandra Mukherjee for the Appellants.

Babus Sarat Chandra Roy Chowdhury and Hemendra Nath Sen for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for recovery of possession of the land in dispute on declaration of the Plaintiffs' title thereto. The Plaintiffs and the Defendants are *putnidars* under the owners of 'Touzis 92 and 14 respectively, both the 'Touzis being situate in the same village. The Plaintiffs claimed the land as appertaining to Touzi No. 92 while the Defendants claimed it as part of Touzi No. 14.

The Court of first instance held that the Plaintiff had failed to prove both title and possession and dismissed the suit. The learned District Judge on appeal found that Plaintiff's title was proved, but that he failed to prove possession within 12 years and accordingly dismissed the suit. The Plaintiff has appealed to this Court.

It is contended on behalf of the Appel-

lant first that the title having been found to be with the Plaintiffs the onus was upon the Defendant to prove that the claim was barred by limitation by reason of adverse possession on his part. Secondly that in any case having regard to the nature of the land the onus should have been placed on the Defendant. Thirdly that the evidence on both sides having been found to be unsatisfactory, there was a presumption that possession follows title.

With regard to the first contention it is to be observed that Plaintiffs alleged that they were in possession of the land which was *khas patit*, and that the Defendant excavated a tank on the land in spite of the objections of the Plaintiff, 4 or 5 years before the suit, claiming the same as part of his *patni mahal*, and they were accordingly dispossessed from the land. The case therefore clearly was one under Art. 142 of the Limitation Act. It is well-settled that where the Plaintiff while in possession has been dispossessed and is out of possession at the date of suit . . . the onus is upon him to prove that he was in possession and was dispossessed within 12 years of the suit.

It is contended, however on behalf of the Appellants that some of the authorities show that where Plaintiffs' title is proved, the onus is upon the Defendant to show that the Plaintiff lost that title by adverse possession for 12 years on the part of the Defendant. It is necessary therefore to examine the authorities on the point.

One of the earliest cases is that of *Moharaja Koorwar Nitrasur Singh v. Nund Lal Singh* (1). In that case, it appears that decrees were made in the year 1816 in suits respecting disputed boundaries of certain mouzahs in two Zemindaries, and the boundary line was determined. In 1845 a suit was brought by the representatives of one of the parties in the above suits

(20) 20 W. R. 25 (P. C.) (1873).

(21) I. L. R. 12 Cal. 38 (1885).

(1) 8 M. I. A. 199 (1860).

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to recover land alleged to be part of one of these mouzas, which land, it was admitted by the Plaintiff that the Defendants had been in possession of since the year 1834. It was pleaded in defence first that the land claimed was within the boundary declared by the decrees of 1816 to belong to the Defendants; and secondly that the Plaintiff or those under whom he claimed had been out of possession for upwards of twelve years and that the cause of action was consequently barred by Reg. III of 1793, sec. 16. Lord Justice Turner in delivering the judgment of the Judicial Committee observed that the issue of possession is the first to be considered in this case and that it is wholly independent of the boundary question. The Appellant is seeking to disturb the possession, "admitted to have existed for about eleven years, of Defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the regulation puts it) on a dispossession within twelve years next before the commencement of the suit; and, therefore, that he, or some person through whom he claims, was in possession during that period. No proof of anterior title such as would be involved in the decision of the boundary question in his favour, can relieve him from the burden, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession. The lands in question may have been part of Mouzah Gopaulpore, and as such may have been enjoyed by his ancestor and yet he may have lost, by lapse of time, his right to recover them. Their Lordships, therefore, propose to consider in the first place, what evidence there is that the Appellant, or any person through whom he claims, was in possession of the

lands in question at any time within twelve years next before the commencement of the suit."

In 1869 in the case of *Rajah Sahab Perhlad Sein v. Moharaja Rajendra Kishore* (2), the Judicial Committee affirmed the same principle. Their Lordships observed: "The Appellant comes into Court admitting upon the face of the plaint that he is out of possession and has been so for more than ten years; and the date which he assigns to his dispossession is the 20th of March 1881. Upon the issue as settled by the Court it lay upon him to establish that he was in possession up to that date; or, failing in that, that the date at which he or some former proprietors of Ramnuggur was last in possession is consistent with a right to institute this suit. Act VIII of 1859, sec. 32 shows that the Plaintiff is bound to satisfy the Court, that his right of action is not barred by lapse of time."

In 1870 again in the case of *Beer Chunder Joobraj v. The Deputy Collector of Bhooloah* (3) where the Plaintiff brought a suit to recover immoveable property which was in the possession of the Defendant since 1845 and at the time of the institution of the suit it was held by their Lordships that "it was essential for the Appellant (the Plaintiff in that case) to have proved two things—first, possession within twelve years before his suit, and secondly, title to possession . . . the onus of proof rests with the Appellant."

The question again came up before the Judicial Committee in 1888 in the case of *Mohima Chander Mozumdar v. Mohesh Chander Neogi* (4). There the Plaintiffs had shown that they formerly were proprietors of the lands to which they alleged title

(2) 12 M. I. A. 292, 337 (1869).

(3) 13 W. R. P. C. 23 (1870).

(4) L. R. 16 I. A. 23; s. c. I. L. R. 16 Cal. 473 (1888).

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and from which they claimed to oust the Defendants, but they had been dispossessed or their possession had been discontinued some years before the suit was brought by them, and the lands were occupied by the Defendants who denied their title. The Plaintiffs were found to be the rightful owners, but their Lordships observed that the question for decision was not "whether or not the title of the Defendants was created just after the disturbance or otherwise but when were the Plaintiffs dispossessed or when did they discontinue possession" "This in reality is what in England would be called an action for ejectment, and in all actions for ejectment where the Defendants are admittedly in possession, and *a fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the Plaintiff to prove his own title. The Plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships, that in this case, the onus is thrown upon the Plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit, namely, for the two or three years prior to the year 1875 or 1874, and that it does not lie upon the Defendants to show that in fact the Plaintiffs were so dispossessed."

In the next year (1889), in the case of *Mahammad Amanullah Khan v. Badan Singh* (5), the Judicial Committee again held that if a claim comes within the terms of Art. 142, adverse possession is not required to be proved in order to maintain a defence.

Lastly in 1906 under Act XV of 1877 in the case of *Rani Hemanta Kumaree v. Moharaja Jogadindra Nath Roy* (6) the

Judicial Committee affirmed the same principle. Their Lordships observed :—"The difference between the admitted possession and the period of limitation being so narrow (one year) the question of onus is important : and their Lordships adhere to the principle stated in the Privy Council case cited by the learned Judge in the High Court [*Mohima Chander Mozundar v. Mohesh Chander Neogi* (4)], and hold that it is for the Appellant as Plaintiff in a suit for ejectment to prove possession prior to the dispossession which he alleges."

In all these cases it was clearly held that where the Plaintiff has been dispossessed and the suit is one for recovery of possession the onus is upon the Plaintiff to prove that he was in possession within 12 years of the suit.

It is contended however that a different principle has been laid down in some other cases, viz., *Karan Singh v. Pakar Ali Khan* (7), *Radha Gobinda Roy v. Inglis* (8), *Secretary of State for India v. Chelikani Rama Rao* (9) and *Kumar Basant Roy v. Secretary of State for India* (10).

In *Karan Singh v. Pakar Ali Khan* (7) their Lordships in dealing with the contention that the Plaintiff must prove that he was in possession within 12 years held that it was not correct under the Limitation Act IX of 1871. Their Lordships observed :—"It would have been correct under the old law, under which the suit must have been brought within 12 years from the time of the cause of action but under the present law it may be brought

(4) L. R. 16 I. A. 23 : s. c. I. L. R. 16 Cal. 473 (1868).

(7) L. R. 9 I. A. 99 : s. c. I. L. R. 5 All. 1 (1882).

(8) 7 C. L. R. 364 (1880).

(9) L. R. 43 I. A. 192 : s. c. 20 C. W. N. 1311 (1916).

(10) L. R. 44 I. A. 104 : s. c. I. L. R. 44 Cal. 858 ; 21 C. W. N. 642 (1917).

(5) I. L. R. 17 Cal. 137 (P. C.) (1889).

(6) 10 C. W. N. 630 (P. C.) (1906).

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within 12 years from the time when the possession of the Defendant or of some person through whom he claims became adverse to the Plaintiff."

It was a case under Art. 145 of Act IX of 1871 (see p. 1 of the report) corresponding to Art. 144 of Act XV of 1877 and Act IX of 1908, and there can be no doubt that the suit was dealt with by the Judicial Committee as coming under Art. 145 of Act IX of 1871 because that article deals with cases where the limitation runs from the date when possession of the Defendant became adverse to the Plaintiff. Under Act XIV of 1859, the period of limitation for suits for the recovery of inmoveable property or of any interest in immoveable property to which no other provisions of the Act applied (there were no other provisions in the Act similar to those of Art. 143 or 145 of Act IX of 1871), is 12 years from the *time when the cause of action arose*; so that all suits whether they came under Art. 143 or 145 of Act IX of 1871 had to be brought under sec. 15 of Act XIV of 1859 within 12 years of the *time when the cause of action arose*. Under Act IX of 1871 for the first time a distinction was drawn between (1) suits for possession when the Plaintiff while in possession has been dispossessed or has discontinued the possession and (2) suits for possession of immoveable property or any interest therein not otherwise provided for. In the first class of cases, the starting point was the date of the possession or discontinuance and came under Art. 143 (Art. 142 of Act XV of 1877 and Act IX of 1908); in the second class of cases the starting point was the date when the possession of the Defendant became adverse to the Plaintiff (Art. 145 of Act IX of 1871 and Art. 144 of Act XV of 1877 and Act IX of 1908). *Karan Singh's* case

(7) fell under Art. 145 of Act IX of 1871, and the Judicial Committee was merely referring to the change in the law stated above. Their Lordships did not or could not have laid down that the law of limitation had been in any way changed so far as suits coming under Art. 143 of Act IX of 1871 (Art. 142 of the present Act) were concerned, as the reference "12 years from the time when the possession of the Defendant came adverse to the Plaintiff" unmistakably shows that their Lordships are dealing with cases under Art. 144 (Art. 145 of Act IX of 1871). It is unnecessary to further discuss this matter which is clear enough, but we may refer to the Full Bench decision in *Mahomad Ali Khan v. Khaja Abdul Guny* (11) which was a case under Act IX of 1871, and where it was settled: "There is no doubt as to the general rule that under the former Limitation Act, the cause of action, and under the present law, the event from which limitation is declared to run, must have occurred within the prescribed period, and that it lies on the Plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, it has more than once been held by the Privy Council that the Plaintiff is bound to prove possession and dispossession within 12 years."

The case of *Radha Gobinda Ray v. Ingltis* (8) was also considered by the Full Bench in *Mahomed Ali Khan's* case (11). Wilson, J., observed "We do not understand that case as establishing the broad proposition contained in the head-note, which would be in conflict with the earlier decisions of the same tribunal."

In that case, their Lordships having disposed of the other questions which were

(7) L. R. 9 I. A. 99: s. c. I. L. R. 5 All. 1 (1882).

(8) 7 C. L. R. 364 (1880).

(11) I. L. R. 9 Cal. 744, 752-753 (F. B.) (1883).

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raised say: "The question remains whether the disputed land had or had not been occupied by the Defendant for 12 years before the suit was instituted, so as to give him a title against the Plaintiff by the operation of Statute of Limitation. On this question undoubtedly, the onus is on the Defendant. The Plaintiff has proved his title, the Defendant must prove that the Plaintiff has lost it by reason of his, the Defendant's, adverse possession." But the land in dispute in that case had formed part of the bed of a *beel* or lake; the title to the *beel* and its bed was found to be in the Plaintiff, and he had been in possession so long as the land was covered with water. The *beel* gradually dried up, and the Defendant occupied the land so formed. There was a controversy as to when the land dried up and the Defendant occupied the land. It was found by the High Court that the land had been formed quite recently within six or seven years or at all events within less than 12 years before the suit and their Lordships held that "if the High Court are right in that finding, of course the statute cannot apply." The constructive possession of the rightful owner continued till within 12 years of the suit and the Defendant relied upon adverse possession for more than 12 years. The observations with regard to the onus of proof quoted above must be taken with the facts of the case.

Much reliance is placed upon the case of *The Secretary of State for India v. Chelikani Rama Rao* (9). The disputed lands in that case formed part of islands which had formed in the bed of the sea within the territorial limits, and which therefore belonged to the Crown, and the lands were constituted a reserved forest under the Madras Forest Act (Mad-

ras Act V of 1882). The Respondents claimed proprietary rights in the said lands, which were disallowed by the District Judge in a proceeding under the Act, holding that the title being originally in the Crown, the onus was upon the claimants to prove adverse possession for sixty years, and that they had failed to do so. The High Court was of opinion that it rested upon the Crown to show that the possession became adverse to the Crown within sixty years prior to the notification under which the land was constituted a reserved forest. The Judicial Committee held that it was for the claimants to prove that they or their predecessors in title had been in adverse possession for sixty years.

The principle laid down is consistent with that laid down by the Judicial Committee in previous cases. The claimants in that case were in the position of Plaintiffs, and they claimed a title to the property by adverse possession. Their Lordships observed: "In their Lordships' opinion objectors to afforestation thus preferring claims are in law in the same position as persons bringing a suit in an ordinary Court of Justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think that Art. 144 of the Limitation Act XV of 1877 (Sch. II) applies, the period of twelve years thereunder being, however, extended to a period of sixty years by Art. 149. In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the Plaintiff. In their Lordships' opinion the situation of a claimant under afforestation proceedings is the same upon this point. Reference may be made to *Radha Gobinda Roy v. Inglis* (8), decided by this Board." Referring to the view taken by the High Court that the

(9) L. R. 43 I. A. 192; s. c. 20 C. W. N. 1311 (1916).

(8) 7 C. L. R. 364 (1880).

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Crown had to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation their Lordships observed: "Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say: I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions. Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory, including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Government officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession. . . . In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for sixty years, their Lordships' opinion is, as stated, that this is erroneous. But secondly with reference to the 'subsisting title,' it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of sixty years, that fundamental fact remains, and that

fact forms 'subsisting title.' And thirdly it is no part of the obligation of the Crown to fortify its own fundamental right by any inquiry into possession or the acceptance of any onus on that subject."

The title of the Crown to the land could not be disputed; the claimants set up a title by adverse possession, and there can be no question that it was upon the Plaintiff who wanted a declaration of his title by adverse possession to prove that he acquired such a title by adverse possession for the statutory period. That is all that was laid down in that case, and the general observations made at p. 204 must be taken with the facts of that case in which the claimants stood in the position of a Plaintiff seeking a declaration of his title to the property. Such a person on the strength of possession for a short period cannot throw upon the Opposite Party the burden of proving that he, the claimant had not been in possession for the statutory period. We do not think therefore that that decision laid down any principle different from that laid down previously in a series of cases by the Judicial Committee.

It is to be observed that their Lordships while dealing with the case coming under Art. 144, referred to *Radha Gobinda Roy v. Inglis* (8) which clearly shows that the latter case also was treated as one falling under Art. 144.

The case of *Kumar Basant Roy v. Secretary of State for India* (10) also does not help the contention of the Appellants. There the land was diluviated, and parts of the diluviated land emerged during part of the year. It was held that the annual cultivation of such parts of diluviated lands as emerge during part of the year is not a dispossession of the owner of the lands within Art. 142 of

(8) 7 C. L. R. 364 (1880).

(10) L. R. 44 I. A. 104; s. c. I. L. R. 44 Cal. 858; 21 C. W. N. 642 (1917).

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the Limitation Act, and that the constructive possession of lands while diluviated being in the true owner cannot be continuous adverse possession within Art. 144 while it is diluviated during part of every year, and that no rational distinction could be drawn between that case where the re-flooding was seasonal, and *Krishnamoni Gupta's* case (12), where the lands were sub-merged for several years.

Their Lordships observed:—"If as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, Art. 144 is the article applicable and not Art. 142. It is not easy to see in the circumstances of a case such as this how conduct insufficient to evidence dispossession of the Plaintiffs can be used to evidence adverse possession available to the Defendants; but be that as it may, in their Lordships' opinion the Defendants' contention resting on Art. 144 fails on another ground."

This case therefore is no authority for the proposition that in a case coming under Art. 142, the onus is upon the Defendant. Their Lordships were dealing with the question what constitutes dispossession in cases of diluviated lands coming out of water during part of the year, and the question of adverse possession having regard to the nature of the land and the nature of possession exercised upon the land.

None of the four cases relied upon by the Appellant, therefore, is any authority for the proposition contended for on behalf of the Appellant.

It is to be observed that *Radha Gobinda Roy v. Inglis* (8) was decided in 1880, and that of *Karan Singh v. Pakar Ali*

(7) in 1882. Had those cases intended to lay down any different principle, the Judicial Committee in 1888 in *Mohima Chander's* case (4), without even referring to those cases, could not have laid down the principle that the Plaintiff in a suit for ejectment cannot succeed without proving possession within 12 years although his title is proved. They were not referred to evidently because they were cases falling under Art. 144. *Mohima Chander's* case (4) was expressly followed 18 years afterwards (in 1906) by their Lordships in *Rani Hemanta Kumaree's* case (6).

We do not think it reasonable to hold that the Judicial Committee in *Secretary of State v. Chelikani Rama Rao* (9) laid down any principle at variance with that enunciated so far back as 1860 in *Moharaja Koowar Nitrasur Singh's* case (1), and which was followed in all cases (where the Plaintiff while in possession was dispossessed) up to 1906 in *Rani Hemanta Kumaree's* case (6), i.e., for nearly half a century. Even leaving aside the earlier cases, which were decided under the Regulations or Act XIV of 1859 (though as stated above there was no difference in the law so far as cases coming under Art. 142 are concerned) their Lordships laid down the same principle in *Mohima Chander's* case (4), *Mahammad Amanullah Khan's* case (5) and *Rani Hemanta Kumaree's* case (6).

There is in fact no inconsistency in the decisions of the Privy Council because the decisions relied upon by the Appellant as

(1) 8 M. I. A. 199 (1860).

(4) L. R. 16 I. A. 23; s. c. I. L. R. 16 Cal. 473 (1888).

(5) I. L. R. 17 Cal. 137 (P. C.) (1889).

(6) 10 O. W. N. 680 (P. C.) (1906).

(7) L. R. 9 I. A. 99; s. c. I. L. R. 5 All. 1 (1882).

(9) L. R. 43 I. A. 192; s. c. 20 O. W. N. 1311 (1916).

(8) 7 C. L. R. 364 (1880).

(12) L. R. 29 I. A. 104; s. c. 6 C. W. N. 617 (1903).

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stated above, show that they were cases not falling under Art. 142 of the Limitation Act, and the contention of the Appellant is based merely upon some general observations in some of the judgments wrenched from the context and the facts of the cases. So far as this Court is concerned, the principle laid down by the earlier Privy Council decisions, and in *Mohima Chander Mozumdar's* case (4) and *Rani Hemanta Kumar's* case (6), and the Full Bench decision in *Mahomed Ali Khan v. Khaja Abdul Gunny* (11) has always been taken as settled law on the point, and we need only refer to the case of *Mirza Shams-her Bahadur v. Munshi Kunj Behary Lal* (13), where Mookerjee and Caspersz, JJ., observed:—"It is now firmly settled beyond all probability of controversy that the Plaintiff in an action for ejectment must not only prove his title but also his possession within 12 years of the suit." A recent Full Bench of the Patna High Court also, upon a review of the decisions on the point has taken the same view. [See *Raja Shiva Prosad Singh v. Hira Singh* (14)].

We are accordingly of opinion that in cases coming under Art. 142, although the Plaintiffs' title is proved the onus is not upon the Defendant to show that the Plaintiff lost his title by adverse possession on the part of the Defendant.

The next question is whether the onus of proof is upon the Defendant having regard to the nature of the land, and this brings us to the question as to what the Plaintiff has to prove in order to show that he was in possession within 12 years of the suit. As pointed out by Wilson,

J., in the judgment of the Full Bench in *Mahomed Ali Khan's* case (11), possession is not necessarily the same thing as actual user. The nature of the possession to be looked for, and the evidence of its continuance must depend upon the character and condition of the land in dispute. Where the land is incapable of actual enjoyment, as in the case of diluvion by a river, if the Plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue so long as the lands continue to be submerged. The cases of *Kali Charan Sahoo v. Secretary of State for India* (15) [overruled by *Secretary of State v. Krishnamoni* (12) in so far as it held that there was constructive possession in favour of a wrong-doer]; *Monomohan Roy v. Mathura Mohan Roy* (16), *Radha Gobinda Roy v. Inglis* (8) and *Raj Kumar Roy v. Gobind Chandra Roy* (17), (where however possession of the Plaintiff was held to be proved); *Secretary of State v. Krishnamoni Gupta* (12) and *Kumar Basant Roy v. Secretary of State for India* (10), illustrate the principle that where the rightful owner proves possession until the land goes under water or otherwise becomes wholly incapable of enjoyment in the usual modes, he is deemed to be in constructive possession until the land emerges out of water and becomes capable of enjoyment in the usual modes and he is actually dispossessed by the Defendant. No such presumption, however, arises in the case of a wrong-doer. In *Kumar Basant Roy v. Secretary of State for In-*

(4) L. R. 16 I. A. 23; s. c. I. L. R. 16 Cal. 473 (1888).

(6) 10 C. W. N. 630 (P. C.) (1906).

(11) I. L. R. 9 Cal. 744 (F. B.) (1883).

(13) 12 C. W. N. 273 (1907).

(14) [1921] Pat. 305.

(8) 7 C. L. R. 364 (1880).

(10) L. R. 44 I. A. 104; s. c. I. L. R. 44 Cal. 858; 21 C. W. N. 643 (1917).

(11) I. L. R. 9 Cal. 744 (F. B.) (1883).

(12) L. R. 29 I. A. 104; s. c. 6 C. W. N. 617 (1902).

(15) I. L. R. 6 Cal. 725 (1881).

(16) I. L. R. 7 Cal. 225 (1881).

(17) L. R. 19 I. A. 140; s. c. I. L. R. 19 Cal. 660 (1892).

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dia (10), the Judicial Committee observed :—"The Limitation Act of 1877 does not define the term "dispossession," but its meaning is well-settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession : constructively it continues, until he is dispossessed; and upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. 'There can be no discontinuance by absence of use and enjoyment, where the land is not capable of use and enjoyment.' [Per Cotton, L. J., in *Leigh v. Jack* (18)]. It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases."

In cases where the land is not incapable of enjoyment, but may produce some profit, though trifling in amount and only of occasional occurrence as is often the case with jungle land, it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the Plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this his possession is presumed to continue so long as the state of the land remains unchanged unless he is shown to have been dispossessed. [See *Mahomed Ali Khan v. Khaja Abdul Guny* (11)]. In *Watson v. The Government*

of Bengal (19), Sir Barnes Peacock, C. J., referred to the "cutting or preserving the wood, gathering wax or wild honey, collecting stick lac, etc." as evidence of possession of jungle lands. In waste lands (and jungle lands also) possession may be exercised by grazing of cattle, putting up boundary marks or fences and the like.

The cases of diluviated lands or jungle or waste lands, however, are no exception to the general rule that a Plaintiff who is dispossessed and brings a suit for recovery of possession must show that he was in possession within 12 years of the suit. The rule of law as pointed out by the Judicial Committee in *Rani Hemanta Kumaree Devi v. Maharajah Jagadindra Nath Ray* (6) is that it is for the Plaintiff in a suit for ejectment to prove possession prior to the alleged dispossession. At the same time in this question of possession the initial fact of Plaintiff's title comes to his aid with greater or less force according to the circumstances established in evidence.

Bearing the above principles in mind we have to see what the Plaintiff has proved in the present case. The land was asserted by the Plaintiff to be *khas palit* formerly but it was admitted in the plaint that the Defendant had excavated a tank on the land 4 or 5 years before the suit. The Court of first instance found that the tank was excavated more than 12 years before the suit. Upon that finding there can of course be no question of any presumption in favour of the Plaintiff because he was ousted from possession 12 years before the suit by the excavation of the tank. The Court of first instance further found that before the excavation of the tank the land was under cultivation of certain persons (Harina and Jala Majhis) with whom the land was exchanged by the

(10) L. R. 44 I. A. 104 : s. c. I. L. R. 44 Cal. 858 ; 21 O. W. N. 642 (1917).

(11) I. L. R. 9 Cal. 744 (F. B.) (1888).

(18) L. R. 5 Exch. Div. 274 at p. 276 (1879).

(6) 10 O. W. N. 630 (P. C.) (1906).

(19) B. L. R. Sup. Vol. 182 : 3 W. R. 73, 80 (1865).

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Defendant. Had these findings been affirmed by the Court of Appeal below, no question of onus of proof or any presumption could arise. The learned District Judge, however, while agreeing with the Munsif that the suit was barred by limitation observes that the best evidence regarding excavation of the tank had not been produced by the Defendant. It is not clear what he meant, because the excavation of the tank 4 or 5 years before the suit was admitted by the Plaintiff in his plaint, and spoken to by his own witnesses. Probably he meant that the excavation of the tank earlier, and the exchange of land, as set up by the Defendant was not satisfactorily proved, and that the evidence of possession on both sides prior to the excavation of the tank was unsatisfactory. It is contended on behalf of the Appellant that in this conflict of evidence the Court ought to have presumed that possession went with the title. That presumption, however, can arise only where the evidence is equally strong on both sides. In *Ranjit Ram Pandey v. Goburdhan Ram Pandey* (20), the Judicial Committee observed:—"Now the ordinary presumption would be that possession went with the title. The presumption cannot of course be of any avail in the presence of clear evidence to the contrary, but where there is strong evidence of possession as there is here on the part of the Respondents opposed by evidence apparently strong also on the part of the Appellant, their Lordships think that in estimating the weight due to the evidence on both sides the presumption may, under the peculiar circumstances of the case be regarded, and that with the aid of it there is stronger probability that the Respondents' case is truer than that of the Appellant." See also *Dharam Singh v. Har*

Prosad (21), *Babu Kasturi Singh v. Raj Kumar Balu Bissen Pragash Narain* (22) and *Mirza Shamsher Bahadur v. Munshi Kunj Behary Lal* (13) (the word "unsatisfactory" at p. 280 is evidently a slip). The principle does not apply to a case where the evidence is equally unworthy of reliance on both sides, see *Thakur Singh v. Bhogeraaj Singh* (23), *Lala Singh v. Mir Latif Hossain* (24) and *Pakira Lal Singh v. Munshi Ram Charan* (25) (the observations with regard to waste or jungle lands are *obiter*).

The question was discussed by a Full Bench of the Patna High Court in the recent case of *Raja Shiva Prosad Singh v. Hira Singh* (14), where it was held (overruling two decisions of the Court) that the presumption can be raised only where the evidence is equally strong on both sides and cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. The subject-matter of dispute in that case was cultivated land. In the order of reference the learned Judge expressed the opinion that in cases of submerged or jungle or waste land, the continuance of possession may be presumed if antecedent title and possession are proved. The observation has reference to land of such a nature that possession cannot be expected to be proved by acts of actual user and enjoyment and the learned Chief Justice referred with approval to the observations of Wilson, J., in the judgment of the Full Bench in *Mahomed Ali Khan's case* (11) (with regard to jungle lands) that the Plaintiff should show such acts of owner-

(11) I. L. R. 9 Cal. 744, 750 (F. R.) (1883).

(13) 12 C. W. N. 273 (1907).

(14) [1921] Pat. 305.

(21) I. L. R. 12 Cal. 38 (1885).

(22) 8 C. W. N. 876, 880 (1904).

(23) I. L. R. 27 Cal. 25 (1899).

(24) 21 C. L. J. 480 (1915).

(25) 1 P. L. J. 146 (1916).

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ship as are natural under existing conditions, and that where this has been done prior possession may be presumed to have continued until the Plaintiff is shown to have been dispossessed.

In the present case, the Plaintiff alleged that the land was waste, but it was not the case of the Plaintiff that no act of ownership could be or were exercised upon the land. The Plaintiff adduced some evidence of possession, *viz.*, grazing of cattle upon the land prior to the excavation of the tank by the Defendants. The Defendants adduced evidence to show that the land was under cultivation before he excavated the tank. According to both parties therefore, acts of possession were exercised upon the land. Now, where definite evidence of acts of possession is forthcoming there is no difference between the proof of possession in the case of jungle, waste or uncultivated lands and in that of cultivated lands. But whereas in the case of cultivated lands the Plaintiff will fail if he does not prove his possession within 12 years, in the case of jungle or waste lands, if he proves his title, there is a presumption in his favour where having regard to the nature of the land possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the Plaintiff asserts that he exercised acts of ownership upon the land and adduces evidence in support of such assertion, he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption, and is inconsistent with it.

In the present case if the Plaintiff had been able to show that neither party had exercised any act of possession, or that he had exercised such acts of ownership as were natural under the existing conditions,

a presumption could have been raised in his favour on the question of possession of the land prior to his dispossession by the Defendant's excavation of the tank. He attempted to prove such acts of possession, but the evidence was not accepted by the Courts below.

It is contended, however, on behalf of the Appellant that the learned District Judge should not have held that "Plaintiff witness No. 1's statement that cattle of all villagers grazed on the disputed land, was consistent with the Plaintiff's case as much as with the Defendant's," and ought to have held that Plaintiff's possession prior to the excavation of the tank by the Defendant was thereby proved. But in that passage the learned Judge was merely commenting upon the statements of the Plaintiff's witness No. 1, and what he meant was that the "villagers" who are said to have grazed their cattle on the land were tenants under the *patni taluks* of both the Plaintiff and the Defendant, both the taluks being in the same village. He did not find that the Plaintiff's tenant grazed cattle on the land, because further on referring to the Plaintiff's witnesses who all deposed to the same effect, he says: "The lower Court rightly disbelieved them as they were clearly not independent and disinterested witnesses." In these circumstances, we do not think that there was any presumption in favour of the Plaintiff.

The appeal accordingly fails, and must be dismissed with costs.

J. N. R.

Appeal dismissed.

[PRIVY COUNCIL.]**[APPEAL FROM PUNJAB.]**

VISCOUNT HALDANE. PANNA LAL and ORS.,
 LORD PHILLIMORE. Appellants,
 MR. AMER ALI. v.

1922, Nihal Chand, substituted for the Marwar
 Heard, 31, January. Bank (in liquidation),
 Judgment, Respondent.
 31, January.

Bond, whether imposed personal liability—Interest on bond pendency lite—Discretion of Court—Civil Procedure Code (Act V of 1908), sec. 34.

Held, on a construction of the bond in question in the case, that it imposed personal liability upon the executants.

The Courts in India having allowed interest at the rate of 8½ per cent. per annum during the period of the pendency of the suit:

Held—That the Civil Procedure Code gives the Court discretion in the matter and the Judicial Committee was not prepared to dissent from the view taken by the Courts in India.

This was an appeal from a decree of the Chief Court of the Punjab, dated the 2nd April 1918, affirming a decree of the District Judge of Ambala, dated the 27th October 1913.

The facts of the case are shortly as follows:—

The Luxmi Company, Ltd., obtained advances from the Respondent the Marwar Bank, Ltd. and as security for these and for future advances Panna Lal (the present Appellant) Ganga Ram, and Basheshar Nath, Directors of the Company, executed a security bond in favour of the Bank to the extent of Rs. 50,000. The bond which is set out in their Lordships' judgment was signed by these three persons with the word "Directors" after their signatures.

The Company subsequently went into liquidation, and the suit out of which this appeal arose was instituted by the Bank

against the three Directors claiming to recover from them jointly and severally on the bond the amount due to the Bank.

The Luxmi Company was impleaded as a Defendant. Ganga Ram paid his proportionate share of the liability, but the Appellants contended that they had not contracted any personal liability. The District Judge decided the suit in favour of the Bank and made a decree for the amount claimed with interest at 8½ per cent. per annum.

On appeal the Chief Court of the Punjab affirmed the decree of the District Judge and the Appellants now appealed to His Majesty in Council.

Messrs. Clauson, K. C. and Wallach for the Appellants.—The question for determination is purely one of construction.

The signatories of the bond do not say "we hereby pledge ourselves" or "we hereby guarantee;" they merely pledge the repayment of the money.

The word "Directors" after the signatures is a clear indication that they signed merely on behalf of the Company and undertook no personal liability.

Messrs. Langdon, K. C. and Dubé for the Respondents were not called upon.

Their LORDSHIPS' JUDGMENT* was delivered by

VISCOUNT HALDANE.—The Luxmi Company, Limited, which was Defendant in the suit out of which this appeal arises, but which is no party to the appeal, was a company trading at Ambala and elsewhere as bankers, cotton merchants and general commission agents. It obtained certain advances from the Respondents, the Marwar Bank. These advances were made under various circumstances but at the material date with which their Lordships are concerned it was necessary to obtain some security for the assurance of the bank, and accordingly on the 28th

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December 1908, the Appellants, Lala Panna Lal and Lala Basheshar Nath, and one Lala Ganga Ram executed a security bond, dated the 28th December 1908, in favour of the manager of the Marwar Bank. Lala Ganga Ram and the Appellant Lala Panna Lal were directors of the Luxmi Company; the other Appellant, Lala Basheshar Nath, was manager of one of the branches of the Luxmi Company, and was an alternative director, that is to say, on certain occasions he acted as a director.

The surety bond which the two Appellants executed was in these terms. It was addressed to the manager of the Marwar Bank, Limited, of Ambala City:—

“DEAR SIR,—In consideration of your allowing the Luxmi Company, Limited, to overdraw sums not exceeding in the aggregate of rupees fifty thousand only (on the security of Luxmi Company, Limited, demand pro-note in your favour of date), we hereby pledge for the repayment on demand of the said overdraft, together with interest thereon and of any other sum or sums of money which may be or become due to you from the Luxmi Company, Limited, on any account whatsoever during the continuance of this pro-note. And we hereby declare and agree that the overdraft allowed and intended to be secured by this agreement shall be taken to have been allowed by you entirely upon the faith of and relying upon the declaration signed by us at the foot hereof, which declaration solemnly we declare to be true in every respect. It is hereby further agreed and declared that these presents shall remain and be a continuing security to you for the balance of the said account for the time being to the extent aforesaid, notwithstanding that at any time or times the balance of the said account may be in your favour, it being expressly intended that these presents shall be a security for the balance of the said account due by the Luxmi Company, Limited, to you while the said account shall continue open. Signed at Ambala City this 28th day of December, in the year one thousand nine hundred and eight.”

It is contended on behalf of the Appellants that this security bond did not impose upon them any personal liability, inasmuch as they signed as directors, which, it is said, meant as directors binding the Luxmi Company and the Luxmi Company alone. The first difficulty in the way of that contention is a very formidable one. If it were true the bank would get no advantage from this security bond, because it had already the liability of the Luxmi Company for the sums which it had advanced to the Luxmi Company. The only materiality of the security bond would be if it gave some new security and some fresh liability, and therefore the natural construction to put upon what is indicated by the use of the imperfect but definite expression “pledge” is that the fresh liability of the three signatories personally was the new security introduced. Moreover, the whole tenor of the document points to an obligation to pay money. It is suggested that the word “pledge” in the beginning of the second sentence, where the expression is used “we hereby pledge for the repayment on demand,” shows that they meant to refer to some specific and tangible securities which they pledged for the advances; but if that were so, then, as these were omitted and not mentioned, the document was bad because of the omission of what was of its essence. The other construction takes the word pledge as loosely used, to mean that they pledge their personal credit in support of the obligation of the company. It is said that if one looks at other documents of the kind one will find that this was only a common form intended for cases where there was a pledge of assets, and that if regard is had to the circumstances in other transactions one will find that in other transactions these gentlemen did not pledge themselves personally.

But their Lordships think that this

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surety bond which was executed on the specific occasion must be taken to have been executed for the purpose of the occasion, and that it cannot be assumed that it had reference to any other circumstances of a different date. On the face of it there is no difficulty in giving it an intelligible meaning as constituting a personal pledge. Their Lordships do not think that extrinsic evidence is admissible in these circumstances to affect its meaning.

Their Lordships are therefore of opinion, taking this as it stands, that the appeal fails.

The only other point that arises is as to the rate of interest given from the date of the proceedings until judgment. As to that there is a discretion in the Judges under the Code of Civil Procedure, and both Courts have said that the interest should be $8\frac{1}{2}$ per cent. Their Lordships are not prepared to dissent from that view. For the reasons they have stated, they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor: Mr. Henry S. L. Polak for the Appellants.

Solicitors: Messrs. Lewis and Yglesias for the Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ATKINSON.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

1922,

Heard, 19 and

20, January.

Judgment,

14, February.

SRIPAT SINGH DUGAR

and anr., Appellants,
v.

RAI HARIRAM

GOENKA and ors.,

Respondents.

Execution of decree—Objection on the ground of non-service of notice—Concurrent findings by two Courts in India—Non-interference by Judicial Com-

mittee—Adjudication of judgment-debtor as Insolvent—Subsequent proceedings in execution against sons and heirs only of judgment-debtor.

In execution of a decree passed in 1896 the decree-holder in December 1915 applied for the attachment of a certain property of the judgment-debtor and obtained the order of attachment on the 21st January 1916. In March 1916 the judgment-debtor applied to have the order of attachment set aside on the ground that no notice of execution had been served on him and the decree was barred by limitation. The decree-holder's contention was that the judgment had been revived by a writ of attachment issued on the 3rd February 1904 and within 12 years from that date, viz., on the 12th January 1916, the notice of execution taken out in December 1915 had been served. This application of the judgment-debtor was, in the first instance, dismissed but on appeal a remand was ordered on 23rd November 1916. On the same day the judgment-debtor was declared an insolvent by the Privy Council. The judgment-debtor died on 25th April 1918 and on 5th August 1918 the decree-holder took out a summons against the present Appellants, the sons and heirs of the judgment-debtor, to show cause why the original decree should not be executed against them and having thus revived against them brought the matter of the remand on for hearing. The decision of both the trial Judge and the High Court in appeal on the remand was that notice had been served on the judgment-debtor as alleged by him:

Held—That, on the question of service of notice, there was nothing exceptional to cause their Lordships to interfere with two concurrent findings of fact.

Held, further—That in the absence of information as to whether the order adjudicating C an insolvent was afterwards annulled or came to a termination in any

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way before or after the death of C, the appeal should be dismissed with the declaration that if the adjudication of the insolvency of C had not been annulled or the insolvency had not otherwise terminated on or before the date, when the order on remand was made in the High Court by the trial Judge, the said order would owing to the absence of the Receiver or other representative of the Insolvency Court be inoperative except in so far as it decided against any asserted interest of the sons and heirs of C, parties to the proceedings.

This was an appeal from a decree of the High Court, Calcutta, dated the 4th July 1919, affirming a decree of Chaudhuri, J., dated the 26th February 1919, in the same High Court in its Ordinary Original Civil Jurisdiction.

In 1896 a decree was pronounced against Chatrapat Singh, the father of the present Appellants, for payment of a large sum of money to the father of the present Respondents.

Execution proceedings were taken by the judgment-creditor in 1904 but were eventually dismissed in 1907 and no further step in execution was taken until December 1915.

In 1912 Chatrapat filed his petition in insolvency and was finally adjudicated an insolvent in August 1917.

In the execution proceedings a prohibitory order was made in January 1916 and upon objections being raised by Chatrapat the matter came before Mr. Justice Fletcher who in May 1916 decided in favour of the decree-holder largely on the question of limitation. On appeal the case was remanded for a determination of the question whether notice had been served on the judgment-debtor, on the 12th January 1916.

On the 19th February 1919 this question was decided in the affirmative by

Chaudhuri, J., and that finding was accepted by the High Court on appeal.

Sir George Lowndes, K. C., and Mr. Kenworthy Brown for the Appellants.—The prohibitory order for attachment of of the Calcutta property was made on 21st January 1916.

The first question is whether this is barred by limitation. See Act IX of 1908, Sch. I, Art. 183.

The decree can be revived by an order for execution after notice, but it was contended by Chatrapat that he had not been served with notice of the application for execution in December 1915.

Our application for setting aside the attachment was dismissed by Fletcher, J., but only on the ground that there had been a revivor in 1904 and that the decree of 1896 was capable of being executed.

On appeal by Chatrapat the question was referred back to the lower Court on the question of notice and there are findings of fact against me on this point but the question of limitation is still open and could not be decided in the absence of the Receiver in Chatrapat's insolvency.

In 1909 Chatrapat filed his petition to be adjudged an insolvent under Act III of 1907 and was finally so adjudicated by order of the Privy Council [vide *Chhatrapat Singh Dugar v. Kharag Singh Lachmiram* (1)].

Creditors have no remedy against the property of the debtor, they can merely prove in the insolvency so that the attachment of 21st January 1916 became bad.

The property became vested in the Receiver in insolvency and the attachment cannot stand as it is an attempt by a creditor to get payment in full—to the detriment of other creditors.

Reference was made to secs. 18, 16 (b), and 24 of Act III of 1907.

(1) L. R. 44 I. A. 11 : s. c. I. L. R. 44 Cal. 535; 21 C. W. N. 497 (1916).

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Messrs. Dunne, K. C. and Dubé for the Respondents.—The only question with regard to limitation is whether notice of the application had been served on Chatrapat. This is a pure question of fact and there are concurrent findings on it in my favour by the lower Courts.

There is no evidence to show that the Receiver was still in existence or that the order of adjudication had not been annulled.

The fact that Chatrapat's heirs are the present Respondents tends to show that the order of adjudication had come to an end, otherwise they would have no interest in the property.

This point was not raised in the lower Courts.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—The late Ram Chandra Goenka, for himself and his partners, obtained in 1896 a decree against the late Chatrapat Singh for a considerable sum of money. Some money appears to have been recovered from time to time under this decree, but on the 21st December 1915, it was still in part unsatisfied, and on that date the decree-holder applied to attach a house belonging to the judgment-debtor in Calcutta. On the 3rd March 1916, the judgment-debtor applied to have the order of attachment which had been thus obtained set aside, saying that no notice of execution had been served upon him and that the decree was barred by the law of limitation. The decree being one made by the High Court of Judicature at Fort William, in Bengal, would be kept alive for twelve years, and thereafter by revivor if the proper proceeding was taken. The decree-holder replied that the judgment had been revived in 1904 by a writ of attachment issued on the 3rd February 1904, and that before

twelve years from the 3rd February 1904, had expired, the notice of execution taken out in December had been served on the 12th January 1916; that is, just within the further period of twelve years.

The application of the judgment-debtor came on for hearing before Fletcher, J., on the 22nd May 1916. He decided in favour of the decree-holder and dismissed the application. The judgment-debtor appealed.

On appeal it could not be gathered from the judgment of Fletcher, J., that he had considered the dispute as to the question of service on the 12th January 1916. His written judgment was wholly concerned with what took place in 1904. And so on the 23rd November 1916 (the date is important), a remand was ordered.

No steps were taken for some time under this remand, and meanwhile the judgment-debtor died on the 25th April 1918. On the 5th August 1918, the decree-holder took out a summons against the present Appellants, the sons and heirs of the judgment-debtor, to show cause why the original decree should not be executed against them as sons and heirs, and having thus revived against them, brought the matter of the remand on for hearing. It was heard by Chaudhuri, J., who decided in favour of the decree-holder, and held that the order of attachment, called the prohibitory order, ought not to be set aside. From this decision an appeal was taken. During the course of the appeal the decree-holder died, and his place was taken by the present Respondents. The decision of Chaudhuri, J., was affirmed by the High Court, and it is from this affirmation that the present appeal is brought.

With regard to what took place in 1904, the only materials for their Lordships' consideration are certain affidavits and the judgment of Fletcher, J., and it is not very clear whether he decided the ques-

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tion as matter of law or matter of fact. But on whatever ground he decided, the High Court must be taken to have agreed with him on this point, for if it had been otherwise it would not have been necessary to remand the case for the consideration of the other point.

It was contended before their Lordships that the remand was general, but this is not their opinion. It was a remand to settle the matter of 1916, the consideration of which was only important if the decree-holder had successfully maintained his point with regard to what took place in 1904. This being so, from the very scanty materials which present themselves, their Lordships can find no reason for disagreeing with the opinion of Fletcher, J., affirmed on this point by the High Court.

With regard to the question of fact as to whether or not Chatrapat Singh had been served, as contended, with a notice of execution on the 12th January 1916, Chaudhuri, J., after hearing the evidence on both sides, came to the conclusion that he had been served, and the High Court accepted his finding, and there is nothing exceptional to cause their Lordships to interfere with two concurrent findings of fact.

This being so, there would be a short end to the matter, and the appeal would be dismissed without further trouble but for one circumstance. It is contended by the Appellants that the proceedings subsequent to the remand were ineffective, and that the judgments of Chaudhuri, J., on remand and of the High Court on appeal must be set aside because of the absence of a material or the material party. It is said that on the 23rd November 1916, the precise date of the order of remand, Chatrapat Singh was adjudged insolvent, and that thereupon the Insolvent Court, through its officer or the Receiver—if one

were appointed under the then existing Insolvency Act—ought to have been served and have had an opportunity of being present and raising his points in objection to the attachment when the matter was heard before Chaudhuri, J.

The first observation which occurs upon this is that if the Appellants were making this point they should have given proper proof of the material documents and have raised the point distinctly at the hearing before Chaudhuri, J. But the only indication of the point being raised is to be found in the two questions following put to the process server, apparently to lead up to the contention that the judgment-debtor could not have been living in the house in which the service is said to have taken place; and as the answers to these questions were in the negative, nothing was proved. Questions and answers are as follows:—

“Do you know that Chatrapat was made an insolvent by an order of the Privy Council?”

“I do not know.”

“And a Receiver was appointed of his estate on the 2nd August 1917?”

“No.”

While there is thus nothing to show that the point was even taken before Chaudhuri, J., there is at no stage in the case adequate and regular proof that Chatrapat Singh was adjudicated insolvent. On the other hand, in the grounds of appeal from the judgment of Chaudhuri, J., to the High Court, and again in the petition for leave to appeal to His Majesty in Council, the point was expressly made, and in the latter document some detail is given, it being stated that a Receiver was appointed by order, dated the 2nd August 1917; and the statements in this petition are supported by an affidavit.

Moreover, however much the Appellants may have precluded themselves personally from raising the point, it is hardly

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possible for their Lordships, in a matter which may concern third parties, to pass it wholly by; for the adjudication of insolvency in this particular case was a remarkable one. The application was made by the would-be insolvent himself. It was refused by both Courts in India, who treated it as an unfounded application made for some fraudulent purpose. But this Board upon appeal felt bound by the terms of the Act, as it then stood, to grant the petition and to declare Chatrapat Singh insolvent. The case is reported in *Chhatrapat Singh Dugar v. Kharag Singh Lachmiram* (1). It was decided on the 20th November 1916, and the Order in Council confirming the report of the Judicial Committee has been before their Lordships and is dated the 23rd November 1916.

As to what happened after this order of adjudication was made there is no information. Whether it was afterwards annulled under the provisions of the Insolvency Act or came to a termination in some other way, before or after the death of Chatrapat Singh, and if so when, their Lordships have no information. It seems unlikely that if the state of insolvency was continuing and was brought to the attention of the Court, it should have been passed over in silence by the various learned Judges, or that a decision in favour of the validity of the attachment should have been delivered in the absence of the Receiver or other officer to whom under the statute the assets of Chatrapat Singh should have passed. Moreover, if Chatrapat Singh remained insolvent, there would be no property to pass to his heirs, and no inducement to them to appear, except for the sake of getting their costs. Whereas they not only appeared, but called witnesses, and appealed and are

now appealing to their Lordships' Board, though urging as one of their grounds of appeal a state of facts which would preclude them from having any interest in the matter.

On the other hand, it is not easy to see why the adjudication of insolvency did not divest the rights of the decree-holder as such and remit him to the position of an ordinary creditor.

In these difficult circumstances their Lordships, having no doubt what the decision as between the two parties to this appeal should be, but desiring that their judgment and His Majesty's order should be so expressed as not to prejudice the rights of other persons, have concluded that the right course is for them, while recommending that this appeal should be dismissed with costs, to recommend also that the dismissal should be accompanied by a declaration in the following words: "that if the adjudication of the insolvency of Chatrapat made on the 23rd November 1916, had not been annulled or the insolvency had not otherwise terminated on or before the 19th February 1919, the order then made by Chaudhuri, J., would, owing to the absence of the Receiver or other representative of the Insolvency Court, be inoperative except in so far as it decided against any asserted interest of the sons and heirs of Chatrapat parties to the proceedings." And they will humbly recommend His Majesty accordingly.

Solicitor: *Mr. G. C. Farr* for the Appellants.

Solicitors: *Messrs. W. W. Box & Co.* for the Respondents.

G. D. M.

(1) L. R. 44 I. A. 11: s. c. I. L. R. 44 Cal. 535; 21 O. W. N. 497 (1916).

[INSOLVENCY JURISDICTION.]

GREAVES, J.
1922,
9, May.

Re ABDUL SAMAD.

*Presidency Towns Insolvency Act (III of 1909),
sec. 36 - Order under section when can be properly
made—Admission of proof of debt by Official
Assignee a condition precedent.*

The words in sec. 36, "any creditor who has proved his debt" mean not merely a creditor who has lodged proof of his debt but a creditor whose proof has been admitted by the Official Assignee and unless this has been done no order can be made under the section. The mere fact that a creditor's name was included in the schedule filed by the insolvent and that so far his claim has not been challenged does not assist him if his debt has not been admitted by the Official Assignee so that he becomes a creditor who has proved his debt within the meaning of sec. 36 of the Act.

This was an application to set aside an order of the Registrar in Insolvency made on the 12th April 1922.

The facts of the case will appear from the judgment.

Mr. W. W. K. Page, Counsel appeared for Messrs. Kendrew & Co.

Sir B. C. Mitter and Mr. D. N. Bose for the Insolvents.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—'This is an application by one Mahomed Omari for an order that a certain order made by the Registrar in Insolvency on the 12th April 1922 on the application of Messrs. J. F. Kendrew & Co. may be set aside.

The order of 12th April was an order made by the Registrar in Insolvency under the provisions of sec. 36 of the Insolvency Act directing Mahomed Omari's examination under that section. The order of the Registrar in Insolvency is attacked by the applicant on two grounds. First,

it is said that having regard to the provisions of sec. 36, Messrs. J. F. Kendrew & Co. are not entitled to the order which has been made by the Registrar and secondly, it is said that upon the merits no such order ought to have been made.

Counsel for the applicant has directed my attention to the evidence upon which the Registrar made his order under sec. 36 and on reading that evidence I am not prepared to disturb the order on that ground, but so far as the first point is concerned I think the application is entitled to succeed. Sec. 36 provides that the Court (in this case the Registrar) may on the application of the Official Assignee or of any creditor who has proved his debt, summon before it any person whom the Court may deem capable of giving information. What it appears has happened is this. Messrs. J. F. Kendrew's name appears as that of a creditor in the schedule filed by the insolvent and it appears that they have also submitted to the Official Assignee proof of their claim supported by an affidavit but there has been no adjudication upon this claim and in my opinion the words in sec. 36 "any creditor who has proved his debt" mean not merely a creditor who has lodged proof of his debt but a creditor whose proof has been admitted by the Official Assignee under the provisions contained in sec. 25 of the 2nd schedule to the Insolvency Act. I think that no creditor is entitled to apply under sec. 36 unless his proof has actually been admitted by the Official Assignee and the mere fact that his name was included in the schedule filed by the insolvent and that so far his claim has not been challenged does not assist him if his debt has not been admitted by the Official Assignee so that he becomes a creditor who has proved his debt within the meaning of sec. 36 of the Act.

The application therefore succeeds on this ground and I set aside the order of the

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Registrar in Insolvency of the 12th April.
Messrs. J. F. Kendrew must pay the costs of this application.

Mr. B. P. Chunder, Solicitor for the Insolvents.

Messrs. Watkins & Co., Solicitors for Messrs. Kendrew & Co., one of the creditors.

S. C. M.

(CIVIL REVISIONAL JURISDICTION.)

THE IMPERIAL TOBACCO

WOODROFFE, J.

GREAVES, J.

B. B. GHOSE, J.

1922,

17, January.

COMPANY OF INDIA
LIMITED, Applicant,

v.

THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL, Opposite
Party.

Indian Income Tax Act (VII of 1918), secs. 31, 33, 34—Assessment to super-tax as agent of principal non-resident in British India—Agent who is—Agent, if must be in receipt of income on behalf of principal.

The applicant Company was assessed to super-tax as agent for six share-holders in the Company all of whom were non-residents of British India in regard to the dividends payable to them by the Company:

Held per WOODROFFE AND GREAVES, JJ.—That secs. 31 and 34 of the Indian Income Tax Act are to be read together, the latter section merely defining who may be included as an agent under sec. 31. That being so the agent must be in receipt of income within the terms of sec. 31 and the Company was not in receipt of income on behalf of the share-holders within the meaning of sec. 31.

That even if the two sections be read disjointly the Company was not in the circumstances of the case an agent within the terms of the Act.

That in this view no question as to the

propriety of assessment to super-tax as agent arose.

Per B. B. GHOSE, J., contra.—Under sec. 33, sub-sec. (1), the agent of any person residing out of British India whose income accrues or arises within British India need not be in receipt of the income on behalf of such person to be assessable to the tax in respect of such income; the mere fact of agency is sufficient. Sec. 34 was enacted for the purpose of assessing the income of such non-residents when they have not appointed agents residing in British India who might be assessed under sec. 33 (1).

It is only necessary that the person on whom the Collector has served a notice under sec. 34 is a "person employed by or on behalf of a person residing out of British India or having any business connection with such person" and if that condition is satisfied the person on whom such notice has been served shall for the purposes of the Income Tax Act be deemed to be the agent of such person.

That the Company was such an agent and was rightly assessed to super-tax as such.

This was a reference under sec. 51 (1) of the Income Tax Act of 1918.

The facts out of which this reference arose will appear from the judgment of B. B. GHOSE, J.

Mr. Langford James and Mr. Ameer Ali appeared for the Applicant Company.

Mr. B. L. Mitter, Officiating Standing Counsel, for the Secretary of State.

The JUDGMENT OF THE COURT was as follows:—

WOODROFFE, J.—In this case the applicant Company has been assessed to super-tax as agent for six gentlemen mentioned in the reference. All these gentlemen are non-residents of British India. They are share-holders in the Company and

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the assessment has been made in regard to the dividends payable to them by the Company. The Company is an Indian Limited Company and the income, of which assessment was made, arose and accrued in British India. The question is whether the Company is an agent for these gentlemen as defined in the Indian Income Tax Act VII of 1918. It is their contention that they are not such agents, and that they are not in receipt of any income of the persons whose agents they are alleged to be.

The Board has held that they were such agents and the matter has been referred to us upon the application of the Company. One substantial question is whether secs. 31 and 34 of the Indian Income Tax Act are to be read together or disjointly, in which latter case it would not be necessary in all cases that the agent should be in receipt of the income. On a consideration of this matter I am of opinion that sec. 34 merely defines who may be included as an agent under sec. 31. If so, the agent whether we look to secs. 31 or 34 must be in receipt of income within the terms of the former section.

I do not think that the circumstances of this case show a receipt within the terms of the section. Though this is sufficient to determine the matter I may add that I am not satisfied that even if secs. 31 and 34 be read disjointly, the Company was under the circumstances of this case an agent within the terms of the Act. The answer, therefore, to the first question, namely, whether the Collector of Income Tax is right in holding that the Company is an agent for these share-holders, is answered in the negative. The second question, namely, if so, whether the Company has rightly been assessed to super-tax on their account, does not arise. A copy of this judgment is directed to be given to the Revenue Authority.

GREAVES, J.—I agree.

GHOSE, J.—I regret very much that I am unable to concur in the judgment just pronounced. I think it necessary that I should state as clearly as I am able the reasons for which I have arrived at a different conclusion.

This is a reference made by the Chief Revenue Authority under sec. 51 (1) of the Income Tax Act, 1918 on the application of the Assessee, the Imperial Tobacco Company of India, Limited. Six persons who are all residing out of British India are share-holders in the Company. They were entitled to certain dividends for their shares in the Company the profits of which accrued in British India and there is no question that the share-holders are liable to pay super-tax on their income so derived. The profits due to those share-holders were sent to them by the Company to their residence outside British India. The Company was assessed for the super-tax due on the income of those six share-holders as agent of the non-resident persons under the provisions of the Income Tax Act and the Company has raised the objection that it cannot be so assessed. The questions on which the decision of this Court is sought are, (1) whether the Collector of Income Tax is right in holding that the Company is agent for these share-holders under sec. 34, Act VII of 1918, and (2) if so, whether the Company has rightly been assessed to super-tax on their account.

A Company incorporated according to law is an artificial legal person having an existence separate from its corporators. There is therefore no legal impediment to a Company being agent for any of its share-holders. The relation however of shareholder and Company is not in itself the relation of principal and agent. *Salomon v. Salomon & Co.* (1) and *Daimler Co. Ltd.*

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v. Continental Tyre & Co. (2). Something more would be necessary in order to constitute a Company an agent for its shareholders. The contention on behalf of the Company in this case is that it cannot be held to be agent of the non-resident shareholders so as to be liable to be assessed for income tax for those share-holders by the procedure taken by the Collector under sec. 34 of the Income Tax Act. It is urged that sec. 34 should be read along with sec. 31 and unless a person receives income on behalf of another residing out of British India he cannot be deemed to be an agent under sec. 34, and although the Company has the income of those persons it is not in receipt of such income. Assuming that the Company is not in receipt of the income, in order to see whether the Company may be treated as agent—the provisions of the Income Tax Act commencing from sec. 31 should be examined. Under sec. 31 an agent of any person residing out of British India being in receipt on behalf of such non-resident person of any income chargeable under the Act* is held liable for the tax. If he is actually an agent and in receipt of income on behalf of the principal nothing more is necessary in order to render him liable, but the tax is to be levied upon and recoverable from him under sec. 31 irrespective of any other provision in any other section of the Act. It is not necessary in such a case for the Collector to give the agent so liable any notice under sec. 34 of his intention of treating him as agent of the non-resident person, because he is in fact the agent. Sec. 32 refers to the case where the income chargeable is received by the Court of Wards and certain other persons. This section has no direct bearing on the present question but it is noticeable that the income chargeable must be received by the Court of Wards or other persons in order

(2) [1916] A. C. 307, 338.

that the tax may be levied upon them. Then comes sec. 33, sub-sec. (1) of which has an important bearing on the present question. Under this section any person residing out of British India whose income accrues or arises within British India “shall be chargeable to income tax in the name of the agent of any such person and such agent shall be deemed to be for all the purposes of the act the assessee in respect of such income tax.” As I read this section the agent of such a non-resident person need not be in receipt of the income on behalf of such person there being no such provision in it as in the preceding sections. The mere fact of agency is sufficient to make him liable to be assessed in respect of the income of the principal. Coming to sec. 34 it seems to me that it gives merely an extension of the meaning of the term “agent” as including persons who are treated as such, and who may be assessed under sec. 33 (1) although such persons are not really agents. Sec. 34 should be read in connection with the preceding section rather than with sec. 31. Sec. 34 refers to cases where the non-resident person has no agent in British India appointed by himself and therefore it becomes necessary to find a person who should be “deemed to be an agent” only for the purpose of the Income Tax Act and that can be done by the Collector acting in accordance with the provisions of this section. Sec. 34 in my opinion was enacted for the purpose of assessing the incomes of persons residing outside British India who are chargeable with income tax here but who have not appointed any agents residing in British India who might be assessed under sec. 33 (1). To hold otherwise, it seems to me, would be to support an anomaly that a person receiving his income through an agent in this country would be assessed, but if he asks his debtor to remit the income

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direct to him he would escape liability to pay the tax, a thing which this section was intended to remove. It is only necessary that the person on whom the Collector has served a notice under sec. 34 is a "person employed by or on behalf of a person residing out of British India or having any business connection with such person" and if that condition is satisfied the person on whom such notice has been served shall for the purposes of the Income Tax Act be deemed to be the agent of such person. The question whether the Company is a person coming within the description of sec. 34 presents to my mind very little difficulty.

The Company remits the incomes of the persons resident outside British India and should be held to have been employed to do so by or on behalf of the non-resident persons. The Company again has without doubt "connection" with the shareholders and what can that connection be but business connection? The Company itself states in its letter to the Collector that on the declaration of a dividend the Company is in the position of debtor to the share-holders. Therefore the Company also comes within the description of "having any business connection" with a non-resident person. To say that such person should also be in receipt of income on behalf of the non-resident person would be to make the enactment of the section unnecessary, because a person in receipt of income is liable to be assessed under sec. 31; also it would not be necessary to give him notice of the Collector's intention to treat him as agent, for a person receiving income for another would be an agent under the general law. It was urged on behalf of the Company that to make one person liable to income tax for another resident abroad, although he might not receive any income on behalf of such a person, might in some

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cases cause great hardship. The answer to this is two-fold; (1) it is a well-established rule that Courts ought not to be influenced by any notion of hardship in exceptional or individual cases in interpreting a statute, and (2) in order to prevent any case of hardship the proviso to sec. 34 has been enacted and the Collector may be trusted to give effect to any reasonable objection before treating a person as agent under this section. In the present case however there can be no such question of hardship. It may be observed that under sec. 21 of the repealed Income Tax Act (II of 1886) the tax was chargeable in the name of the agent where the income was received through the agent, and there was no provision corresponding to sec. 34 of the present Act. The alterations in the present Act were in my opinion, made to remove an anomaly as I have already indicated.

I would therefore answer the first question in the affirmative. The answer to the second question depends upon the first and no argument was addressed on it. Therefore the answer to it should also be in the affirmative.

Mr. H. C. Morgan, Solicitor for the Applicant Company.

Mr. Kesteven Gooding, Officiating Government Solicitor, for the State.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 199 OF 1918.

MOOKERJEE, J.
BUCKLAND, J.
1921,
21, June.

BIBI JINJIRA KHATUN
and ors., Defendants,
Appellants,
v.
MOHAMMAD FAKIRULLA
MIA and ors., Plaintiffs,
Respondents.

Mahomedan Law—Wakf—Musalman Wakf Validating Act (VI of 1913)—Provision for support and maintenance of family how far validates wakf—If wakf property be mortgaged at the time of dedication whether the wakf valid—Whether delivery of possession essential—Settlor in death illness—Wakf affects what share of the property—Death illness, conditions of—Question when one of fact only and when of law and fact.

In a wakf although provision is made for the maintenance and support of the family, children and descendants of the settlor, if the ultimate benefit is reserved for the poor and for other purposes recognized by the Mahomedan law as religious, pious or charitable purposes of a permanent character, then, tested in the light of the provisions of the Musalman Wakf Validating Act, no valid objection can be taken to the legality of such a wakf.

The circumstance that the property dedicated was under a mortgage at the time of creation of the endowment and that provision was made in the wakf for the discharge thereof does not render the endowment invalid under the Mahomedan Law.

SHAHZADI HAJRA BEGUM v. KHAJA HOSSAIN ALI KHAN (2) referred to.

According to the Calcutta High Court, a valid wakf is created by declaration of endowment by the owner, and delivery of possession is not essential.

Where the settlor had appointed himself as the first mutwali no formal deli-

very of possession from himself was a prerequisite to the validity of the wakf and even if transmutation of possession was necessary, no formal delivery was essential.

ABDUL v. BAI JUNA BAI (11) referred to.

A Muslim who is in Marz-ul-maut or death-illness cannot make a valid disposition of more than one-third of his property after payment of funeral expenses and debts, and if he purports to make a wakf in such illness, unless his heirs assent, the wakf will affect only one-third of his estate and will be invalid in respect of the excess notwithstanding that possession of the entire property dedicated has been delivered to the person nominated mutwali.

In order to establish the existence of death-illness there must be at least three conditions with regard to the illness which has caused death: (a) proximate danger of death so that there is a preponderance of apprehension of death, (b) there must be some degree of subjective apprehension of death in the mind of the sick person and (c) there must be some external indicia such as inability to attend to ordinary avocations.

FATIMA BIBI v. AHMAD BAKSH (20) referred to.

Whether or not a particular illness constitutes Marz-ul-maut is primarily a question of fact, but may sometimes be a mixed question of law and fact, for instance, where the question arises whether the facts found as to the physical condition of the deceased at the date of the execution of the deed constitute the essential elements of Marz-ul-maut as formulated by Mahomedan jurists.

This was an appeal against the decree of Babu Hem Kumar Neogi, Additional Subordinate Judge of Zillah Rajshahi, dated the 26th of March 1918.

(11) 14 Bom. L. R. 295 (1911).

(20) L. R. 35 I. A. 67; s. c. I. L. R. 35 Cal. 271; 12 C. W. N. 214 (1907).

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The facts of the case will appear from the judgment.

Babus Dwarka Nath Chakerbutty, Bhudar Haldar and Bankim Chandra Mookerjee for the Appellants.

Babus Sarat Chandra Roy Chowdhury, Krishna Kamal Moitra, Satyendra Nath Sinha and Indubhusan Majumdar for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the first two Defendants in a suit instituted by the Plaintiffs for a declaration that a *wakf* executed by the late Mohamed Elahi Buksh Sarkar on the 31st January 1915 is valid, that the first Plaintiff is the duly appointed *mutwali* thereof and that no title accrued to the seventh Defendant under the conveyance executed in his favour by the first six Defendants on the 11th April 1906. The Defendants resisted the claim upon every conceivable ground: the chief objections are indicated in the following three issues :—

“6. Was Elahi Buksh Sarkar at the date of execution of the *wakfnama* suffering from death illness? Was he physically and mentally incapable of executing the *wakfnama* when it is alleged to have been executed? Did Elahi Buksh Sarkar execute the *wakfnama*, if at all, with his free consent and with that of his heirs?

7. Did Elahi Buksh Sarkar belong to Shafi sect of Mahomedans? If so, was the alleged *wakf* valid?

8. Is the *wakfnama* propounded by the Plaintiff genuine and legally valid?”

The Subordinate Judge has found in favour of the Plaintiffs upon all the points in controversy and has decreed the suit. Upon the present appeal, his decree has been challenged substantially on four grounds, namely, first, that the *wakf* as is indicated by its terms was illusory and

inoperative in law; secondly, that the *wakf* was invalid because the settlor was at the time heavily involved in debts and the properties dedicated were under mortgage; thirdly, that the *wakf* was invalid, as possession of the properties dedicated was not transferred to the *mutwali* during the life-time of the settlor; and fourthly, that the *wakf* in excess of a third share was invalid as it was executed when the settlor was suffering from *marz-ul-maut* or death-illness and without the consent of his heirs.

As regards the first point, it is plain that the legality of the dedication which, it is not now contested, was in the present case made by a Hanafi Mussalman, must be tested with regard to the provisions of the Mussalman Wakf Validating Act (Act VI of 1913). This Act came into force on the 7th March 1913, and in secs. 3 and 1 provides as follows :—

“3. It shall be lawful for any person professing the Mussalman faith to create a *wakf* which in all other respects is in accordance with the provisions of Mussalman law for the following among other purposes :—

(a) for the maintenance and support wholly or partially, of his family, children or descendants, and

(b) where the person creating is a Hanafi Mussalman, also for his own maintenance and support during his life-time or for the payment of his debts out of the rents and profits of the property dedicated :

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

4. No such *wakf* shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent

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nature is postponed until after the extinction of the family, children or descendants of the person creating the *wakf*."

We shall now analyse the provisions of the *wakfnama* to show that they do not contravene the requirements formulated by the legislature. The preamble recites that the settlor is a Hanafi Mussalman and that he is anxious to attain salvation, though he also realises the paramount duty of every one to provide for the maintenance and worldly expenses of his own self and family, children and descendants. He accordingly creates the *wakf* for religious purposes, for the maintenance of his own self and family, children and descendants, and also to prescribe a suitable means for the payment of all his debts. Then follow detailed rules in seven paragraphs. The first paragraph lays down that the settlor shall be *mutwali* during his lifetime and then describes how the office of *mutwali* shall be held by his descendants from generation to generation, or in the event of extinction of his line, by suitable persons selected by the District Judge. The second paragraph describes the expenses to be met from the gross collections of the *wakf* estate. The third paragraph provides that one-eighth of the net income is to be spent for specified religious purposes, such as, prayer in mosques, instruction in religion and morals, distribution of alms, feeding of the poor and the like. The fourth paragraph provides that one-fourth of the net income is to be annually devoted for the liquidation of a mortgage debt of Rs. 20,000. After clearance of the debt, the amount is to be regularly applied in the payment of monthly allowance to poor Mussalman students. The fifth paragraph provides that one-half of the net income is to be applied for the payment of maintenance allowances to the descendants of the settlor in specified proportions; on failure of the

person or persons to whom allowances are directed to be paid, their share of the money is to be applied for one or more of the religious acts previously mentioned. The sixth paragraph provides that one-sixteenth of the net income shall be carried to a reserve fund for payment of rent and revenue, if at any time there should be no good collection of rent from scarcity of crops due to drought or inundation. The seventh paragraph provides that the remaining one-sixteenth of the net income shall be received by the *mutwali* as his remuneration. This summary of the leading provisions of the *wakf* leaves no room for serious controversy that the dedication cannot in any sense be deemed illusory. Although provision is made for the maintenance and support of the family, children and descendants of the settlor, the ultimate benefit is reserved for the poor and for other purposes recognised by the Mahomedan law as religious, pious or charitable purposes of a permanent character. Indeed, there is an immediate gift to charity of a substantial character. We hold accordingly that tested in the light of the provisions of the Mussalman Wakf Validating Act, no valid objection can be taken to the legality of the *wakf*.

As regards the second point, it is plain that under sec. 3 (b) of the Wakf Validating Act, it is lawful for a person professing the Mussalman faith to create a *wakf* for the payment of his debts out of the rents and profits of the property dedicated. This is in accord with the case of *Luchmi-pat Singh v. Amir Alum* (1), which is an authority for the proposition that a Hanafi Mussalman may execute a valid *wakf* by a deed which directs that the income of the property dedicated should be applied, in the first instance, for the payment of his debts and after the discharge thereof, towards defined religious and charitable

(1) I. L. R. 9 Cal. 176 (1882).

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purposes. In an earlier case, *Shahzadi Hajra Begum v. Khaja Hossain Ali Khan* (2), it had been held by Sir Barnes Peacock, C. J., that the existence of a mortgage at the time of creation of the endowment, does not render the endowment invalid under the Mahomedan law. This view is supported by texts of the highest authority. Thus, in the *Fatawai Alamgiri* (text, Vol. II, p. 458, Baillie, Digest, Part I, p. 563), it is stated on the authority of *The Fath-ul-Kadir* (text, Vol. II p. 638) :

"It is not a condition that the property dedicated should be free from the rights of others (*hakh-ul-ghair*) as in the case of pledge and bailment, so that if one were to give a lease of his land and were then to make a *wakf* of it before the expiration of the term, the *wakf* would be binding according to its conditions, and the contract of lease would not be voided, but on the expiration of the terms the land would revert to the purposes to which it was dedicated. In like manner if a man were to mortgage his land, and then dedicate it before redeeming it, the *wakf* would take effect, but the land would not be withdrawn in the same way from the mortgage, and if it should remain for years in the hands of the mortgagee and then be redeemed, it would revert to the uses for which it was made *wakf*. And if the mortgagor should die before redemption, yet if he should leave sufficient inheritance to redeem the land, it is to be redeemed and the *wakf* would take effect. But if he should not leave enough for that purpose, the land may be sold and the *wakf* would become void. In the case of a lease, when either the lessor or lessee dies, the lease becomes void, and the *wakf* immediately takes effect; so in the *Fath-ul-kadir*."

The statement in the *Durr-ul-Mukhtar*

(text p. 417, tr. Brij Mohan Dayal, p. 358) is expressed in similar terms :—

"*Wakf*, during his (the dedicator's) death-illness, has the same effect as gift during that period, that is, it is valid to the extent of a third (of the dedicator's estate) when possession is delivered. Now if the *wakf* can take effect out of a third (of the dedicator's estate) or (his) heir sanctions it, it would take effect in full, otherwise it would fail so far as it exceeds the third. If the heir sanctions it in part, it would be valid to that extent. *Wakf* created by one who has mortgaged his property and is in bad circumstances as well as by an ill person who is heavily indebted is ineffectual, but not by a debtor who is not ill, provided he creates it before his becoming incompetent (for dedicating his property on account of his heavy debts). If a dedicator who is indebted provides for the payment of his debts out of the usufruct, the *wakf* shall be valid, but should he make no such provision, the debt shall be paid out of surplus income, after meeting the expenses of the trust economically. If he dedicates the property for the benefit of a person other than himself, then the income of the dedicated property shall belong to him exclusively for whom it is dedicated—*Fatawa of Ibn-i-Najeem*.

I say that Ibn-I-Najeem has said that the debt must be heavy, because if it is not heavy, dedication shall be valid to the extent of a third of the dedicator's estate after payment of debts in case the dedicator has got heirs, otherwise in respect of the whole of it. If a Kazi sells the endowed property (to pay off the debts) and then some money is found, another land shall be purchased instead of the one sold. The whole of this discussion is to be found in the *Is'at*, under the Chapter on *wakf* by a sick people.

In the *Wahbaniah* it is said :—

If one dedicates mortgaged property and

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then redeems it, it is lawful. If he dies leaving behind money sufficient for redemption, no change (in the dedication) shall be necessary, that is to say, if he does not leave behind so much money, the *wakf* would fail or (the defraying of the expenses of the trust out of) the usufruct will be suspended (till payment of debt).

I say that in the Marrozat of Mufti Abu Saud it is recorded that he was enquired as to whether it was valid for a man to dedicate his property for the benefit of his descendants and thus avoid payment of his liabilities. His reply was that it is not valid and binding and that Kazis are forbidden from enforcing and registering such trusts so far as the liabilities extend. So remember this."

In our opinion, there can be no room for real doubt that the *wakf* in the present case is not invalidated by reason of the circumstances that the property dedicated was under mortgage and that the provision was made in the *wakfnama* for the discharge of the mortgage debt.

As regards the third point, it has been urged that the *wakf* must be pronounced invalid, in the absence of conclusive evidence to show that the possession of the properties dedicated was transferred to the *mutwali* during the life-time of the settlor. There is some divergence of opinion among classical Mussalman jurists on the question of the elements essential for the completion of a valid *wakf*. Under Hanafi law, a *wakf* is completed, (a) according to Abu Yusuf, by the mere declaration; [Hedaya trs. Hamilton and Grady, pp. 233, 239, 240. Baillie, Part I, pp. 551 and 591, *Dayal v. Keramat* (3)], (b) according to Imam Mohamed, it is completed, only if after the declaration a *mutwali* is appointed and possession is delivered to him; *Muthukhana Rama-*

nadhan Chettiar v. Veda Levaai Morakayar (4), (c) according to Abu Hanifa, it is completed, except in the case of a testamentary *wakf*, only when a decree of the Court declares that the property is the subject of a *wakf*, but not before; this is analogous to the *in jure cessio* of Roman law and the *fines* of the early English law; (Hedaya trs. Hamilton and Grady, p. 233; Baillie, part 1, p. 550). In *Doedem Jawn Bibi v. Abdullah* (5), Ryan, C. J., and Grant, J., held, after reference to the Mohamadan law officers, that the exposition of Hanafi law by Abu Yusuf on this point should be adopted, in other words, that a valid *wakf* is created by declaration of endowment by the owner and delivery of possession is not essential. This decision, so far as we have been able to trace, does not appear to have been doubted in this Court, and was followed in *Ramizan v. Zahur* (6) as an authority for the proposition that the appointment of a *mutwali* is not essential to the validity of a *wakf*. It may also be observed that in *Khaja Hossain Ali v. Hazara Begum* (7), Mr. Justice Kemp whose opinion prevailed against that of Mr. Justice Markby and was upheld on appeal under the Letters Patent [*Shahzadi Hazra Begum v. Khaja Hossain Ali* (2)] observed that decisions are primarily given according to Abu Yusuf and next according to Imam Mohamed; and this preference to the opinion of Abu Yusuf is supported by the statement in the *Fatawai Alamgiri* (text, Vol. 11, pp. 454-455). Reference may also be made to the following passage from the *Suzzat-ul-Fatawa*, p. 430:—

"Though according to Mohamed, consignment of the dedicated property and

(2) 12 W. R. 498; 4 B. L. R. 88 (A. C.) (1869).

(4) I. L. R. 34 Mad. 12 (1910).

(5) [1838] Fulton 345.

(6) 18 Ind. Cas. 240 (1913).

(7) 12 W. R. 344 (1869).

(3) 16 W. R. 116 (1871).

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separation of it (from the other properties of the *wakf*) are necessary to the completion of a *wakf*, according to Abu Yusuf, the *wakf* becomes absolute and binding, like emancipation, on the mere declaration of the *wakf*, and his right therein becomes extinguished at once. And in the *Khulasa* it is laid down that the jurists of Balkh decide according to the rule laid down by Abu Yusuf and Sadr-ush-Shahid has stated that the *Fatawa* is according to him; and in the *Fath-ul-kadir* it is mentioned that Abu Yusuf's opinion is the accepted doctrine; and in the *Munich* it is stated that the *Fatawa* is with Abu Yusuf and this is the rule accepted by the jurists of Balkh. But the Bokharites have adopted Mohammed's opinion. And in the *Shar-i-Vikavali* and the commentary of Mulla Khusru (the *Durrar-ul-Akham*) it is laid down that the *Fatawa* is with Abu Yusuf. In some places, it is mentioned in the *Khanieh* (*Fatawai Kazi Khan*) that the *Fatawa* is with Mohammed But in the *Mohit* it is laid down that the universality of our jurists have adopted the rule laid down by Abu Yusuf and this is correct."

In a recent case in the Allahabad High Court, however, [*Mohammad Azizuddin Ahmed v. Legal Remembrancer, N. W. P.* (8)], where the decision in *Doedem Jaun Bibi v. Abdullah* (5) was not brought to the notice of the Court, preference was given to the opinion of Imam Mohammed. We do not see sufficient reason to depart from the rule which was enunciated more than eighty years ago by the Supreme Court and is not shown to have been ever successfully challenged. We notice that the question was raised but not actually decided in *Banubi v. Narsingrao* (9), inasmuch as, in the cir-

cumstances of that case, there was neither declaration of *wakf* nor delivery of possession; a mere intention to set apart property for charitable purposes was clearly not sufficient to create a valid *wakf* [*Mulla Vectil Ussain v. Subramania Ayyar* (10)]. In the present case, there is a further difficulty in the path of the Appellants. Here the settlor had appointed himself as the first *mutwali*, and in such a contingency, no formal delivery of possession from himself would be necessary even according to Imam Mohammed [*Abdul v. Bai Juna Bai* (11)]. We must further remember that the *wakfnama* was executed on the 31st January 1915, and the settlor died on the 15th April 1915. It can hardly be expected that during this short period, there could be many transactions indicative of transmutation of possession. But such evidence as is on the record points to the conclusion that, after the execution of the *wakfnama*, the settlor held the dedicated property, not as owner but as *mutwali*. The direct oral evidence on the point is corroborated by the collection papers, the counterfoils of rent receipts, the plaints in rent suits and the power-of-attorney which have been produced to show that after the date of the *wakfnama* Elahi Baksh held and managed the endowed property in the character of *mutwali*. There is consequently no room for the application of the principle which has sometimes been recognised, namely, that where the declaration of a *wakf* is not acted upon by the settlor and its objects are not given effect to, it may be presumed that the *wakf* was not completed or that the settlor had no *bonâ fide* intention to create a *wakf*, [*Dilroos Banoo Begum v. Nawab Asghar Ally Khan* (12) and

(5) [1839] Fulton 345.

(8) I. L. R. 15 All. 321 (1893).

(9) I. L. R. 31 Bom. 250 (1906).

(10) 31 Mad. L. J. 431 (1916).

(11) 14 Bom. L. R. 295 (1911).

(12) 15 B. L. R. 177; 23 W. R. 453 (1875).

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Zooleka v. Zynal Abedin (13). We hold accordingly that delivery of possession was not a pre-requisite to the validity of the *wakf* in the present case, and that even if transmutation of possession was necessary no formal delivery was essential, as the settlor was himself the first *mutwali*. The third ground consequently fails.

As regards the fourth point, it has been urged that the *wakf* was invalid to the extent of a two-thirds share inasmuch as it was executed by the settlor in death-illness without the consent of the future heirs. The Subordinate Judge negatived this contention as, in his opinion, the evidence did not establish that the settlor was in death-illness at the time of execution of the deed of *wakf*. Before we refer to the evidence on the point, the requisites of the Mohammedan law on the subject may be usefully recalled here. It is well-settled that gift made by a Mussalman during *Marz-ul-maut* or death-illness cannot take effect beyond a third of the surplus of his estate, after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect, *Ibrahim Goolam Ariff v. Sailboo* (14), nor can such gifts take effect if made in favour of an heir, unless the other heirs consent thereto after the donor's death. [*Khajooroonnessa v. Rowshan Jehan* (15) and *Bafatun v. Bilaiti Khanum* (16)]. Similarly, a *wakf* made in death-illness is valid only to the extent of a third of the net estate left by the deceased unless the heir's consent [Baillie Part I, p. 601, Part II, p. 212; *Ali Hissin v. Fazla Husain* (17)]. The substance of the matter is that a

Muslim who is in *Marz-ul-maut* or death-illness cannot make a valid disposition of more than one-third of his property, and if he purports to make a *wakf* in such illness, unless his heirs assent, the *wakf* will affect only one-third of his estate and will be invalid in respect of the excess; and it is important to add that this principle operates, notwithstanding that possession of the entire property dedicated has been delivered to the person nominated *mutwali*. In order to establish the existence of death-illness, there must be at least three conditions with regard to the illness which has caused death: (a) proximate danger of death, so that there is a preponderance of apprehension of death, (b) there must be some degree of subjective apprehension of death in the mind of the sick person; and (c) there must be some external indicia, such as inability to attend to ordinary avocations. Whether or not a particular illness constitutes *Marz-ul-maut* is primarily a question of fact, as stated by Lord Robertson in *Ibrahim v. Sailboo* (14), but it may sometimes be a mixed question of law and fact, for instance, where the question arises whether the facts found as to the physical condition of the deceased at the date of execution of the deed constitute the essential elements of a *Marz-ul-maut* as formulated by Mohammedan jurists. The leading authorities in this Court which support these propositions are the cases of *Hasarat Bibi v. Goolam Jaffar* (18) and *Fatima Bibi v. Ahmad Baksh* (19), which was affirmed by the Judicial Committee in *Fatima Bibi v. Ahmad Baksh* (20). In the case last mentioned,

(13) 6 Bom. L. R. 1058, 1066 (1904).

(14) L. R. 34 I. A. 167; s. c. I. L. R. 35 Cal. 1, 22; 11 C. W. N. 973 (1907).

(15) L. R. 3 I. A. 291; s. c. I. L. R. 2 Cal. 184; 26 W. B. 36 (1876).

(16) I. L. R. 30 Cal. 683 (1903).

(17) I. L. R. 35 All. 431 (1914).

(14) L. R. 34 I. A. 167; s. c. I. L. R. 35 Cal. 1, 11 C. W. N. 973 (1907).

(18) 3 C. W. N. 57 (1898).*

(19) I. L. R. 31 Cal. 319 (1903).

(20) L. R. 35 I. A. 67; s. c. I. L. R. 35 Cal. 271; 12 C. W. N. 214 (1907).

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the three elements emphasised were (1) illness, (2) expectation of a fatal issue and (3) certain physical incapacities which indicate the degree of the illness. The second condition, it was pointed out, cannot be presumed to exist from the existence of the first, while the incapacities indicated in the third condition (with perhaps the single exception of the case where a man cannot stand up to say his prayers) are more or less of an empirical character, based upon an imperfectly devolved science of diagnosis and cannot possibly serve as infallible signs of death-illness. The importance of the subjective element was emphasised in the course of argument and will be found developed in the texts set out by Mr. Mohammed Yusuf in his Tagore Law Lectures on Marriage Dower and Divorce, Vol. III, paras. 2919-2924, 2945-2947. This view, however, is repudiated by Sir Abdur Rahim in his Tagore Law Lectures on Mahomedan Jurisprudence (p. 255), where reference is made to *Kulsoom Bibi v. Goolam Hussan Cassim* (21). A view similar to that adopted in this Court has been taken in the Bombay High Court in the case of *Sara Bai v. Rabia Bai* (22) and *Rasid v. Sherbanoo* (23), by the Allahabad High Court in the cases of *Labbi v. Bibban* (24), *Mohammed Gulshere Khan v. Mariam Begum* (25), *Mahsud Hassan v. Anwar Hussain* (26), *Muhammad Sayceed v. Muhammad Ismail* (27), *Nazar Ali v. Rafiq Husain* (28), *Khurshed Husain v. Fayaz Husain* (29), *Shauikh Muham-*

med v. Khadeja Bibi (30), *Wazir Jan v. Altaf Ali* (31) and *Fazl Ahmed v. Rahim Bibi* (32) and by the Patna High Court in *Fazlur Rahaman v. Mohammed Umar* (33). (See also Durrul Mukhtar, tr. Dayal, p. 411—Hedaya, trs. Hamilton and Grady, p. 685 and Baillie, Part I, pp. 551-552). We have now to consider, whether the evidence shows that, in the words of Lords Robertson in *Ibrahim v. Sailboon* (14), the *wakf* was made "under the pressure of the sense of imminence of death." The deed of *wakf*, as we have seen, was executed on the 31st January 1915, and was registered on the following day. The Defendants rely chiefly upon documentary evidence to show that from the beginning of November 1914, to the middle of January 1915, Elahi Buksh was ill and that he was laid up again in the second week of March 1915. The Defendants have also adduced oral evidence to show that Elahi Buksh was ill continuously from November 1914 to April 1915, when his death took place. The Subordinate Judge has carefully analysed the oral evidence and has come to the conclusion that the persons who have come forward to depose in favour of the Defendants cannot be regarded as witnesses of truth. After examination of this evidence in detail we see no reason to doubt that the Subordinate Judge correctly estimated its value, specially as the witnesses, almost without exception, are not free from bias. As regards the documentary evidence, it appears that in a suit instituted by Elahi Buksh against one Ataraddin Mondal and others for arrears of rent, the Defendants cited him as a witness. The result was that on the 3rd

(21) 10 C. W. N. 449 (1905).

(22) I. L. R. 30 Bom. 527 (1905).

(23) I. L. R. 31 Bom. 264 (1907).

(24) [1874] 6 All. H. C. R. 159.

(25) I. L. R. 3 All. 731 (1881).

(26) 6 All. L. J. 1909 (1909).

(27) I. L. R. 33 All. 233: s. c. 7 All. L. J. 1176 (1910).

(28) 8 All. L. J. 1154 (1911).

(29) I. L. R. 36 All. 289: s. c. 12 All. L. J. 417 (1914).

(14) L. R. 34 I. A. 167: s. c. I. L. R. 35 Cal. 1: 11 C. W. N. 973 (1907).

(30) 12 All. L. J. 132 (1914).

(31) I. L. R. 9 All. 357 (1887).

(32) I. L. R. 40 All. 238 (1917).

(33) [1917] 3 Pat. L. W. 232.

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November 1914, Elahi Buksh applied for time to give his evidence, and four days later, he prayed that as he was an old man of 77, bed-ridden with fever for a week, he might be examined on commission. This was supported by an affidavit from Kabiraj Sris Chandra Sen who certified that he was suffering from chronic intermittent fever; this Kabiraj has been examined as a witness in this case. An order was made for the issue of a commission but a postponement was obtained, as the pleader was unwell on the date fixed (7th March 1915). Thereupon the Commissioner went to examine Elahi Buksh on the 14th March 1915, but he was asked to postpone the examination, as the illness had increased and the patient had very little hope of surviving. This was supported by a certificate from Kabiraj Satis Chandra Sen stating that Elahi Buksh was confined to bed from fever, piles and pain, that he was unable to speak and that there was danger of death if he gave his deposition. Neither the Commissioner nor the Kabiraj has been examined as a witness, and the statements in the report by the Commissioner to the Court and in the certificate given by the Kabiraj are not admissible in evidence. But, the statements, even if admitted do not show the condition of Elahi Buksh on the 31st January 1915, when the *wakf-nama* was executed. The Subordinate Judge has further observed that Elahi Buksh was perhaps reluctant to give evidence and that the allegations as to the state of his health were not improbably exaggerated. This finds some support in the evidence adduced by the Plaintiffs, which relates to a point of time much nearer to the date of execution of the *wakf-nama* than the evidence of the incidents mentioned by the witnesses of the Defendants. The evidence led by the Plaintiffs shows that in January 1915

Elahi Buksh went to the house of his father-in-law at Rajarampur which involved a journey by bullock cart over 12 to 14 miles of road. One of these journeys was shortly before, while the other was shortly after, the 31st January 1915. On his return journey, he lost a silver betel-pot and on the 6th February 1915, he lodged information at the police station. He had also an altercation on the way with Kadir Buksh, a witness of this case, who laid an information with the police against Elahi Buksh and his peon on the 21st January 1915. There can thus be no doubt on the oral evidence, supported by reliable documentary evidence, that between the 21st January and the 6th February 1915, the state of health of Elahi Buksh was such that he was able to go from village to village to see his friends and relations, to arbitrate in the settlement of disputes of other people, and to follow the ordinary avocations of life. In cases of this character, when direct evidence of the state of health of the settlor on the date of the deed is not available, the evidence of antecedent and subsequent conditions of the settlor should converge to that point of time; this test is well-satisfied in the present case. Even if it be assumed that Elahi Buksh was ill in November and December 1914, and in the first week of January 1915 and further that he was ill again from the middle of March till his death in the middle of April, the validity of the *wakf-nama* executed on the 31st January 1915 cannot be successfully impeached on the ground of *Marz-ul-maut*, when there is positive evidence to show that from the middle of January to the middle of February 1915, which includes the date of execution of the deed, he was in a fairly good state of health. In such circumstances it cannot be urged that the *wakf-nama* was executed under the pressure of the sense of imminence of death.

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We hold accordingly that the conclusion of the Subordinate Judge on this part of the case cannot be successfully challenged.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BUCKLAND, J.—I agree and have nothing to add.

S. C. C.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 78 OF 1920

IN

APPEAL FROM APPELLATE DECREE

No. 121 OF 1919.

RAJENDRA NARAIN

MAZUMDAR and ors.,

Plaintiffs, Appellants,

v.

SHEIKH KALIM and

ors., Defendants,

Respondents.

MOOKERJEE, J.

CUMING, J.

1922,

10, February.

Bengal Tenancy Act (VIII of 1885), sec. 29 (b), enhancement of rent by contract by more than two annas in the rupee—Tenant proving previous rent, onus on Plaintiff to justify the enhancement—Sec. 109—Decision under sec. 105, if bars the entertainment of a defence to a suit already instituted—Sec. 105, decision under, if can have retrospective effect—Sec. 110.

In a suit for arrears of rent, the Plaintiff claimed an enhanced rent on the basis of a kabuliyat. The tenant proved the previous rent and that the enhancement claimed was in excess of two annas in the rupee. The Plaintiff claimed the benefit of a decision under sec. 105 of the Bengal Tenancy Act pronounced subsequent to the institution of the rent suit and before the trial thereof:

Held—That as the previous rent of the tenant had been proved, it was for the Plaintiff to justify the enhancement of the rent claimed which was obviously in excess

of the enhancement allowed by sec. 29 (b) Bengal Tenancy Act.

MANINDRA CHANDRA NANDY *v.* UPENDRA CHANDRA HAZRA (1) *followed.*

Even assuming that the expression "entertain an application or suit" in sec. 109 includes an application or suit made or instituted before the date of the application, suit or proceeding under secs. 105 to 108, it is clear that what is barred is the entertainment of an application or suit and not the entertainment of a defence to an application or suit.

APURBA KRISHNA ROY *v.* SHYAMA CHARAN PRAMANIK (2) *distinguished.*

The fair rent settled under sec. 105 cannot possibly have retrospective effect on liability for rent incurred in respect of a period prior to the decision under sec. 105.

This was an appeal under sec. 15 of the Letters Patent Act from the decision of Mr. Justice Panton, dated the 18th August 1920, in Appeal from Appellate Decree No. 121 of 1919, affirming a decree of the Subordinate Judge of Mymensingh (Babu Sarat Ch. Basu), dated the 28th September 1918, which had confirmed a decree of the Munsif of that place (Babu Birendra Kumar Dutt), dated the 16th April 1918.

The facts will fully appear from the judgment of Panton, J., which was as follows:—

PANTON, J.—“A preliminary objection is made on behalf of the Respondents that substitution of the heirs of Respondent No. 6, who died before the filing of the appeal, was improperly made by a Division Bench of this Court by its order of the 13th June last. There is no substance in the objection since the heirs in question were already parties to this appeal.

The Appellants sued to recover the rent

(1) I. L. R. 36 Cal. 604 (1908).

(2) 24 C. W. N. 223 (1919).

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of a raiyati holding, with cesses, at the rate of Rs. 22-1 a year, for the years 1320-1323, B. S. The defence was that the correct rate was Rs. 12-2 a year, at which rate the Munsif decreed the suit. An appeal by the Plaintiffs to the Subordinate Judge of Mymensingh failed and against his decision this second appeal is preferred.

The Plaintiffs relied in the Courts below upon a *kabuliyat*, executed in respect to the holding in the year 1301, in which the rent is fixed at the rate claimed by them; and they also rely upon the proceedings of the settlement officer under sec. 105 of the Bengal Tenancy Act in which, acting upon the *kabuliyat*, I have just mentioned, he settled the rent of the holding at the rate provided for in it.

The learned Subordinate Judge finds that the rent before the execution of the *kabuliyat* was at the rate of Rs. 12-2 and that the Plaintiffs had not been able to discharge the onus of proving that the enhancement effected by the *kabuliyat* did not offend against the provisions of sec. 29 of the Bengal Tenancy Act.

It is here argued that the Plaintiffs are entitled to recover rent at the rate settled by the Revenue Officer under sec. 105 of the Bengal Tenancy Act and that effect should be given to a finding come to in the course of his judgment that rent was in fact paid in the past at the higher rate. The rent claimed is, as I have observed, that of the years 1320-1323 B. S. The Revenue Officer's decision is dated October 1917, that is in 1324. It can only have effect from that date and does not relate back to years before the fair and equitable rent was settled. Nor does sec. 109 of the Act apply to the incidental finding of the Revenue Officer as to the rate at which rent was in fact paid in the past. That no doubt, is a fact which the Revenue Officer can properly consider in arriv-

ing at what the fair and equitable rent is. But it is incidental only and not the subject of the application made, suit instituted or proceedings taken under secs. 105 to 108 within the meaning of sec. 109.

The appeal fails and is dismissed with costs."

Babu Bankim Chandra Mukerjee (for *Babu Kali Kinkar Chakravarty*) for the Appellants

Babu Annada Charan Karkoon for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal under cl. 15 of the Letters Patent from the judgment of Mr. Justice Panton in a suit for recovery of arrears of rent.

The Plaintiffs claimed rent at the rate of Rs. 22-1 per year in respect of four years from the 14th April 1913 to the 13th April 1917. The Defendants pleaded that rent was payable at the rate of Rs. 12-2 per annum. The suit was instituted on the 21st April 1917 and was decided by the first Court on the 16th April 1918. The claim of the Plaintiffs was founded upon a *kabuliyat* executed by the predecessors of the Defendants on the 19th April 1894. The rent payable thereunder was that claimed in the suit. The Defendants contended that the *kabuliyat* was in contravention of sec. 29 (b) of the Bengal Tenancy Act. The trial Court held that the Defendants had successfully proved by the production of road cess return filed by the landlords on the 26th May 1885 that the rent was originally fixed at the rate of Rs. 12-2. Consequently there was, *prima facie*, an increase of Rs. 9-15 by means of the contract of the 19th April 1894. This was plainly in contravention of sec. 29. In these circumstances, from the decision of this Court in the case of *Manindra Chandra Nandy v. Upendra*

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Chandra Hazra (1), it followed that as the previous rent of the tenant had been proved, it was for the Plaintiffs to justify the enhancement of the rent claimed which was obviously in excess of the enhancement allowed by the statute. The Plaintiffs tried to discharge this burden by the allegation that at the time of the execution of the *kabuliyat* it was discovered that the Defendants were in occupation of excess lands. But this was not established to the satisfaction of the trial Judge who consequently held that the rent as fixed in the *kabuliyat* was not recoverable. The Plaintiffs, however, contended that they were entitled to the benefit of a decision under sec. 105 of the Bengal Tenancy Act, which had been pronounced on the 19th September 1917 subsequent to the institution of this suit for arrears of rent and before the trial thereof. This contention was overruled and the rent was decreed at the rate admitted by the Defendants. On appeal to the Subordinate Judge the decision of the primary Court was affirmed and Mr. Justice Panton has confirmed the decree of the Subordinate Judges.

In this Court the substantial contention on behalf of the Plaintiff-Appellant is that by virtue of sec. 109, it is not open to the tenants to contend, contrary to the decision in the proceeding under sec. 105, that the rent was payable, not at the rate of Rs. 22-1 but at the rate of Rs. 12-2. In support of this proposition reliance has been placed upon the decision of this Court in the case of *Apurba Krishna Roy v. Shyama Charan Pramanik* (2). We are of opinion that this contention cannot be supported, however much the plain language of sec. 109 may be strained.

Sec. 109 is in the following terms :—
“Subject to the provisions of sec. 109A a

Civil Court shall not entertain any application or suit concerning any matter which is or has been the subject of an application made, suit instituted or proceedings taken under sec. 105 to 108, both inclusive.” Let it be assumed for the moment that the expression “entertain an application or suit” includes an application or suit made or instituted before the date of the application, suit or proceeding under secs. 105 to 108. It is clear that what is barred is the entertainment of an application or suit and not the entertainment of a defence to an application or suit. In the case before us, if the contention of the Appellants were to prevail, the Court would be incompetent to entertain their suit for rent, and this undoubtedly is not their object in invoking the aid of sec. 109. The decision in *Apurba Krishna Roy v. Shyama Charan Pramanik* (2) is of no assistance to them. It was there ruled that sec. 109 was a bar to a civil suit by a person claiming a rent-free title when in a proceeding under sec. 105 the same question arose and rent was assessed on account of the failure of the Defendant in the proceeding under sec. 105 to adduce evidence in support of his allegation of the rent-free title. In that case, the suit which was held to be barred under sec. 109 had been instituted by the tenant who had failed to adduce evidence in support of his defence in the proceedings for settlement of fair rent under sec. 105. In the present case, the suit has been instituted by the landlord. It is clear that the fair rent which had been settled in the proceeding under sec. 105 cannot possibly have retrospective effect. The rent was claimed from the 14th April 1913 to the 13th April 1917. The proceeding for the assessment of fair rent was instituted under sec. 105 in 1914 and the decision thereunder was pro-

(1) I. L. R. 38 Cal. 804 (1908).

(2) 24 O. W. N. 223 (1919).

(2) 24 O. W. N. 223 (1919)

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nounced on the 19th September 1917. Under sec. 110 the rent settled by the Revenue Officer would take effect from the beginning of the agricultural year next after the date of the decision fixing the rent; that is, next after the 19th September 1917. This could not alter the liability for rent already incurred in respect of the period between the 14th April 1913 and the 13th April 1917. We are clearly of opinion that the view taken by Mr. Justice Panton is correct and his judgment must be affirmed.

The appeal is accordingly dismissed with costs.

J. N. R.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

THE CORPORATION OF
VISCOUNT HALDANE. CALCUTTA, Appellant,
LORD ATKINSON. v.

LORD PHILLIMORE. THE CHAIRMAN OF
1921, THE COSSIPORE AND
12, July, CHITPORE MUNICIPALITY, Respondent.

Bengal Municipal Act (III, B. C., of 1884), sec. 101—"Machinery," meaning of—Balancing tank of Calcutta Municipality with supporting structure, at its pumping station, if machinery and exempted from assessment as such.

Held—That neither the balancing tank at No. 1, Khelat Babu's Lane within the Cossipore and Chitpore Municipality (which is used to regulate the supply of water to the Calcutta Corporation) nor its supporting structure, nor both combined are "machinery" within the meaning of sec. 101 of the Bengal Municipal Act.

There is nothing in the language of the Act or in the objects it was designed to effect to suggest that the word "machinery" was used in any special sense differing from its ordinary sense.

The determination in any given case of what is or is not machinery must, to a large extent, depend upon the special facts of the case.

The word "machinery" must mean something more than a collection of ordinary tools. It must mean something more than a solid structure built upon the ground whose parts either do not move at all, or if they do move, do not move the one with or upon the other in interdependent action with the object of producing a specific and definite result.

There is great danger in attempting to give a definition of the word "machinery" which will apply in all cases. The word when used in ordinary language prima facie means some mechanical contrivances which, by themselves or in combination with one or more other mechanical contrivances, by the combined movement and interdependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result.

This was an appeal against the decree of the High Court of Judicature at Fort William in Bengal, dated the 18th March 1919.

The suit giving rise to this appeal was Suit No. 75 of 1915 in the Subordinate Judge's Court at Alipore, which was brought by the present Appellant against the present Respondent. The question therein was whether the Cossipore and Chitpore Municipality has acted *ultra vires* in assessing the Corporation of Calcutta on an annual value of Rs. 25,000 in respect of a certain holding described in the plaint.

The Subordinate Judge answered this question in the affirmative and he passed a decree for the Plaintiff, viz., the Corporation of Calcutta. But his judgment

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was reversed by the final decree of the High Court above-mentioned whereby the suit was dismissed with costs.

The present appeal had been preferred by the Plaintiff, *viz.*, the Corporation of Calcutta.

Within the limits of the Respondent Municipality the Corporation of Calcutta possesses two buildings, one being No. 71, Barrackpore Trunk Road and the other which is over 16 bighas in extent, being No. 1, Khelat Babu's Lane. The last-mentioned holding to which the present litigation related was assessed by the Respondent Municipality for rating purposes at the annual value of Rs. 25,000, this sum having been finally determined by a Board of Commissioners under sec. 114 hereinafter referred to as the Appeal Board. The case for the Appellant Corporation was that this assessment was *ultra vires* and was open to revision and cancellation by the Court, and the ground of complaint was that the storage tank erected on the holding was machinery and had improperly been taken into consideration in arriving at the said annual value.

A pumping station and engine-house of the Corporation Water-works are situated at No. 71, Barrackpore Trunk Road and the water is there pumped into underground reservoirs, whence it is pumped into the main pipes supplying Calcutta. About 350 feet from the pumping station was erected at No. 1, Khelat Babu's Lane a structure of concrete and masonry (the construction of which alone cost over a lac) with columns or trestles which supports a large steel storage tank. The said tank is connected by pipes with the pumping house and is utilised as follows. When the water pumped up exceeds the quantity required by the city the excess is allowed to pass through a valve operated by hand into the said storage tank. On the other hand, when the water pumped

up is insufficient to meet the demand, the water in the tank runs out again by the same pipe by which it was pumped into the tank, the valve being opened again to let it out. One of the witnesses referred to it as a balancing tank, and explained that its function was to store water when the demand was small and to supplement the supply given by the pumps when the demand was large. The case for the Appellant Corporation was that the said erection and the tank constituted machinery on the holding, and should in no way have been taken into consideration in arriving at its rateable value.

On the 15th June 1915 the Plaintiff Corporation instituted the present suit. In the plaint it set out from its point of view the facts of the case and prayed that the said assessment should be declared *ultra vires* and be quashed and set aside, and that the Defendant Municipality be directed to make a fresh valuation and assessment of the said holding according to law. An injunction and other relief were also asked for.

A written statement of defence was put in on behalf of the Defendant, *viz.*, the Respondent Municipality. It was pleaded *inter alia* that the decision of the Appeal Board was final, and that the assessment was legal.

On these pleadings issues were framed as follows:—

(1) Has the Court jurisdiction to try this suit?

(2) Whether the valuation and assessment made by the Defendant Municipality of the premises in suit were made according to law and procedure of the Bengal Municipal Act, and whether they are binding on the Plaintiff? Has the Civil Court any power to look into the first portion of this issue?

(3) Whether the overhead tank mentioned in the pleadings is or is not liable to be

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valued, having regard to the provisions of sec. 101 of the Bengal Municipal Act, especially having regard to the third proviso to the said section?

(4) Whether the Plaintiff is entitled to the declarations prayed for in the plaint?

(5) To what relief, if any, is the Plaintiff entitled?

The suit having come on for hearing before the Subordinate Judge, he delivered judgment therein on the 24th July 1916 for the Plaintiff and passed a decree making the declarations prayed for. He was of opinion that the proceedings of the Appeal Board were not conclusive and that the tank with the structure supporting it was machinery within the meaning of the Bengal Municipal Act and that its value had been taken into consideration for the purpose of assessment contrary to the final clause of sec. 101.

Against the said decree an appeal was preferred by the present Respondent to the High Court. The case came on for hearing before two learned Judges, who differed in opinion. They delivered their judgments on the 12th April 1918. Mr. Justice Chatterji held "That the tank is not machinery within the third proviso to sec. 101, and that even assuming it is machinery its existence upon the holding has been rightly taken into account in arriving at the annual value of the holding under sec. 101," and he was for allowing the appeal and dismissing the suit. Mr. Justice Walmsley held "That the tank is machinery and that the third proviso to sec. 101 is an absolute prohibition against taking the tank into account in arriving at the annual value," and he was for dismissing the appeal and affirming the decree appealed from.

In consequence of this difference of opinion, the appeal stood dismissed and the present Respondent preferred a further

appeal under the provisions of the Letters Patent.

The said appeal came on for hearing before a bench of three Judges, and the learned Judges had the executive engineer of the waterworks of the Calcutta Corporation called as a witness, and he gave additional evidence explaining the utility of the said tank and produced certain plans which were exhibited.

On the 18th March 1919 the learned Judges delivered their judgments and in the result a decree was passed allowing the appeal and dismissing the suit with costs throughout.

Mr. Justice Beachcroft, in the course of his judgment, said :—

"It is not suggested that the tank by itself could be called machinery, but it is argued that it answers that description by reason of its connection with the pumps, the two, to use Mr. MacCabe's words, being 'designed as one unit,' and the fact that it is part of the system for supplying water to the city . . .

"It seems to me that the function of the tank is simply this, to store water during those hours when the demand is comparatively small and to supplement the supply given by the pumps when the demand is large. In my opinion, the tank is not 'machinery' . . .

"It is conceded that if it be held that the tank is not machinery, no objection can be legally taken to the assessment. And it is obviously so for the tank being attached to the earth is 'land' within the definition contained in sec. 6 (5) of the Act and as such liable to assessment. I would allow the appeal and dismiss the suit with costs in both Courts."

Mr. Justice Greaves, who agreed with this conclusion, said :—

"I am not unmindful that we are in the present case called on to construe the meaning of 'machinery' in a clause in a statute imposing a rate and to construe the word in respect of an exemption from liability in respect of the rate imposed, but even so I am not prepared to hold that the steel tank

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falls within the meaning of machinery in the third proviso to sec. 101. Upon the evidence it appears to me that the tank in question is nothing more than a building for the storage of water, the water so stored being used when the need arises to supplement the amount of water pumped into the mains from the underground reservoir. It no doubt forms part of the system for supplying Calcutta with water and is filled from the same pumps which pump the supply of water into the mains, but that in my opinion does not make it machinery within the third proviso to sec. 101. *Prima facie* the tank is not a machine and I do not see that it becomes a machine by reason of its connection with the pumps and engine by means of the steel pipe.

"In this view the other question, namely, whether if the tank is machinery it should be taken into account in arriving at a valuation of a holding, does not arise; but assuming that I am wrong in the conclusion at which I have arrived and that the tank is machinery, then I do not think that the Cossipore and Chitpore Municipality were justified in taking its existence into account in valuing the holding."

Mr. Justice Fletcher, who dissented, said:—

"On the evidence I think the overhead tank is a mechanical contrivance used in connection with the pumps for the attainment of a particular end and that it forms an integral part of the machinery for the distribution of the filtered water supply to Calcutta. This, I think, brings the overhead tank within the definition of 'machinery' given by Davey, L. J., in *Chamberlayne v. Collins* (1).

"I agree, therefore, with the conclusion of the learned Subordinate Judge that the tank is not liable to be taken into consideration for the purpose of valuing the holding.

"The second contention was that even if the tank is 'machinery' within the meaning of sec. 101 of the Bengal Municipal Act, the existence of machinery on the holding should not be left out of consideration. This view was adopted by Chatterjea, J., and in the course of his judgment he has

(1) 70 L. T. N. S. 217 (1894).

referred to certain English authorities in support of his view. But those cases were decided on a totally different statute and it is, I think, misleading to refer to those cases for the purpose of the construction of sec. 101 of the Bengal Municipal Act. Sec. 101 of the Bengal Municipal Act, I think, excludes machinery from the valuation of the holding for all purposes."

The appeal to His Majesty in Council was brought against the decree of the High Court referred to above under a certificate granted by the High Court on the 19th August 1919.

Messrs. A. MacMorran, K. C., A. M. Dunne, K. C. and A. M. Lallier for the Appellant.

Messrs. L. DeGruyther, K. C., E. M. Konstam, K. C., and Kenworthy Brown for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—This is an appeal against the decree of the High Court of Judicature at Fort William in Bengal, dated the 18th March 1919.

The suit out of which this appeal has arisen was instituted in the Subordinate Court at Alipore by the present Appellants against the present Respondent. The question raised therein was whether the Cossipore and Chitpore Municipality had acted *ultra vires* in assessing the Corporation of Calcutta on an annual value of Rs. 25,000 in respect of a certain holding described in the plaint.

The Subordinate Judge answered this question in the affirmative and gave a decree for the Plaintiffs, the Corporation of Calcutta. But his judgment was reversed by the final decree of the High Court above-mentioned whereby the suit was dismissed with costs.

The present appeal has been preferred by the Plaintiffs, the Corporation of Calcutta, from this decree.

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The Appellants supply Calcutta with water, and for this purpose own two holdings of land, one situate at 71, Barrackpore Road, Tallah, on which there is now and has for some time past been a reservoir and a pumping station. This piece of land has been assessed as a separate holding for the purposes of the Bengal Municipal Act, 1884 (Bengal Act III of 1884), and the other, an adjoining holding, No. 1, Khelat Babu's Lane, situate about 380 to 400 feet distant from the pumping station and measuring about 16 bighas, 18 cottahs and 5 chittacks of land. It is with regard to the assessment of this latter piece of land (hereinafter referred to as No. 2 holding) that this litigation has arisen. Both pieces of land are within the municipal boundary of the Defendant's Municipality (the Respondent).

The principal waterworks of the Appellants are situate at a place named Pulta, about 15 miles from Calcutta, and its principal pumping and distributing station is at Tallah; the pump and engine-house are situate on the piece of land, called in this case holding or lot No. 1, at 71, Barrackpore Road. On this latter plot a very large underground reservoir has been constructed, from which the water is pumped into the mains at the rate of about 2,000,000 gallons per hour. These pumps work continuously, night and day.

Lot or holding No. 2 is described in the Appellants' plaint as measuring about 16 bighas, 18 cottahs and 5 chittacks, and having upon it an old stone masonry building measuring 30 by 20 feet, used as an out-office, and an overhead steel tank, resting on and supported by steel columns and girders. The tank is styled a balancing tank, and is capable of holding when full about 9,000,000 gallons. It is by pipes connected with the pumping-house.

Before its erection the Appellants en-

deavoured to send through their mains to Calcutta a constant supply of water, as far as possible at an equal pressure. In addition to the pumps and underground reservoirs at their main pumping station, they had a number of subsidiary pumps and reservoirs at different places in or near the town. These subsidiary pumps only worked during the day time. This system of distribution was adopted in order to cope if possible with the difficulty presented by the extreme want of uniformity in the rate at which water was used and consumed in Calcutta. During the hours of the morning, from 6 o'clock to 10 o'clock, the consumption in Calcutta amounted to nearly 4 million gallons per hour, about twice as much as the principal pumps were capable of pumping into the mains; while during the afternoon and the evening so much less water was consumed in the town that the principal pumps, working as they did continuously, were able to supply what was sufficient. After the erection of the balancing tank the subsidiary pumps and reservoirs were no longer used, and the following method was adopted in substitution for them to furnish Calcutta with a constant and at all times an adequate supply of water. When the consumption in Calcutta exceeded what the pumps could pump into the mains, the balancing tank was tapped by opening with the hand a cock or valve on one of the pipes connecting the tank with the water mains. Through this pipe the water flowed into the mains. Not only did it mingle with and increase the volume of the water already in the mains, but, by reason of the elevation of the tank the force of gravity acting on the water the moment it passed from the tank into the pipes, caused it to rush as it were through the pipe and increase the velocity at which the whole volume of water in the mains flowed towards the

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town. When the demand in the town had decreased to less than the pumps could supply, a cock on another pipe connected with the tank was by hand opened and the unneeded surplus water was pumped back into the tank, replenishing it so as to raise the level of the water in it to what it was before the discharge of the morning took place. Before the erection of this tank the holding No. 2 of the Appellants was by the Commissioners of the municipality in exercise of their powers under the aforesaid Act of 1884, assessed at the annual value of Rs. 1,053.

After the erection of the tank with its supporting structure, which cost the Appellants about 20 lakhs of rupees, they assessed this holding at the annual value of Rs. 1,27,030 on the basis of the cost of construction, and demanded rates to the amount of Rs. 1,462-5-3. On an objection being made by the Appellants this assessment was, in the month of August 1914, revised and reduced to Rs. 30,000, that being the yearly rent at which, according to the Respondent assessors, it might reasonably be expected to be let as it stood to a hypothetical tenant. On a further revision in March 1916, the assessment was, on the same basis reduced to Rs. 25,000. It was not really disputed that the rise in the assessment from Rs. 1,053 to Rs. 30,000 was due to the fact that the value of the tank and its supporting structure was not excluded from consideration. The Appellants contend that the tank and its supporting structure are, within the meaning of the third proviso of sec. 101 of the Bengal Municipal Act of 1884, "machinery," and being so, that the Respondent was bound by the provisions of that section to exclude them from consideration in making the assessment of Lot No. 2, and that in taking them into consideration and thereby

raising the assessment they acted *ultra vires*. Sec. 101 runs as follows :—

" 101. The gross annual rent at which any holding may be reasonably expected to let shall be deemed to be the annual value thereof, and such value shall accordingly be determined by the Commissioners and entered in the valuation list.

" Provided that (except in the Darjeeling Municipality), if there be on a holding any building or buildings the actual cost of erection of which can be ascertained, or estimated, the annual value of such holding shall in no case be deemed to exceed an amount which would be equal to seven and a half per centum on such cost, in addition to a reasonable ground rent for the land comprised in the holding:

" Provided also that, where the actual cost so ascertained shall exceed one lakh of rupees, the percentage on the annual value to be levied in respect of so much of the cost as is in excess of one lakh of rupees shall not exceed one-fourth of the percentage determined by the Commissioners under sec. 102:

" Provided further that in estimating the annual value of a holding under this section, the value of any machinery that may be on such holding shall not be taken into consideration."

It thus results that the sole question for decision on this appeal is whether or not this balancing tank with its supporting structure is "machinery" within the meaning of the last proviso of this section. No definition of the term "machinery" is to be found in the Act. It is not an easy task to define its meaning. Perhaps the consideration of what are the precise functions which the tank and its supports respectively discharge may afford some assistance. The supporting structure merely serves to give the tank elevation so that the water which is allowed to escape from it may have a fall. The same function would be discharged by any hill-side into an excavation upon which a reservoir was constructed at an adequate

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height above the house or town which the reservoir has to supply with water.

Then as to the tank itself, what functions does it discharge? It is a receptacle for water. It holds the water that is poured into it as long as that is desired. It is stationary. It does not move, nor do any of its parts move, the one upon the other. While water is in it the force of gravity acts upon the water; but the strength and rigidity of its sides counteract that force and prevent the escape or movement of the water. When this water is allowed to escape from it through a hole or holes in its side into pipes, the same force of gravity acts upon the water and pushes or draws it down the pipes, but this force of gravity acting on the unimprisoned water is neither generated, modified, directed nor applied by the tank. The latter does not move anything automatically. If it be a machine and its parts be machinery, then it is difficult to see why every reservoir which holds the water that is poured into it and lets that water escape from it through an opening on its side or bottom when that opening is not blocked up, is not equally a machine.

With a view of showing that the tank was a machine or machinery, it was urged on behalf of the Appellants that the flow into the pipes of the water allowed to escape from it regulated, the course of the water in the pipes and kept up a uniform pressure. But the nature and character of the functions which a reservoir performs cannot depend upon, the work done by the water drawn off from it, or the use to which that water is put. These functions remain the same, whether the escaped water be allowed to flow over land and irrigate it, or be used to water roads, or to drive a dynamo for the purpose of lighting a house or houses with electric light.

Sec. 6 of the aforesaid Act, no doubt provides that holding means land held

under one title, or agreement and surrounded by one set of boundaries, and further provides that where two or more adjoining holdings form part or parcel of the site or premises of a dwelling-house, manufactory, warehouse or place of trade or business, such holdings shall be deemed to be one holding for the purposes of the Act, other than those mentioned in cl. A of its 85th section (*i.e.*, the taxing of persons), and further provides that holdings separated by a road or other means of communication are to be deemed to be adjoining within the meaning of that section. Mr. Macmorran, as their Lordships understood him, having regard apparently to these provisions, contended on behalf of the Appellants that in order to determine what was the true meaning of the word "machinery," as used in sec. 101 of this Valuation Act, the works and erections on the two lots numbered 1 and 2 respectively, should be taken as a whole, and viewed as so many interdependent parts of one mechanical unit, but if that contention were sound, the underground reservoir, the roof and walls of the engine-house, if not indeed the old stone building used as an office, would all be covered by the word "machinery," quite as completely as would the tank and its supporting structure. The word "machinery" is often used in an entirely metaphorical sense, as in the phrase "the machinery of Government," but, in their Lordships' opinion, neither this engine-house nor this office could, according to the ordinary use of language, possibly be held to be "machinery" within the meaning of this statute, while on the other hand, if the tank and its supports be "machinery," it is difficult to see why the underground reservoir is not also "machinery." There is no essential difference between the two, except their situation, the one is buried underground, the other is raised high into the air. Skill,

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care and money are expended equally on the construction of both. Water is pumped or let flow into the underground reservoir (it does not appear which) from some external source, is stored there and pumped out of it into the mains. Into the tank water is pumped, stored there and allowed when occasion requires to flow out of it through an aperture in its side or bottom into the same mains. Their respective functions so closely resemble each other as to be in essence identical, yet it was not contended, nor even suggested, that the underground reservoir was "machinery."

The functions discharged by the tank closely resemble those discharged by the cisterns built on the roofs of those country houses which are situated far away from any system of water-works. The rain water which falls upon the roof of the house is conducted by rain shoots or pipes into the cisterns, is stored there till needed, and is, through an aperture or apertures in its sides or bottom, drawn by the force of gravity through pipes into the interior of the dwelling-house to satisfy domestic needs of different kinds. If the cistern rested on a tower built purposely to support it, the case would not be altered. Yet, in their Lordships' view, no intelligent person would, in the ordinary use of language, describe this cistern, whether supported on the roof of the dwelling-house or on such a tower, together with the rain shoots and rain pipes, as "machinery" and still less would they describe the roof of the house, acting in this case the part of a catchment basin, as "machinery" nor even the water pipes in the interior of the house, nor all the four together. The money of the householder, the skill of the plumber, the carpenter, the mason, and possibly the slater, all have to be expended to fix *in situ* this system of water supply, just as the similar expense must have been

incurred and skill exercised to erect the tank and its supports, but that consideration does not by itself make the one structure or the other "machinery." Nor in the case of the cistern would the fact that the water was drawn into it by the action of a hydraulic ram erected 100 yards from the dwelling-house on the bank of a swiftly flowing river alter the case.

Illustrations such as these may possibly be better guides to the true meaning of the word "machinery," when used in ordinary speech, than scientific definitions. For there is nothing in the language of this statute of 1884 or in the objects it was designed to effect, to suggest that its words are used in any special sense differing from their ordinary sense. A completed machine or a number of completed machines may of course, according to the ordinary use of language, be properly described as "machinery," so may those parts or members of a machine which when assembled, as it is styled, form a complete machine; so also may some of such of those parts which when assembled with the other necessary parts, would form a complete machine be styled "machinery"; but none of these conditions exist in the present case.

Much reliance was placed by the Appellants' Counsel in argument on a passage in the judgment of Lord Davey in the case of *Chamberlayne v Collins* (1) reported in 70 L. T. N. S. 217 and 218, but nowhere else. The question he was dealing with was whether within the meaning of a covenant in the lease with which he was dealing a switchback railway with its equipment was "operative machinery."

The first part of the passage runs thus:—

"There is always great danger in giving definitions, but I think I may say that 'machinery' implies the application of mechanical means to the attainment of

(1) 70 L. T. N. S. 217 (1894).

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some particular end by the help of natural forces, and the addition of the word "operative" means with the potentiality of operating or doing work. It is clear to my mind that a switchback railway comes within that definition."

He then gives his reason for so thinking in the following words :—

"because it is a thing skilfully built with curves of a particular shape, which by their peculiar form supply the motive power which actuates the carriages which run up and down the railway."

With all respect for Lord Davey, the words "supply motor power" do not appear to their Lordships to be very happily chosen. When a solid body is placed upon an inclined plane, two natural forces operate upon it—the force of friction and the force of gravity. If it moves down along this plane it is the resultant of those two forces which pull or push it down. The force which the inclined plane contributes is the force of friction. The force of gravity acts with equal strength, whether the slope of the plane be gentle or steep. The force of friction is in this instance a retarding not an accelerating force. If the incline of the plane be very gentle and its surface rough, the force of friction will so effectually counteract the operation of the force of gravity that the solid body will remain at rest. If, on the other hand, the incline of the plane be steep and its surface smooth, the force of gravity will so overcome the force of friction that the resultant of the two will pull or push the body down the incline. Of course, if the solid body be mounted on wheels running on rails the force of friction will be greatly diminished.

The curves of the switchback railway may by their shape favour the operation of the force of gravity, but they cannot increase or diminish that force. It is always constant. The only force the curves contribute to the action of the car

is the retarding force of friction, which tends to prevent their movement. It is an error to say that the shape of the curves "supplies motive power." It may give and does give to the ever present force of gravity the opportunity of exerting itself more effectually. That is all.

If a man standing on the roof of a house and holding in his hand a stone, drops that stone into the street below, he does not in any way generate or supply the force which brings the stone to the ground with a velocity which increases as the square of the height of the man's hand above the street, and as momentum is weight multiplied by velocity, the stone strikes the ground with great force. But that force is, in no proper sense of the term, generated or supplied by the man. While he held the stone in his hand he overcame the action of the force of gravity by the upward pressure of his hand. When he drops the stone he simply withdraws that upward pressure and allows the force of gravity to take full effect.

So in the present case it would, in the view of their Lordships, be an entire mistake to treat the force which hurries through mains the water that escapes from this tank, as a force generated or supplied or directed by the tank itself. The tank no more actuates the rush of the escaping or escaped water than does, in the above example, the hand of the man on the roof of the house actuate the fall of the stone he held in it. The respective effects of the forces of gravity and friction on solid bodies resting on a sloping hill-side were much discussed in the case of the Rhondda Valley land-slip, *Atty.-Gen. v. Cory Bros. & Co.* (2) It may well be, however, that in the case of a switchback railway there is great art and ingenuity in constructing its curves in such a way that the momen-

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tum gathered by a car in descending one curve is sufficient to carry it up the next curve in front, but not to carry it over the summit of the latter with a dangerous speed, but there is no art or ingenuity of that kind expended in so raising the height of the structure on which water takes stand so that the head pressure desired will be obtained, no more than there would be in selecting the site of a reservoir to be constructed on a hill-side.

The word "machinery" must mean something more than a collection of ordinary tools. It must mean something more than a solid structure built upon the ground, whose parts either do not move at all, or, if they do move, do not move the one with or upon the other in interdependent action with the object of producing a specific and definite result.

Their Lordships concur with Lord Davey in thinking that there is great danger in attempting to give a definition of the word "machinery" which will be applicable in all cases. It may be impossible to succeed in such an attempt. If their Lordships were obliged to run the hazard of the attempt they would be inclined to say that the word "machinery," when used in ordinary language *prima facie* means some mechanical contrivances which by themselves or in combination with one or more other mechanical contrivances, by the combined movement and interdependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result. The tank and its supporting structure do not satisfy this definition.

But their Lordships think that however skilfully definitions of "machinery" may be framed, the determination in any given case of what is or is not "machinery," must, to a large extent, depend upon the

special facts of that case. In the present case their Lordships' view is that if this tank were fed by water, whether continuously, or as it is, intermittently, but from a natural source such as a mountain burn for example, no intelligent person would, in the ordinary use of language, describe it with its supporting structure as "machinery." The fact that the water it receives does not flow into it from some such a source, but is pumped into it, does not alter its character essentially, especially as the pumps which supply the water are situated at a distance of over 300 yards from it on a holding different from, though adjoining that on which it stands, that these pumps were constructed and worked in all essentials as they are now worked long before its erection was thought of, and that it is only the unneeded surplus of the water raised by these pumps in their ordinary operation from the underground reservoir that is diverted into it. They are, therefore, of opinion that neither this tank nor its supporting structure, nor both combined, are "machinery," within the meaning of the 101st section of the above-mentioned statute of 1884; that the Respondent was justified in taking the value of these works into consideration as he has done in making the assessment of the Appellant's No. 2, holding; that the decree appealed from was right and should be affirmed, and this appeal dismissed, and they will humbly advise His Majesty accordingly. Some reliance was placed by the Appellants upon the case of *Auckland City Corporation v. Auckland Gas Co., Limited* (2). But that case is fundamentally distinguishable from the present one. What was then decided was that "the main pipes, gasometers and governors" of a gas company were, when taken all together, "machinery." The Appellants must pay the Respondent's costs.

(2) 37 New Zealand Law Report 1028.

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Solicitors : *Messrs. Orr, Dignam & Co.*,
for the Appellant.

Solicitors : *Messrs. Pugh & Co.*, for the
Respondent.

R. M. P.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD ATKINSON.

LORD PHILIMORE.

SIR JOHN EDGE.

MR. AMER ALI.

1922,

Heard, 19, January.

Judgment,

19, January.

NANKU PRASAD

SINGH, Appellant,

v.

KAMTA PRASAD

SINGH and ors.,

Respondents.

Mortgage—Equity of redemption, sale of—Purchaser retaining portion of purchase money to pay off mortgage, if personally liable for the mortgage debt.

A purchaser of mortgaged property who retains a portion of the purchase-money in order to enable him to pay off the mortgage does not thereby become personally liable to discharge the mortgage debt.

This was an appeal from a decree of the High Court, Patna (7th June 1918), reversing a decree of the Subordinate Judge of Patna (29th March 1915).

The question for determination by the Board was whether the purchaser of mortgaged property from the mortgagor became, by retaining part of the purchase price to enable him to pay off the mortgage, personally liable to discharge the mortgage debt.

On the 17th August 1901 the 1st Defendant Babu Rakhal Chunder Sur (who was not a party to the appeal) mortgaged certain property to the Appellant.

On the 14th December 1908 the 1st Defendant sold the said property in two moieties to the Respondents for Rs. 32,000. In each sale deed there was a statement that the vendor had left with the purchaser Rs. 9,818, half of Rs. 19,636 due

under the said mortgage for payment by the purchasers (Respondents) to the Appellant.

On the 28th August 1913 the Plaintiff (Appellant) instituted the present suit seeking the usual decree for sale of the mortgaged property and realization of any deficiency from the Defendants.

The trial Judge passed a decree on the 29th March 1915 for sale of the mortgaged property and for the recovery of the balance of the decretal money, if any, and costs from the Respondents personally.

On appeal the High Court at Patna set aside the decree of the Subordinate Judge so far as it made the Respondents personally liable and dismissed the suit as against them with costs.

From this decree the Appellant appealed to His Majesty in Council.

Mr. DeGruyther, K. C., (with him *B. Dube*) for the Appellant.—Urged that the decree of the Subordinate Judge was right and that the Respondents had become personally liable for the mortgage money.

Mr. E. B. Raikes for the Respondents.—Relied on the principle decided by the Privy Council in *Jamna Das v. Pandit Ram Autar Pande* (1).

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—Their Lordships have considered this case, and they think it is clear that no personal liability was incurred by the purchasers of the equity of redemption, who, their Lordships understand, are Defendants Nos. 2 to 11 of whom only five are Respondents here. Their Lordships therefore think that the decree of the High Court was right and that the point made by the Appellant fails.

The decree of the High Court, which is in general terms will, however, be amended so as to make its intention clear.

NANKU PRASAD SINGH v. KAMTA PRASAD SINGH.

So much of the decree of the Court of the Subordinate Judge as relates to the sale will stand, but it will be modified to the extent of declaring that the purchasers of the equity of redemption are under no personal liability to the Plaintiffs.

As to the costs, their Lordships think that the decree in the Subordinate Judge's Court should be modified and that the Defendants Nos. 2 to 11 and the Plaintiffs should bear their own costs in that Court. The Appellant must pay the costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor : Mr. Henry S. L. Polak for the Appellant.

Solicitors : Messrs. Watkins & Hunter for the Respondents.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 1120 OF 1919.

C. C. GHOSE, J.
1921,
25, July.

PROMOTHO NATH
MULLICK
v.
PRODYMNO KUMAR
MULLICK.

Indian Contract Act (IX of 1872), sec. 162—Son's liability for jewellery deposited with father—The son as an involuntary bailee, whether comes within the category of a depository—Limitation Act (IX of 1908), Art. 49 or 145, which applies in a suit for recovery from son of jewellery deposited with his deceased father—Wrongful or unlawful possession of the son, if attracts operation of Art. 49—Statement in a Will, how far evidence.

All actions for the recovery of a deposit of moveable property are, by the express words of Art. 145 comprised within it and no exception is made as regards deposits where demand and refusal make the continuance of possession unlawful.

The fact of the possession by the depository after demand becoming wrongful does not make Art. 49 applicable.

GANGINANI v. GATHIPATI (2) followed.

BANK OF NEW SOUTH WALES v. O'CONNOR (9) distinguished.

Notwithstanding the provisions of sec. 162 of the Indian Contract Act, (which is not an exhaustive Code) the relation of depositor and depository does not cease on the latter's death. The relation of the depositor and depository is that of a voluntary bailor and voluntary bailee and when the latter dies his successor becomes and remains an involuntary bailee so long as the article is not returned to the true owner. For the purpose of the Limitation Act, involuntary bailees can be described as depositories.

ADMINISTRATOR-GENERAL OF BENGAL v. KRISTO KAMINI (1), NARMADABAI v. BHAVANI SHANKAR (3), GOBIND PRASAD v. PATNA MUNICIPALITY (4), RAM KRISHNA v. PANAYA (5), GOPALASWAMY v. SUBRAMANIAM (6), BALKRISHNAOJI v. NARAYANASWAMI (7) and GANGABAI v. NABIN (8) referred to.

The statement in a Will cannot be used as evidence for the purpose of showing that the facts therein mentioned are true, but it can be looked at for the purpose of finding out whether it is consistent with the assertions made from time to time by the testatrix in her life-time.

The facts will fully appear from the judgment.

Sir A. Chaudhuri, and Messrs. B. L. Mitter, D. N. Basu and B. N. Ghosh for the Plaintiff.

Mr. H. D. Bose for the Defendant.

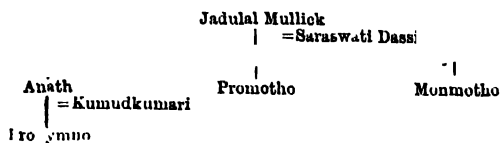
- (1) I. L. R. 31 Cal. 519 (1904).
- (2) I. L. R. 38 Mad. 56 (1909).
- (3) I. L. R. 26 Bom. 430 (1902).
- (4) 6 C. L. J. 535 (1907).
- (5) 9 Mad. L. J. 51 (1899).
- (6) I. L. R. 35 Mad. 636 (1911).
- (7) I. L. R. 37 Mad. 175 (1912).
- (8) 23 C. L. J. 145 (1915).
- (9) L. R. 14 A. C. 273 (1889).

PROMOTHO NATH MULLICK v. PRODYMNO KUMAR MULLICK.

The JUDGMENT OF THE COURT was as follows :—

In this suit the Plaintiff prays for an order that the Defendant Prodymano Kumar Mullick may be directed to make over to him a certain ornament, being a *nath*, or nose ring, or in lieu thereof may be directed to pay a sum of Rs. 25,000 being the value, according to the Plaintiff, of the said ornament.

The following genealogical table will explain the relationship of the parties herein :—



The Plaintiff is the executor of the last Will and testament of his mother Srimati Saraswati Dassi who died on the 16th April 1916. She made her Will on the 9th May 1913. Besides the Plaintiff, as will be seen on reference to the genealogical table set out above, Saraswati Dassi had two other sons, Anath Nath, who died on the 28th June 1900 leaving him surviving the Defendant as his only son (the latter having been born on the 20th November 1893), and Monmotno Nath who is still alive and who has given evidence in this case.

Saraswati Dassi's husband, Jadulal Mullick, died on 5th February 1894. The Plaintiff alleges that on the death of Jadulal, there was a partition of the properties left by him amongst his three sons and that some time in the year 1899 when the partition had been effected, but before the sons had separated from each other and had commenced to live separately, Saraswati Dassi deposited with her eldest son Anath a *nath* or nose ring consisting of two pearls, one pearl pendant, and a ruby, with a diamond suspender which belonged to her absolutely as her *stridhan* property.

The date of the deposit according to Plaintiff is fixed in this manner. The Plaintiff states that during the *pujas* of 1899 he went to Kashmir and his elder brother Anath went to Almorah. After the *pujas* were over, they returned to Calcutta and on one occasion when they were seated in the old family dwelling-house of Jadulal Mullick, Anath, the eldest son, who had been complaining that his mother was giving away all her ornaments to her daughters and was not keeping any ornaments for the wives of her sons brought up the subject again, and upon that Saraswati said to Anath "As you have always been bringing up this subject, here is this *nath* which you had better hold in deposit for me." Saraswati at that interview handed over the *nath* in question to Anath. It is alleged by the Plaintiff that upon the death of Anath in June 1900 his widow Srimati Kumudkumari Dassi took possession of the said nose ring on behalf of her infant son, the Defendant. It may be noted, in passing, that the Plaintiff had left the family dwelling-house in May 1899 and was staying in a house in Beadon Street and did not return to the family dwelling-house till the 28th June 1900, that being the date of the death of Anath. The Plaintiff alleges further that the Defendant who attained his majority in 1914 has since then been and is still in possession of the said nose ring and that although he has demanded from the Defendant the return of the said nose ring the Defendant has failed and neglected to comply with the Plaintiff's request. The Plaintiff obtained grant of the probate of the Will of his mother on 1st May 1919 but before that date he had addressed a formal letter of demand to the Defendant for the return of the nose ring in question, which demand was followed on 23rd April 1919 by the institution of the present suit.

PROMOTHO NATH MULLICK v. PRODYMNO KUMAR MULLICK.

The Defendant in his written statement denies the allegation that his grandmother Saraswati deposited with his father the nose ring in question. He states on information that on the occasion of his *annaprasan* ceremony, which took place sometime in May 1894, Saraswati made a gift of a nose ring of the value of Rs. 5,000 or thereabouts to his mother and that thereupon the nose ring became the absolute property of his mother. He further states that after the death of his father, disputes and differences arose between his mother and his grand-mother and in consequence thereof his grand-mother wrongfully demanded of his mother the return of the said nose ring, which demand was refused by his mother on the ground that the nose ring had become her absolute property by reason of the gift mentioned above. The Defendant also states that the Plaintiff's present action is barred by the statute of limitation.

On these pleadings the following issues were settled between the parties :

- (1) Was there a deposit of the *nath* as alleged in para. 3 of the plaint?
- (2) Was there a demand for the return of the said *nath*, and if so, was there a refusal to return it?
- (3) Is the suit barred by limitation?
- (4) What is the value of the said nose ring?
- (5) Does the plaint disclose a cause of action against the Defendant?

Before I deal with the evidence in this case it may be stated at this stage that the Defendant has produced before me two nose rings (Exbts. 2 and 3), Exbt. 2 being alleged by him to be the nose ring which had been given by his grand-mother to his mother on the occasion referred to above, and Exbt. 3 being a nose ring which his mother had apart from Exbt. 2. The Plaintiff after inspection of the nose ring (Exbt. 2) maintained that

the nose ring which was deposited by his mother with Anath was not the same as Exbt. 2 produced by the Defendant. The Plaintiff lays no claim to the nose ring (Exbt. 3).

In his evidence, the Plaintiff stated that his mother, who had valuable ornaments of her own, made from time to time gifts of some of those ornaments to her daughters and also to the wives of himself and his two brothers. Saraswati Dassi had a nose ring which she considered to be the most valuable of her ornaments. As mentioned above, the eldest son Anath was apprehensive that this nose ring might be given away by Saraswati to her youngest daughter or to some one not belonging to Anath's branch of the family and he used to request Saraswati from time to time not to give away the nose ring in question to any body without his knowledge. The Plaintiff relates an incident which took place after the *pujas* of 1899 when, at an interview at which besides Saraswati, the persons present were the Plaintiff and Anath, Anath having renewed one of his usual requests about the nose ring, Saraswati felt annoyed and brought out the nose ring and handed it to Anath to be kept by him as deposit on account of Saraswati. The Plaintiff states that after the death of Anath which took place on 28th June 1900 he removed from his Beadon Street residence to the old family dwelling-house in Pathuriaghata Street. Sometime thereafter Saraswati enquired of Anath's widow about the nose ring whereupon the latter stated that she had the nose ring in her possession. After that, she brought it out and showed it to Saraswati. The Plaintiff stated that this incident took place in his presence in the Pathuriaghata house. The Plaintiff further alleged that Saraswati made demands from time to time for the return of the nose ring, but Anath's widow

PROMOTHO NATH MULLICK v. PRODYMNO KUMAR MULLICK.

put her off on the pretext that inasmuch as her son, the Defendant, was still an infant she could not part with the nose ring till her son attained majority. The conversations between Saraswati and Anath's widow just referred to, according to the Plaintiff, took place in the latter's presence. The Plaintiff stayed in the old family dwelling-house from 28th June 1900 to 4th February 1911 when he removed to his present residence in Cornwallis Street. The Plaintiff stated that during this interval he saw the nose ring in the custody of the Defendant. One incident is referred to by the Plaintiff in some detail. He states that on one occasion during the rainy season it became necessary to clean the pearls pendant to the nose ring. The nose ring in question had been locked up in a safe which it was difficult to open. The Defendant's services were requisitioned and he succeeded in opening the safe and the Plaintiff found that the nose ring with the pearls, the ruby, and the diamond suspender, was kept intact within the iron safe which had been opened by the Defendant. The Plaintiff speaks to the fact that his mother felt considerably annoyed owing to the refusal on the part of the Defendant's mother and on the part of the Defendant to return the nose ring in question and that in consequence of this irritation and annoyance she removed shortly after the 4th February 1911 to the Plaintiff's new residence in Cornwallis Street. She remained there continuously from that time till her death except that on festive occasions, etc., she used to visit her grand-child and her son Monmotho in the old Pathuriaghata house. The Plaintiff states that on one occasion a friend of the family, Rai Chandi Charan Chatterjee Bahadur, who had been invited to a ceremony at the Pathuriaghata house, came to the Plaintiff's residence and interviewed his mother. The occasion for the inter-

view was that this gentleman had made enquiries during his visit to the Pathuriaghata house about the cause of the absence of Srimati Saraswati therefrom and had been informed that inasmuch as her ornaments were being detained by the Defendant she was annoyed with the Defendant and for that reason would not come to the Pathuriaghata house. At the interview between Rai Chandi Charan Chatterjee and the Plaintiff's mother, it is stated that she complained about the detention of the nose ring, the subject-matter of the present suit, and thereupon Rai Chandi Charan Chatterjee offered to mediate and bring about a settlement of the matters in dispute between Saraswati Dassi, and the Defendant, and his mother. This, according to the Plaintiff, took place sometime in 1912. In 1915 the Plaintiff states that there was some talk of settlement between the Defendant and his mother on the one hand and Saraswati on the other, but apparently nothing came out of the negotiations. As I have said, Saraswati made her Will on 9th May 1913, and in cl. 1 of the Will she stated as follows :—

“ Whatever jewellerys and cash money given by my husband Muhasoy I had, or whatever money has since accumulated, a large portion thereof has been expended and I have from time to time given to my sons and daughters valuable jewellerys, etc. Moreover there are jewellerys of Rs. 7,600 in cash as per Schedule given below in deposit with my youngest son and I have kept in deposit with my eldest son one pearl nose ring with pendant of the value of about Rs. 25,000. Now my youngest son and the heirs of my eldest son are not willing to return to me the said jewellerys or the money and have been treating me badly in various ways.”

The Plaintiff denies that the Defendant's *annaprasan* ceremony took place

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in May 1894 as alleged in the written statement and he maintains that the real *annaprasan* ceremony of the Defendant took place in 1898 and was celebrated in Tarakessur when the Defendant was about five years old. As regards the value of the nose ring the Plaintiff states that in the life-time of his father Jadulal, *i.e.*, in 1893 the nose ring had been valued by the late Rai Bahadur Badridas Mukim at Rs. 25,000. It was again valued in 1907 when it was in the custody of Anath's widow. The occasion of the last valuation, according to the Plaintiff, is this : " My elder brother's widow asked me to value some of her ornaments, that is to say, Prodymano's ornaments, because the market was going up, and she was thinking what the valuation might be. The valuers were Arjun Thakur, a jeweller, who used to call at the Pathuriaghata house, and one Johuri Pande, and the valuation was at forty five to fifty thousand rupees." Rai Badridas and Arjun Thakur are said to be dead, and the whereabouts of Johuri Pande are now unknown.

In cross-examination the Plaintiff admitted that neither he nor his mother had any documentary evidence showing that the nose ring in question had been deposited with Anath as alleged by the Plaintiff. He admitted also that between the time when the Defendant attained majority and the date when Saraswati died, the latter had not made any demands of the Defendant for the return of the nose ring in question. His attention was drawn to certain entries in the account books of the family, and although he was unwilling to admit at first that the books which had been produced by Monmotho Nath Mullick on subpoena were the account books of the family, he admitted in the end that the account books showed that certain moneys had been spent in May 1894 on account of the *annaprasan*

ceremony of the Defendant. He maintained, however, notwithstanding the entries to which his attention had been drawn, that the real *annaprasan* ceremony took place in 1898 as stated by him in examination-in-chief. He detailed the circumstances under which he saw the nose ring in the custody of the Defendant in 1911 and in support of his contention that the *annaprasan* ceremony of the Defendant could not have taken place in May 1894 as alleged by the Defendant he called his priest Rishikesh Haldar as a witness in this case.

Rishikesh stated that the Defendant's grand-father Jadulal having died in February 1894, the period of mourning called "*Kal Asauch*" had not expired in May 1894 and therefore the *annaprasan* ceremony of the Defendant in May 1894 was an impossibility. Rishikesh stated that his father Shibchandra Haldar was the family priest of the late Jadulal Mullick and his family. The eldest son of Shibchandra was Upendra Nath who gave evidence on the side of the Defendant. Rishikesh's point was that after the death of his father and as a matter of fact during the life-time of his father it was he and not Upendra who used to assist in the performance of religious ceremonies in the house of Jadulal and his family. Rishikesh stated that he went to Tarakessur with a family party in 1898 and assisted in the performance of the *annaprasan* of the Defendant at Tarakessur.

The next witness was Rai Chandi Charan Chatterjee Bahadur. He stated, as has already been indicated, that on one occasion in 1912 he had an interview with the Plaintiff's mother at the house of the Plaintiff. I need not repeat here the occasion for that interview but it is sufficient to state that according to Rai Chandi Charan Chatterjee he tried to persuade Saraswati Dassi to go back to the family

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dwelling-house. Saraswati would not go back unless and until her ornaments had been returned to her and these ornaments included the nose ring mentioned above. The witness stated that upon hearing what Saraswati had stated about the nose ring, he reported the substance of the conversation to the Defendant when the latter stated to him that he (the Defendant) did not know anything about the matter personally; all he knew was that he had heard that his father (Anath) left the *nath* in a box and his mother did not know to whom it belonged. This concludes the evidence on behalf of the Plaintiff.

The Defendant in his evidence stated that he attained his majority in 1914 and thereupon the estate of his father, both moveable and immoveable, was made over to him by his mother who had been appointed his guardian by this Court. His father's moveable estates as made over to him did not include the nose ring which the Defendant produced in Court, being Exbt. 2. He had seen the nose ring in the custody of his mother and at the time when he was required to file his written statement in this case he made enquiries of his mother. The result of the enquiry is stated by the Defendant in his written statement. He stated that he had unfortunately been deprived of the evidence of his mother as she suddenly died on 19th March 1921. He had no personal knowledge of the circumstances under which the *nath* came in the possession of his mother but since he was 15 or 16 years old, he came to know that there was a dispute about this nose ring between his mother and his grand-mother. The grand-mother was claiming the *nath* as her own and his mother was contending that the grand-mother was not entitled to a return of the *nath* because the grand-mother had made a present of the *nath* to his mother. The

Defendant was cross-examined at some length by Sir Ashutosh Chaudhuri as to why the evidence of his mother had not been taken on commission although the suit had been in the prospective list for a considerable period before the 19th March 1921. The Defendant gave what to my mind was a sufficient explanation as to why the evidence of his mother had not been taken on commission.

The Defendant called as his next witness Upendra Nath Halidar, the elder brother of Rishikesh Halidar. Upendra stated that his father Shibchandra used to officiate as priest in the house of Jadulal Mullick. On occasions when Shibchandra was absent and after Shibchandra's death Upendra used to officiate as priest. He said that Defendant's *annaprasan* ceremony took place at No. 7, Prosonno Kumar Tagore street, which, I understand, is the same house which is known as the Pathuriaghata house. The Defendant was then six months old and at the time of the *annaprasan* ceremony a *nath* was given by the Defendant's grand-mother to the Defendant's mother. This incident, according to Upendra, took place in his presence and in the presence of the Plaintiff and of Monmotho Nath Mullick. He further stated that at the time when the partition proceedings were going on, the Defendant's grand-mother had asked him to speak to Babu Gopimohun Mullick the father-in-law of Anath, in order that the father might speak in his turn to Anath's widow and induce her to return the nose ring in question. Upendra Spoke to Gopimohun Mullick at a sitting held by the Commissioner of partition and in the presence of the Commissioner. Gopimohun thereupon, it is alleged, went away to make enquiry about the nose ring of his daughter, i.e., Anath's widow. He returned and stated to Upendra that his

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daughter (Anath's widow) claimed the nose ring in question as a gift by the grandmother (Saraswati) to her and would not on any account part with it. This message was subsequently communicated by Upendra to Saraswati. In cross-examination, he stated that it was customary on the occasion of an *annaprasan* ceremony that presents should be given to the mother of the child whose *annaprasan* was being celebrated.

On the day the Defendant was examined before me, the maternal grand-father of the Defendant Babu Gopimohun Mullick was in attendance in the Court house. Just as he was about to be called into the witness box, he met with an unfortunate accident in the corridor of the Court house and died. The further hearing of the case had to be adjourned on account of this incident and after an interval of several days, the hearing was resumed. When the Defendant called as his last witness his uncle Monmotha Nath Mullick.

The latter stated that the nose ring, the subject-matter of the present litigation had not been given to the Defendant's mother in his presence. It will be remembered that Upendra had stated definitely in his evidence that the nose ring had been presented to the Defendant's mother in the presence of the Plaintiff, Monmotho and himself. Monmotho stated that during the life-time of Anath he had not heard anything about the deposit of a *nath* by Saraswati with Anath; but subsequently he came to know that his mother Saraswati claimed the return of the *nath* on the ground that she had deposited the same with Anath. The witness corroborated what had already been stated by Upendra about Gopimohun Mullick being asked to plead with his daughter (Anath's widow) for the return of the *nath* to Saraswati.

In this state of the evidence, it has been contended by Mr. H. D. Bose, who ap-

peared for the Defendant, that the Plaintiff's claim is barred by the law of limitation. His contention, shortly stated, was that on the Plaintiff's allegation there was a deposit by Saraswati of the nose ring with Anath; that Anath having died on the 28th June 1900 demands were made by Saraswati for the return of the nose ring; that on Anath's widow having refused to return the nose ring, the possession of the nose ring in the hands of the Anath's widow became wrongful; that the Defendant having attained his majority in 1914 obtained possession of the nose ring, and refused to return the nose ring and therefore continued to be in wrongful possession of the nose ring and that in the circumstances, Article 145 of the Limitation Act had no application, and that the proper article to be applied to the facts of this case was Art. 49 of the Limitation Act. He referred me to the cases: *Administrative General of Bengal v. Kristo Kamini* (1), *Ganginani Kondiah v. Gothipati Padda* (2), *Narmadabai v. Bharani Shankar* (3), *Gobind Prosad v. Patna Municipality* (4), *Ram Krishna v. Panaya* (5), *Gopalswamy v. Subramaniam* (6), *Balkrishnaou v. Narayanaswami* (7) and *Gangabai Nabin Chander* (8) and argued that as in none of these cases, sec. 162 of the Indian Contract Act was taken into consideration, the matter was *res integra* and that I should hold that Art. 145 of the Limitation Act could not possibly apply to this case. I do not propose to discuss in detail the cases referred to above, for, to my mind, the Defendant's contention is unsustainable

- (1) I. L. R. 31 Cal. 519 (1904).
- (2) I. L. R. 33 Mad. 56 (1909).
- (3) I. L. R. 26 Bom. 410 (1902).
- (4) 6 C. L. J. 585 (1907).
- (5) 9 Mad. L. J. 51 (1898).
- (6) I. L. R. 35 Mad. 636 (1911).
- (7) I. L. R. 37 Mad. 175 (1912).
- (8) 23 C. L. J. 145 (1915).

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having regard to the express language of Art. 145. It is a special article provided for application in cases where the depositor seeks to recover from the depository moveable property deposited and time runs from the date of the deposit. Art. 49 is, on the other hand, a general article for the recovery of specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same and time runs from the date when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful. For the reasons given by Sir Arnold White, C. J., in the case *Ganginani Kondiah v. Gothipati Padma* (2), I am of opinion that the fact of the possession by the depository after demand being wrongful does not make Art. 49 applicable. All actions for the recovery of a deposit of moveable property are, by the express words of Art. 145, comprised within it and no exception is made as regards deposits where demand and refusal make the continuance of possession unlawful. (In passing, it may be observed that there is a reference to Art. 162 of the Contract Act in the case in *Ganginani Kondiah v. Gothipati Padma* (2) at p. 60). The considerations arising from what obtains in England by reference to the case *Bank of New South Wales v. O'Connor* (9) are entirely out of place where you have a special article such as Art. 145. It is said however that as soon as Anath died, the relation of depositor and depository ceased and the person who obtained possession of the subject-matter of the deposit after Anath's death did not become the depository thereof and that therefore the Defendant is not a depository within the meaning of Art. 145 of the Limitation Act. There is a clear answer to this. As

pointed out by Lord Macnaghten, the Indian Contract Act is not an exhaustive Code. Therefore it cannot be said that what is stated therein with reference to the question of bailments is exhaustive. Bailments, it is well known, are of two kinds, voluntary and involuntary. Assuming the Plaintiff's story to be true, so long as Anath was alive, the relationship was that of a voluntary bailor and a voluntary bailee. When Anath died and the subject-matter of deposit passed into the hands of his widow, the latter became an involuntary bailee. As long as the article was not returned to the true owner and it remained in possession of Anath's widow she remained an involuntary bailee thereof. The Indian Contract Act contains no definition of deposit; but there can be no doubt that it is one of the species of bailments dealt with in Chap. IX of the Act. For the purpose of the Limitation Act, I think involuntary bailees can be described as depositories. In this view also, Art. 145 would come into play. On these grounds, I am of opinion that the suit is not barred by the law of limitation.

It is common ground that this nose ring was *stridhan* property of Srimati Saraswati Dassi. The executor of Saraswati Dassi would therefore, *prima facie*, be entitled to the possession of the nose ring unless he is unable to make out the case of deposit with which he has come to Court or unless his title as executor is defeated by a paramount title in the Defendant.

Now before I examine the truth or otherwise of the Plaintiff's story of deposit I desire to advert for a second to the case set up by the Defendant. Now the Defendant's story about this nose ring having been given by the Defendant's grandmother to his mother rests on the evidence of Upendra alone. The Defendant has no personal knowledge about the matter as indeed under the circumstances he could

(2) I. L. R., 38 Mad. 56 at p. 60 (1909).

(9) L. R., 14 A. C. 273 (1889).

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not be expected to have any. His uncle, Monmotho Nath Mullick, has stated in definite and unambiguous language, that he was not present at the time when, it is alleged, the nose ring was given by Srimati Saraswati Dassi to Anath Nath's widow. Therefore, as I have said, the evidence so far as the question of gift is concerned, rests on Upendra's testimony. Having given to the matter my fullest consideration, I am unable to act on Upendra's evidence, because I do not consider the same to be satisfactory. The Plaintiff, however, is not entitled to judgment even if the Defendant fails to make out the case of gift alleged in his written statement. Now Mr. Bose has criticised the evidence of the Plaintiff at great length and he has pointed out that it is certainly very remarkable that the Plaintiff should have been present on the three material occasions when the matter of the nose ring in question was discussed. As regards the first occasion, Mr. Bose points out, that the Plaintiff had left the family dwelling-house on the 16th May 1899 and did not return to the family dwelling-house till the 28th June 1900. It is therefore very remarkable, argues Mr. Bose, that the Plaintiff should have been present at the Pathuriaghata dwelling-house after the *pujas* of 1899 when there was a discussion about the nose ring between Anath Nath and Srimati Saraswati Dassi and when Srimati Saraswati Dassi made over the nose ring to Anath to be kept by him as a deposit. In the second place, Mr. Bose points out that it is also remarkable that when after the death of Anath Nath Mullick the Plaintiff had returned to the family dwelling-house he should have been present at an interview between Saraswati Dassi and Anath Nath's widow when the question of the nose ring was under discussion. In the third place, Mr. Bose points out that it is remarkable that the

Plaintiff should have been present when the iron safe in which the nose ring in question had been kept was opened by the Defendant. Now, having seen the Plaintiff in the box, I am unable to say that he is an untruthful witness. I ought to add that in my opinion the circumstances of the three occasions referred to above are not such as to lead to the necessary conclusion that the Plaintiff has deposed falsely. On the question of deposit, there is the Plaintiff's evidence which I have reviewed at length. The second point is this, it is clear that at any rate, after the death of Anath Mullick, Srimati Saraswati Dassi made consistent demands for the return of the nose ring. This is borne out by the evidence of Monmotho Nath Mullick. Thirdly, there is the statement in the Will of Srimati Saraswati Dassi. That statement cannot be used as evidence on behalf of the Plaintiff for the purpose of showing that the facts therein mentioned are true but it can be looked at for the purpose of finding out whether it is consistent with the assertions made from time to time by Srimati Saraswati Dassi in her life-time. I am not unmindful of the fact that the evidence of valuation as deposed to by the Plaintiff is such that it is impossible to place any reliance thereon. But the conclusion which I draw from the evidence taken as a whole is this that so long as Saraswati Dassi was alive, she had always made demands for the return of the nose ring. As against that, there is the fact that whenever demands were made, Anath Nath's widow always asserted that the *nath* in question had been given to her as a gift and had not been deposited with Anath Nath Mullick. Contrasting the evidence on behalf of the Plaintiff with that on behalf of the Defendant I have come to the conclusion that on the question of deposit I have no other alternative but to accept as substantially

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true the Plaintiff's account. The Plaintiff, it is true, did not admit that Exbt. 2 was the nose ring which had been deposited by Srimati Saraswati Dassi with Anath Nath Mullick but Mr. Mitter who appeared for the Plaintiff conceded that, in the absence of reliable evidence as to the valuation of the nose ring, I must accept the Defendant's word as true that Exbt. 2 was the ring which belonged to Saraswati Dassi and which was in the custody of his mother. I accept the Defendant's evidence and I find that Exbt. 2 was the nose ring which was with the Defendant's mother. There will, therefore, be judgment in favour of the Plaintiff for the return of the nose ring (Exbt. 2) to him. With regard to the costs of this suit, I have given the matter my best consideration. The Defendant, I think, has very frankly stated the circumstances which came to his knowledge in connection with the nose ring. He is in no way to blame for what has happened; there has been great delay in this matter and I think the Defendant ought not to be saddled in any way with the costs of this suit. Each party will pay his own costs. Exbt. 3 will be returned to the Defendant.

Mr. S. K. Ghosh, Solicitor (of Messrs. B. N. Basu & Co.) for the Plaintiff.

Mr. H. N. Dutt, Solicitor for the Defendant.

J. N. R. Suit decreed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 2130, 2377 TO 2379 OF 1919.

MOOKERJEE, J. ANNADA PRASAD GHOSE,

PANTON, J. Defendant No. 4,

1921, Appellant,

Heard, 4 and v.

5, August. UPENDRA NATH DEY

Judgment, SARKAR, Plaintiff,

5, August. Respondent.

Civil Procedure Code (Act V of 1908), Or.

XXXII, r. 3 - Appointment of certificated guardian as guardian ad litem R. 4, sub-r. (3), Court's power to appoint a guardian without his consent—Decree against a minor where his guardian was appointed without his consent, if binding upon him—Classes of guardians to whom sub-r. (3) applies—Guardians and Wards Act (VIII of 1890), sec. 10, sub-sec. (3)—Willingness of the guardian to act, essential—Sec. 99, applicability of.

The generality of the language used in Or. XXXII, r. 4, sub-r. (3), makes it clear that the Legislature has prescribed that no person who is competent to act as guardian of an infant, either under sub-r. (1) or under sub-r. (2), shall be appointed guardian for the suit without his consent. The willingness of the proposed guardian is essential even in cases of appointments of guardians under the Guardians and Wards Act as guardians ad litem.

When a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect upon him.

The provision as to the consent of the person proposed to be appointed guardian for the suit is mandatory and imperative.

KHIRAJMALL v. DIAM (1), RASHIDANNESSA v. NAHAMMAD (2) and several other cases referred to.

WALIA v. BANK (17) distinguished.

The fact that the guardian preferred an appeal cannot be taken as an index that he consented to his appointment as guardian for the suit, when in fact he never appeared during the trial of the suit.

SHAROOF v. RAGHUNATHA (14) referred to.

(1) L. R. 32 I. A. 23; s. c. I. L. R. 32 Cal. 293; 9 C. W. N. 201 (1904).

(2) L. R. 36 I. A. 163; s. c. I. L. R. 30 All. 672; 13 C. W. N. 1182; 10 C. L. J. 218 (1909).

(13) 18 Mad. L. T. 401 (1915).

(16) L. R. 30 I. A. 182; s. c. I. L. R. 30 Cal. 1021; 7 C. W. N. 774 (1903).

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This was an appeal preferred on the 10th November 1919 against a decree of the Subordinate Judge of Hughly (Babu Krishna Kumar Sen), dated the 19th June 1919 affirming a decree of the Munsif of that place (Moulvi Abdul Khaleque), dated 19th June 1917.

The facts of the case will fully appear from the judgment.

Babu Debendra Nath Mandal for the Appellant.

Babus Karunamoy Ghose, Bepin Behari Ghose and Sarat Kumar Mitter for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal by the fourth Defendant in a suit for recovery of possession of immoveable property on establishment of title. The Appellant was an infant at the date of the institution of the suit on the 5th May 1916. An application was made on behalf of the Plaintiff that Hari Das Ghose who had been appointed guardian of his person and property under the Guardians and Wards Act, 1890 might be appointed his guardian for the suit. Thereupon notices were issued upon the minor and the proposed guardian. The notices were in the form proscribed in Appendix H to the Code of Civil Procedure, and stated that if within the period prescribed an application was not made to the Court for the appointment of the proposed guardian or some friend of his to act as guardian of the minor for the suit, the Court would proceed to appoint some other person to act as guardian *ad litem* of the minor. On the 6th June 1916 it was reported to the Court that the notices had been duly served both upon the minor and his proposed guardian. There was no appearance, however, on behalf of the proposed guardian; yet the Court proceeded to appoint him as guardian of the

minor for the suit. At no stage of the suit, did the guardian appear and the result was that the suit was decreed *ex parte* against the infant described on the record as represented by the certificated guardian. Against this decree, the guardian on behalf of the infant preferred an appeal to the Subordinate Judge and contended that the decree could not stand as against the infant. This contention was overruled and the appeal was dismissed. Since the date of the decree of the Subordinate Judge, the infant has attained majority and the present appeal has been preferred by him in his own right. His contention is that the decree made by the primary Court is void and inoperative as against him and should be set aside with direction to that Court to re-try the suit so far as he is concerned. This position has been controverted on behalf of the Respondent. The decision of the question raised before us is not free from difficulty and depends upon the true construction of the provisions of Or. 32 of the Code of Civil Procedure.

Or. 32, r. 3 (1) provides that where the Defendant is a minor, the Court on being satisfied of the fact of his minority shall appoint a proper person to be guardian for the suit for such minor. This makes it obligatory on the Court to appoint a proper person to be guardian of the minor Defendant for the suit. The Rule then prescribes the procedure to be followed for the purpose of such appointment. No order shall be made on any application under this Rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent on that behalf, and where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in

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whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. R. 4 next deals with the question as to who may act as next friend or be appointed guardian for the suit. The persons who may so act are divided into two classes. Sub-r. (1) provides that any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit. Sub-r. (2) provides that where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be. Then follows sub-r. (3) in the following term: "No person, shall, without his consent, be appointed 'guardian for the suit.'" The generality of the language used in sub-r. (3) makes it abundantly clear that the Legislature intended this sub-rule to be applicable as well to cases under sub-r. (1) as under sub-r. (2); in other words, the Legislature has prescribed that no person who is competent to act as guardian of an infant either under sub-r. (1) or under sub-r. (2) shall be appointed guardian for the suit without his consent. It was argued on behalf of the Respondent in essence that this sub-rule is applicable only to cases of persons other than certificated guardians. This result, it was contended, follows from the provisions of the Guardians and Wards Act, 1890, which defines, in secs. 10 and 27 the duties of a person appointed as guardian of the person and property of an infant. Sub-sec. (3) of sec. 10 provides that the application of a person to be appointed guardian of an infant must be

accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses. Sec. 27 provides that a guardian of the property of a ward is bound to deal with it as carefully as a man of ordinary prudence would deal with it, if it were his own, and, subject to certain qualifications, he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property. The Respondent has urged that a guardian appointed under Act VIII of 1890 is under an obligation to defend a suit instituted against his ward; and that consequently, the Court where the suit has been instituted is entitled to presume, if not as a matter of law, at any rate as a matter of fact, that he will consent to be appointed guardian for the suit. We are of opinion that this contention should not prevail. If this were the intention of the Legislature sub-r. (3) of r. 4 might have been placed between sub-rs. (1) and (2) or might have been framed in different words. For instance, it might have provided that no person, other than a certificated guardian, shall, without his consent, be appointed guardian for the suit.

But, beyond this, a serious difficulty might arise, if the Court which had seized of the suit were held competent to appoint a certificated guardian as guardian for the suit even where he withheld his consent or expressly declined the appointment. A person appointed guardian for the suit in such circumstances, would, almost to a certainty neglect to look after the suit, and the interest of the minor would be placed in serious jeopardy. It may be conceded that a certificated guardian who takes up such an attitude may render himself amenable to the disciplinary jurisdiction of the Court which appointed him as guardian. He may, indeed, be re-

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moved under sec. 39 for breach of duty or neglect of trust. But that clearly does not afford adequate protection to the infant whose interests would be imperilled by the remissness of a person appointed, against his wishes, possibly in spite of his protest, to act as guardian for the suit. We are reluctant to adopt a construction of r. 4 which may conceivably lend to so disastrous a result. In our opinion sub-r. (3) of r. 4 controls both sub-r. (1) and sub-r. (2) and places a material restriction upon the power which the Court may exercise thereunder. It is thus plain that, in the case before us, as the proposed guardian did not signify his consent, the Court should not, in contravention of the express direction of sub-r. 3 of r. 4, have appointed him as guardian for the suit.

What then, is the effect of an appointment so made? It has been laid down in a long series of decisions that when a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect upon him. Amongst the decisions of the Judicial Committee, reference may be made to *Khiraajmal v. Diam* (1), *Rashidannessa v. Mahammad Ismail Khan* (2) and *Partab Singh v. Bhabuti Singh* (3). Amongst the decisions of this Court, reference may be made to *Dakheswar Prosad Narain Singh v. Ruwat Marton* (4), *Narsingh Narayan v. Sheikh Jahi Mistry* (5), *Bal Kishan v. Topeswar* (6), *Dinabandhu Nandi v.*

Mashuda Khatun (7), *Purna Chandra v. Bijoy Chand* (8), *Baneswar v. Tara Pada* (9), *Radhashyam v. Ranga Sundari* (10) and *Barendra Nath Bose v. Aghore Nath Bose* (11). A similar view was adopted by the Madras High Court in *Chaudhuri Krishnayya v. Koripalli Raju* (12) and *Sharooof Sahib v. Raghunatha Sivaji* (13), though a contrary view appears to have prevailed at one time in that Court as indicated by the judgment in *Oodayanasamy Tevar v. Alagappa Chetty* (14). Indeed, it is now well settled that the provision as to the consent of the person proposed to be appointed guardian for the suit is mandatory and imperative and this was emphasised by Patna High Court in *Mohan Krishna v. Har Prosad* (15). But the Respondent has urged that the present case falls within the principle of the decision of the Judicial Committee in *Waliar v. Banke Behari Pershad Singh* (16), which is clearly distinguishable. As appears from the judgment of the Judicial Committee in that case, the mother who had been proposed for appointment as guardian of her minor son had entered appearance and acted throughout the trial of the suit. No trace, however, could be found on the record of a formal order for her appointment as guardian *ad litem*. The Judicial Committee held in substance that the absence of a formal order of appointment as guardian is not fatal to the validity of the proceedings, where the proposed guardian

(1) L. R. 32 I. A. 28: s. c. I. L. R. 32 Cal. 296; 9 O. W. N. 201 (1904).

(2) L. R. 26 I. A. 168: s. c. I. L. R. 30 All. 672; 13 O. W. N. 1152; 10 C. L. J. 318 (1909).

(3) L. R. 40 I. A. 182: s. c. I. L. R. 35 All. 487; 17 O. W. N. 1165 (1913).

(4) I. L. R. 24 Cal. 25 (1896).

(5) 15 C. L. J. 3 (1911).

(6) 15 C. L. J. 446 (1911).

(7) 16 C. L. J. 318 (1912).

(8) 18 C. L. J. 18 (1915).

(9) 26 C. L. J. 258 (1917).

(10) 24 C. W. N. 541 (1920).

(11) 25 C. W. N. 525 (1920).

(12) 31 Mad. L. J. 39 (1916).

(13) 18 Mad. L. T. 401 (1915).

(14) 14 Mad. L. J. 342 (1903).

(15) 40 Ind. Cas. 2 (1917).

(16) L. R. 30 I. A. 182: s. c. I. L. R. 30 Cal. 1021; 7 C. W. N. 774 (1903).

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has in fact appeared and acted on behalf of the minor. In such a contingency, the absence of the formal order may well be treated as a curable irregularity. That this is the true effect of the decision of the Judicial Committee follows from the decisions in *Janaki Das v. Mohabir* (17), *Pokhpal v. Chidder* (18) and *Asray Singh v. Sheo Naran Singh* (19), and *Keshwesarendra Sahi v. Ranec Debedra Bala Dasi* (20). That principle has obviously no application to the circumstances of this case; nor can the provision of sec. 99, C. P. C., be invoked successfully, because as pointed out in *Barendra Nath Bose v. Aghore Nath Bose* (11), when the Court proceeds to make a decree against an infant who is not properly represented by a guardian as contemplated by the Code of Civil Procedure, the Court acts without jurisdiction, inasmuch as a decree is made against a person who is in essence not before the Court.

It has been finally urged that the fact that the proposed guardian had preferred an appeal to the Subordinate Judge may be taken as an index that he had consented to his appointment as guardian for the suit. We are unable to give effect to this contention. No doubt the proposed guardian preferred an appeal on behalf of the infant, but we have the equally important fact that he never appeared during the trial of the suit and took no steps to protect the interest of the infant. The view we take is supported by the decision of the Madras High Court in *Sharooof v. Raghunatha* (13). We hold accordingly that the decree made against the Appellant can not be maintained and must be vacated.

(11) 25 C. W. N. 525 (1920).

(13) 18 Mad. L. T. 401 (1915).

(17) 22 Ind. Cas. 240 (1913).

(18) 9 All. L. J. 653 (1912).

(19) 1 P. L. J. 573 (1916).

(20) 4 P. L. J. 213 (1918); [1919] Pat. 121.

The result is that this appeal is allowed, the decrees of both the lower Courts set aside, only in so far as the Appellant is concerned, and the suit remitted to the Court of first instance to be retried against him. The Appellant is entitled to his costs in this Court from the Plaintiff Respondent. We make no order as to his costs in the Courts below.

It is conceded that this judgment will govern second Appellants Nos. 2377 to 2379 of 1919; a decree will be drawn up in similar terms in each of those cases.

J. N. R.

'Appeal allowed.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

SURISSETTI BUT-
CHAYYA and anr.,
Appellants,

v.

LORD ATKINSON.

LORD PHILLIMORE.

SIR JOHN EDGE.

1921,

11, July.

SRI RAJAH PARTHA-
SARATHY APPA ROW
BAHADUR ZAMINDAR
GARU and anr.,
Respondents.

Madras Estates Act (I of 1908)—Object of the statute—Rights conferred by the statute on occupying cultivators of raiyati lands, if can be claimed by middlemen who sub-let to occupying and cultivating tenants—Lease of Lanka lands for term—Passing of this Act before expiration of lease—Lessee who sub-let lands to cultivating tenants if can claim permanent occupancy rights and compel landlord to grant patta—Izadars and farmers of rent if identical, and if may acquire occupancy right.

The Appellants obtained from the Respondents a lease of certain Lanka lands for a period of three years at an annual rent. The lease contained various stipulations from which it was clear that the parties contemplated the cultivation of the land and the raising of crops upon it by raiyats and there was no clause forbidd-

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ing sub-letting. It was further stipulated that at the conclusion of the term the lands were to be dealt with according to the pleasure of the Estate authorities without obtaining any release from the lessees. After obtaining the lease the Appellants did not cultivate the lands themselves but sub-leased them to cultivating tenants. On the termination of the lease the Appellants were served with a notice to quit. The Appellants, contending that inasmuch as they were cultivating the lands as raiyats when the Madras Estates Act of 1908 came into operation the contract of tenancy was entirely superseded by that statute, instituted a suit against the Respondents for determination of a fair and equitable rent for the holding leased to them and for a decree directing the Respondents to grant to them a patta in proper terms:

Held—That the object of the Madras Estates Act, 1908 was to improve the condition and confer new rights and privileges especially upon the occupying cultivators of raiyati lands and it would be quite opposed to its policy to confer on middlemen who sub-let to occupying and cultivating tenants rights and privileges at all resembling those conferred on occupying cultivators and indeed would result in depriving the latter class of the benefits intended to be conferred upon them.

The words “izadar and farmer of rent” in sub-sec. 1, sec. 6 are not synonymous. They denote two classes of persons. If izadars and farmers of rent are raiyats at all, they are, as appears from sec. 46, non-occupying raiyats and cannot be converted into raiyats with a permanent right of occupancy.

This was a consolidated appeal against two decrees, dated 14th April 1916, of the High Court of Judicature at Madras, affirming two decrees, dated 30th March

1914, of the Court of the District Judge of Kistna at Masulipatam, which affirmed two decrees, dated 25th April 1913, of the Court of the Suits Deputy Collector, Kistna District, Ellore, and made in Summary Suits No. 376 and No. 377 of 1912.

They arose out of two separate suits, wherein the parties as well as the subject-matter were different. There were, however, two questions which were common to both appeals, viz.: (1) whether the Plaintiffs-Appellants in each were occupancy tenants within the meaning of that term in the Madras Estates Land Act, 1908 (Madras Act I of 1908); and (2) whether the Plaintiffs-Appellants having given up possession of the lands in their respective occupations were entitled under sec. 55 of the said Act to a “*puttah*,” for Fasli 1320, which was the year after they had surrendered their rights, if any. There was also a further question in the first of the two appeals, viz., whether the Plaintiffs-Appellants could, under the circumstances of the case, maintain their suit?

The facts leading up to the present litigation may be briefly stated as follows:—The land in respect of which the Plaintiffs-Appellants claimed permanent occupancy rights measured 110 odd acres and was described as *lanka*-land (i.e., land formed as an island in the bed of a river). It was situate within the Zemindari of Maddur. There was litigation in connection with the right of succession to the Zamindari, and in 1908 it was under the management of a receiver appointed by the Court. The *ijara* of the land in suit was put up to auction sale early in 1908, when three persons, Butchayya and Venkataratnam (Plaintiffs-Appellants) and one Pedaswami, the husband of the second Respondent, became successful purchasers. Thereupon the receiver representing the

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Maddur estate gave a joint and several *ijara-puttah*, dated the 31st March 1908, to the said three persons, who executed an *ijara* Muchilka bearing the same date in favour of the receiver. In these documents the *lanka*-lands were called *ijara*-lands, *cists ijara-cists*, rights created thereby *ijara*-rights and the *lankas* were described to have been given on *ijara*. The *puttah* and the Muchilka were executed for a period of three years, Faslis 1317, 1318 and 1319. The *ijara*-lessees covenanted not to transfer their *ijara*-rights without the approval of the Zamindar, and as regards giving up possession at the end of the term they agreed as follows :—

“At the conclusion of the term, the estate authorities may deal with the said *lanka* as they please without the necessity of relinquishment on our part.

“At the conclusion of the term, *i.e.*, though it expires by the 20th June of Fasli 1319, we will for convenience of transaction, give up the *lanka* without leaving any produce belonging to us in the said *lanka* by the end of May of that Fasli.”

Under the terms of the *ijara-puttah* the *ijara*-lessees entered into possession, and for the entire term thereof they sublet the lands to other persons who actually cultivated the same.

On the 30th December 1909 the Appellants were served with a notice that the lease would expire Fasli 1319 and they were bound to quit the lands by the end of May 1910 and they were required to remove their things and quit the lands by that date.

On the 24th March 1911, two of the said three *ijara*-lessees instituted the suit under sec. 55 of the Madras Estates Land Act in the Court of the Sub-Collector, Narasapur Division, Narasapur, from which Court it was subsequently transferred to the Court of the Suits Deputy

Collector, Kistna, at Ellore. The receiver of the estate was the first Defendant, and the Plaintiffs made the widow and the legal representative of the third *ijara*-lessee the second Defendant, alleging that she declined to join them in bringing the action. The Plaintiffs alleged that the said *ijara*-lands were *raiyyati*-lands, and that they were in possession thereof as *raiyyats* on the 1st July 1908, on which date the said Madras Estates Land Act came into force; that under sec. 6, sub-sec. 1, of the Act they had acquired occupancy right in the said lands, and that the first Defendant, the receiver, had not complied with their demand for a *puttah* for Fasli 1320. The Plaintiffs, therefore, prayed for a decree directing the first Defendant to grant them a “*puttah*” for Fasli 1320 in the prescribed form with proper terms for the holding in question and for costs.

On the 25th April 1913, the Suits Deputy Collector delivered judgment in favour of the first Defendant and passed a decree dismissing the suit with costs. He held that the lands in suit were *raiyyati*-lands, but that the Plaintiffs, who did not actually cultivate the lands, were *ijaradars* and not *raiyyats*, and consequently could not acquire occupancy rights under sec. 6, sub-sec. 6, of the Act. He also held that the Plaintiffs had given up possession as alleged by the first Defendant, and that as they were not in possession in Fasli 1320, they could not maintain the suit. He found the sixth issue in favour of the first Defendant. He finally held that even if the Plaintiffs had acquired occupancy rights, they being only two of the three joint tenants could not maintain the action as the lands had not been separated by metes and bounds.

Against the said decree of the Suits Deputy Collector, the Plaintiffs appealed to the Court of the District Judge, Kistna,

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at Masulipatam, who, on 30th March 1914, delivered judgment in favour of the first Defendant and made a decree, dismissing the Plaintiffs' appeal with costs. He held that as the widow of the third shareholder in the *ijara-puttah* had not joined the Plaintiffs either in their suit or appeal, the latter must fail, and that, if that view were wrong, the Plaintiffs, as decided by him that day in the appeal in the second case, were not the actual cultivators of the land but were holding the same as *ijaradars* as mentioned in sec. 6, sub-sec. 6, and were not holding as occupancy *raiyati* tenants, and consequently they had acquired no occupancy rights in the land during their *ijara*. He also held that as the Plaintiffs were not in possession in Fasli 1320, they had no right to a *puttah* for that year and their action must fail.

Against the said decree of the District Judge the Plaintiffs appealed to the High Court at Madras, which Court delivered judgment on the 14th April 1916, in favour of the first Defendant and made a decree dismissing the Plaintiffs' appeal with costs. The learned Judges who heard the appeal held that though the Plaintiffs were only two of the three original joint *puttah*-holders, they were entitled to maintain their suit, but that, as held by them in the second case, the Plaintiffs were not the actual cultivators of the lands, and that they were not *raiyats* within the meaning of the Act, and consequently had acquired no occupancy rights thereunder. They also held that though the Plaintiffs were out of possession in Fasli 1320, they were competent to bring the suit for a *puttah* for that year.

Against the said decree of the High Court the Plaintiffs have appealed in the ordinary way to His Majesty in Council and their appeal has been consolidated, as already stated, with the second appeal.

Mr. K. V. L. Narasimham for the Appellants.

Sir G. R. Lowndes, K. C., and Mr. J. M. Parikh, for the first Respondent.

Messrs. DeGruyther, K. C., and Kenworthy Brown for the second Respondent.

Mr. K. V. L. Narasimham.—The point in this case is that after the lease was granted the Madras Estates Act I of 1908 was passed, and I now claim to hold under it. The Act supersedes this special lease.

The suit was begun by us for a new *patta* under sec. 53 of the Act.

Notice was given us in 1909 to quit the lands in 1910. Sec. 55 of Madras Act I of 1908.

The land is part of a Zamindari and so part of permanently settled estate under the Act. Sub-sec. 3, cl. (2).

[Sir George Lowndes.—There is a special definition of landlord under the Act and the question is whether the Appellants also are not sub-landowners.]

It is true that I have leased out portions of the land but it is not necessary that I should cultivate the whole.

Sec. 5 of the Act defines "landlord."

Sec. 3, sub-cl. (15) defines "*raiyati*."

I say that everyone who holds "*raiyati* land" for purpose of cultivation is a *raiyat*. "*Raiyati* land" is defined in the Act. Para. 10 of the section defines "private land."

It is only such persons as are entitled to collect the rents as come under the definition of landlords.

If I once establish I am a *raiyat* I come under sec. 6 (1) and not under sec. 6 (6).

The definition of *raiyat* says that I must hold the land for purposes of agriculture. This is the only condition. I need not cultivate the land myself.

I say I am neither a farmer of rent nor an *ijaradar*. It is no doubt true the *patta* is called an "*ijara*" *patta* but one must look at the whole deed.

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[LORD PHILLIMORE.—I see the Act received the assent of the Governor-General (28th June 1908) six days before this *patta*. So the parties when they drew this up had the Act evidently in their mind.]

Collector of Tanjore v. Ramasamiar (1), *ijara* or lease defined.

Sec. 187 of the Madras Estates Act—“Any contract made before or after this Act shall take away, etc,” no freedom of contract. There is no condition in the lease which gave me a right to renewal. It is not suggested that any one else has occupancy rights. It is held that the land is *raiyyati* land and so the landlord's contention that he had possession fails from the very definition of “*raiyyati*” land.

The land was divided into six portions and I have always been cultivating three portions.

Ramasami v. Collector of Madura (2), defines the word “*raiyyati*.” Before the Act, in Act VIII of 1865, when word “tenant” is used the man need not cultivate it himself, or at any rate the whole of it himself. The sub-letting of a portion of the land should not be allowed to deprive the tenant of his rights.

The reason for the Courts below deciding against me is the way in which they treat the lease. They take it that it is an *ijara* lease. *Krishnasami v. Varadaraja* (3). Wilson's Glossary, p. 214. Definitions of *ijara* in judgment (p. 61 records).

Napier, J., seems to think that because my rent cannot be fixed, I cannot be a *raiyyat*:

There were no actual tenants of the land when possession was given to me.

[LORD PHILLIMORE called on the other side for reference to cases on this point.]

Sir George Lowndes referred to *Debedra Nath v. Bibhudendra Mansingh* (4), *Rajani Kanta v. Secretary of State for India* (5) and *Yarlagadda Malakarjuna v. Somaya* (6).

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—This is a consolidated appeal against two decrees, both dated the 14th April 1916, of the High Court of Judicature at Madras, affirming two decrees, both dated the 30th March 1914, of the Court of the District Judge of Kistna at Masulipatam, which affirmed two decrees, both dated the 25th April 1913, of the Court of the Suits Deputy Collector, Kistna District, Ellore, made in Summary Suits No. 376 and No. 377 of 1912.

Though the parties in each of these suits, as well as the property affected, are different, the questions raised for decision in both appeals are practically identical, so that the decision made in one disposes of the other.

In the first suit the first Defendant who had been, in a suit dealing with the estate of the Zamindar upon which the Lanka lands, the subject of the suit, are situated, appointed Receiver by the Court by a lease bearing date the 31st March 1908, demised to the two Plaintiffs, the Appellants in this appeal, and to the deceased husband of the second of the two Defendants, the Respondents in the appeal, a considerable tract of Lanka land, over 100 acres in extent, for a term of three years from the

(1) I. L. R. 3 Mad. 342 (F. B.) (1881).

(2) L. R. 6 I. A. 170; s. c. I. L. R. 2 Mad. 67 (1879).

(3) I. L. R. 5 Mad. 345 at p. 353 (F. B.) (1882).

(4) L. R. 45 I. A. 67; s. c. I. L. R. 45 Cal. 803; 22 C. W. N. 674 (1918).

(5) L. R. 45 I. A. 199; s. c. I. L. R. 46 Cal. 99; 23 C. W. N. 649 (1918).

(6) L. R. 46 I. A. 41; s. c. I. L. R. 42 Mad. 400; 23 C. W. N. 626 (1918).

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31st March 1908, reserving thereout a cist or rent of Rs. 2,420 per annum.

Some of the provisions of this lease demand consideration. It contains a recital that, in an auction held by the lessors, on whose behalf, of course, the Receiver acted, the lease had been made. The practice prevailing on this estate in reference to such lands as were demised was proved to be this : that when a lease was about to expire, or had but recently expired, an auction was held. Those who desired to become lessees of the land previously demised, bid at this auction, and the new lease was granted to the highest bidder, whether he was the old lessee or another. There was thus no custom of continuity of occupation. The outgoing lessee had no privilege or advantage. It is further recited that as the lessees had executed a Muchilka in favour of the lessors agreeing to cultivate the said Lanka lands under the conditions set forth in the lease, the lessors had "written and given their *patta*." One of these conditions was that as regards planting seeds, turfs, grass, etc., and enlarging the extent of land, the lessees were to regard all the orders the lessors had issued or might issue. Another condition was that the lessees were to continue to cultivate only 110 acres and 85 cents. A third, that if the Government should during the lease take any of the demised lands for conservance works or any other purpose, the lessees would get a remission for that land of only the average cist that might accrue with reference to the *izara* cist. That in the event of the Government taking lands with crops upon them the lessees might receive compensation from the Government for loss of profits, but would not be given any compensation out of the estate funds for such crops. A fourth condition, that if within the term silts should be formed and loss be caused by

erosion, the lessees must bear the loss and pay the whole cist, etc., every year, and that they were not to apply for remission on any ground whatever. Again, the lessees were to bind themselves to all the steps the lessors might take against them under the Madras Rent Recovery Act 8, 1865, in regard to the collection of arrears. These are distress, sale or eviction. Another condition was that the lessees were not to transfer their *ijara* rights to others without the lessors' consent, and again, another, that neither the lessees nor the *raiyyat* who cultivates it, nor the merchant who purchases it, nor anybody else, shall take the tobacco and other produce raised on the *izara* Lanka to other places than the *izara* Lanka.

It is clear from this provision that the parties contemplated the cultivation of the land and the raising of crops upon it by *raiyyats*. No clause prohibiting sub-letting is to be found in the lease.

It is further stipulated that at the conclusion of the term the Lanka lands leased are to be dealt with according to the pleasure of the Estate Authorities without obtaining any release from the lessees, and that at the conclusion of the term, though it ends by the 30th June Fasli 1319, the lessees are to give up the Lanka land without leaving on it any produce whatever belonging to them by the end of May of that Fasli for the convenient transaction of business. Provisions so elaborate as these are scarcely such as one would expect to find in the contract of tenancy of an ordinary *raiyyat*.

The Appellants contend that by the provisions of certain clauses of the Madras Estates Act of 1908, this contract of tenancy is entirely superseded; that they are relieved from the obligations imposed on them by many of the covenants of their lease; that their tenure is changed, their occupancy continued, and their rent made

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subject to revision. If that be so, as they contend it is, then the burden rests upon them of clearly establishing that those clauses apply to their case. The obligation of proving the negative proposition that these clauses do not apply to their case does not rest upon the lessors.

On the 30th December 1909, a notice was, on behalf of the lessors, served upon the lessees informing them that as the term of three years' *izara* of the Lanka lands which they held from the lessors would expire by this Fasli 1319, and as they were bound to quit the lands at the end of May 1910, according to the contract of their registered Muchilka, they were required to remove by that date their things, etc., that were on the said Lanka lands and to vacate the same.

To this notice the lessees, on the 18th April 1910, sent a reply to the effect that they were cultivating the lands as *raiya*t when the Madras Estates Act, 1908, came into force; that they thereby acquired under sec. 6 of that statute permanent occupancy rights in the said Lanka lands and would not vacate them; and, further, that they possessed the right to obtain *patta* of the said lands; and that if *patta* should not be granted to them they would take legal proceedings. Accordingly the Appellants, in pursuance of this intimation of their intention, instituted on the 14th March 1911, against the Respondents, the suit out of which this appeal has arisen, praying the Court to determine what was a fair and equitable rent for the holding so leased to them, and further, to make a decree directing the Respondents to grant to them a *patta* in the form prescribed of their said lands on proper terms and to pay their costs.

In the judgment of Napier, J., who delivered the judgment of the High Court of Madras, the following passage is to be found: "It is admitted that the lessees

did not cultivate the lands themselves, but sub-leased them to cultivating tenants." From the judgment of the Deputy Collector it clearly appears that it was proved before him by the witnesses examined on behalf both of the Appellants and the Respondents that the Appellants had sub-let, at all events, a considerable portion of the demised lands to sub-tenants who cultivated them personally, paying rent therefor. In the judgment of the Judge of the District Court is to be found the following passage:—

"Much stress has been laid upon the fact that there were no tenants on the lands when leased to the Plaintiffs. I do not see that this alters the case in the least, if the lands were leased to them under *Izara* tenure as I have held they were. It is in evidence the Plaintiffs did not cultivate the lands at all themselves, but let them out to cultivating tenants. Even if they had cultivated some of the lands themselves, I do not think it would have altered the position as the *Izara* tenure was clearly understood between the parties when it was entered upon."

The above-mentioned extract from the judgment of Napier, J., cannot, in their Lordships' view, be treated as merely a re-statement in wider language of the conclusion at which the District Judge had arrived. It may well be that, before the High Court the advocate who appeared for the present Appellants, feeling it hopeless, owing to the evidence that had been given, and to the judicial opinions which had been pronounced, to contest the point further, made the admission set forth by Napier, J. The passage from Mr. Justice Napier's judgment should, in their Lordships' view, be taken in its ordinary meaning, from which it follows that the Appellants dealt with the lands demised as middlemen, sub-letting them to tenants who held their holdings subject to a rent payable to their immediate landlords, occupied them and cultivated them. The

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lessees claim to have a rent fixed for all the land demised to them by their leases, and to have a *patta* granted to them of all these lands. Their Lordships have not to determine, if Mr. Justice Napier's statement be accepted according to its ordinary meaning, whether, if the Appellants had only sub-let to occupying and cultivating sub-tenants a substantial portion of their lands, they would be altogether disentitled to the relief they seek, or would only be entitled to that relief in relation to the portion of the demised lands which they had not sub-let, especially as this question was not raised or argued before their Lordships on the hearing of this appeal. A decision on either of them is not called for in this appeal, and their Lordships must not be taken to have formed, much less to have expressed, any opinion upon them.

It appears to their Lordships to be plain, from the provision of the first seven chapters of this statute of 1908, if not indeed from the whole of it, that the object of the Act was to improve the condition and confer new rights and privileges especially upon the occupying cultivators of *raiyyati* land such as these lands admittedly were. It would be quite opposed to its policy to confer on middlemen who sub-let to occupying and cultivating tenants, rights and privileges at all resembling those conferred on occupying cultivators, and, indeed, would result in depriving the latter class of the benefits intended to be conferred upon them. It could hardly be suggested that it was the object of the statute to bring about such a result as this, that the middleman could compel his landlord to grant him a *patta* at a rent to be fixed by a Court, and the middleman's occupying and cultivating sub-tenants should in their turn be able to compel their immediate landlord, the middleman, to grant to them *pattas* of

their holdings at rents to be similarly fixed, and this, though the middleman was an absentee who never even visited his estate.

By sec. 50 of the Act, sub-sec. 1, the class of persons is described to whom the provisions of Chap. 4 are to apply. By sub-sec. 2 of that section, it is provided that a person of that class shall be entitled to have granted to him a *patta* for any current revenue. Turning back to sub-sec. 1 to find the description of the class to whom the right is given, it is to be composed of *raiyyats* with a permanent right of occupancy, and also *raiyyats* holding old waste lands under a landlord otherwise than under a lease in writing.

It is obvious the lessees in this case are not members of this latter section of the class. It is equally clear that they are not members of the first section of the class. They are not *raiyyats* with a permanent right of occupancy. It is to be observed the word is "occupancy" not "possession." An owner may in one sense be in possession of his estate by the receipt of rent from the tenants of that estate, but not occupancy.

Sec. 51 prescribed what the *patta* is to contain, and by sub-sec. 2 of that section it is enacted that any stipulation in restraint of cultivation or of harvesting by a *raiyyat*, or the giving up possession of his land by an occupying *raiyyat* at any specified time, is to be void and of no effect. A provision which in itself seems to suggest that the *raiyyat*, to be entitled to have a *patta* granted to him, has to be a cultivator of his holding.

Sec. 6, sub-sec. 1, defines the persons who are to be entitled to acquire the permanent right of occupancy in holdings. This definition qualifies the first section of the class mentioned in sec. 50 which are entitled to apply for a *patta*. They are those which were *raiyyats*, at the passing of

SURISETTI BUTCHAYYA v. SRI RAJAH PARTHASARATHY APPA ROW.

the Act, and then in possession, or thereafter admitted by a landowner to possession of *raiyyati* land not being waste land situate on the landlord's estate. It is this permanent right of occupancy which entitles the *raiyyat* to apply for the *patta*.

Sec. 46 prescribes the mode by which a non-occupying *raiyyat* may acquire a permanent right of occupancy of his land, but cases falling within sec. 6, sub-secs. 4 and 5, are expressly excluded.

In the view of their Lordships the words "izadar and farmer of rent" occurring in this sub-section are not synonymous. They denote two classes of persons. They are not defined in the definition clause. If *izadars* and farmers of rent are *raiyyats* at all they are as appears from sec. 46, non-occupying *raiyyats*, and cannot be converted into *raiyyats* with a permanent right of occupancy. For these several reasons their Lordships are of opinion that the Appellants do not belong to the class of persons entitled to the kind of relief they seek to obtain, that the judgments appealed from were right and should be affirmed, and this appeal be dismissed; and they will humbly advise His Majesty accordingly. The Appellants must in both appeals pay the Respondents separate costs.

Solicitor: Mr. H. S. L. Polak for the Appellants.

Solicitor: Mr. E. Dalgado for the first Respondents.

Solicitor: Mr. Douglas Grant for the Respondent in the second appeal.

R. M. P.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD BUCKMASTER.

LORD ATKINSON.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1920,

Heard, 1, December.

1922,

Judgment, 17, January.

MAHOMED IBRAHIM ROWTHER,
Appellant,

v.

SHAIKH IBRAHIM ROWTHER and
ors., Respondents.

Mahomedan Law—Proof of custom in derogation of, if permissible—Standard of proof—Onus—Lubbai Mahomedans of Coimbatore—Custom excluding females from succession.

The parties to the litigation were Lubbai Mahomedans of the Sunni sect residing in the District of Coimbatore in the Madras Presidency, the question was whether succession to the estate of a deceased member of the sect was governed by Mahomedan Law or by a rule of descent excluding females:

Held—That in view of sec. 16 of the Madras Civil Courts Act, III of 1873, *prima facie* all questions of succession amongst the parties who were Mahomedans were to be decided according to Mahomedan Law, but it is now well established that in India a custom at variance even with the rules of Mahomedan Law, governing the succession in a particular community of Mahomedans may be proved.

The onus of proof is on the party alleging the custom.

The custom should be ancient and invariable and established to be so by clear and unambiguous evidence.

RAMALAKSHMI AMMAL v. SIVANANANTHA PERUMAL SETHURAYAR (4) and ABDUL HUSSEIN KHAN v. BIBI SONA DERO (3) referred to.

(3) L. R. 45 I. A. 10; s. c. I. L. R. 45 Cal. 450; 22 C. W. N. 853 (1917).

(4) 14 M. I. A. 570 (1872).

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Held—That the evidence in this case fell far short of the standard of proof requisite to establish the custom alleged.

Apart from Madras Act III of 1873, the standard of proof found sufficient in *FANINDRA DEB RAIKAT v. RAJESWAR DAS* (1), could not be accepted as a guide in this case, upon the assumption that many of the Lubbais being recent converts from Hinduism retained the mode of the devolution of property according to Hindu usage even after their conversion.

ABRAHAM v. ABRAHAM (2) referred to.

This was an appeal from a decree of the High Court, Madras (12th August 1915) which reversed a decree of the Subordinate Judge of Coimbatore (7th January 1914).

The parties were Lubbai Mahomedans of the Sunni sect and the Plaintiffs sued to recover their share of inheritance in the estate of a deceased lady according to their personal law. The defence was that the parties were not governed by Hindu law, but by a special custom which excluded females from inheritance. The Subordinate Judge held that the onus was on the Defendants to prove the alleged custom and that they had failed to do so. He accordingly decreed the Plaintiffs' claim. On appeal the Madras High Court (Wallis, C. J., and Srinivasa Iyengar, J.) reversed the decree of the Subordinate Judge and the Plaintiff now appealed to His Majesty in Council.

The facts of the case are fully set out in the judgment of their Lordships. The Respondents were not represented before the Board.

Mr. B. Dube for the Appellant. (*Ex parte*).

The question is whether this family is governed by Mahomedan or Hindu law.

(1) L. R. 12 T. A. 72 at p. 81: s. c. I. L. R. 11 Cal. 463 (1884).

(2) 9 M. I. A. 19 (1895).

The parties are Lubbais and are *primâ facie* governed by Mahomedan Law.

I concede that each family may have its own custom whether Lubbai or anything else but if it is apparently Mahomedan it will be presumed to be governed by Mahomedan Law until some other custom is proved. Proof here is not sufficient to discharge the onus.

Mirabivi v. Vellayanna (5), Madras Act III of 1873, sec. 16. *Abdul Hussain Khan v. Bibi Sona Dero* (3)

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—This is an appeal from a decree dated the 12th August 1915, of the High Court at Madras reversing a decree of the Subordinate Judge of Coimbatore, dated the 7th January 1914.

The litigants are Lubbai Mahomedans of the Sunni sect, and the contest is as to the devolution of the estate of Mahomed Hussain Rowther. He died in 1904 leaving a widow and three sons and also two daughters named Ponnuthayee and Sulaiha Bi.

Ponnuthayee died in September 1905, leaving a husband and a daughter. They are the Plaintiffs in this suit. The Defendants are the three sons of Mahomed Hussain Rowther, his widow and the two children of Sulaiha Bi who was dead at the institution of this suit.

The Plaintiffs claim shares in Mahomed Hussain's estate as heirs of Pannuthayee, and they are supported by the children of Sulaiha Bi, who make a similar claim as heirs of their mother. The contesting Defendants are the three sons and their mother.

The decision of the rival claims depends upon whether the devolution of Mahomed

(3) L. R. 45 I. A. 10: s. c. I. L. R. 45 Cal.

450: 22 C. W. N. 353 (1917).

(5) I. L. R. 8 Mad. 464 (1885).

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Hussain's estate is governed by Mahomedan Law as the Plaintiffs contend or by a rule of descent excluding females as the contesting Defendants maintain.

Though it is common ground that Mahomed Hussain and the litigants are Mahomedans the contesting Defendants seek to escape from the course of devolution this would ordinarily involve by setting up what they describe as an immemorial custom and ancient usage.

In paras. 15, 16 and 17 of their written statement, they plead as follows :—

"15. It has been the immemorial custom and ancient usage in the Mahomedan families in the district of Coimbatore in general and in the families of these Defendants and the relations in particular that they have followed the Hindu Law as regards the law of property and succession and partition. Only the male members are entitled to succeed to the properties of their ancestors and females are excluded from inheritance when there are males. Besides it is also the custom in the Mahomedan families to give some amount including jewels at the time of or immediately after marriage to the female members in lieu of their shares; and consistently with that usage Defendants' father gave jewels, cash and other moveables worth about Rs. 4,000 to the mother of the second Plaintiff immediately after the marriage and the Plaintiff's conduct in not adverting to this in the plaint is fraudulent.

"16. According to that immemorial custom and usage the Plaintiffs have no right to claim a share in the share of Ponnuthayee Ammal while Ponnuthayee Ammal herself had no share.

"17. It has been the custom also in the family of the Plaintiffs."

On the settlement of issues the following (amongst others) were ordered to be tried :—

"(1) Are parties to suit governed by Hindu Law and whether Ponnuthayee, mother of the second Plaintiff, was not entitled to her share in the estate of her deceased father, Mahomed Hussain Rowther?

"(8) Whether the custom set out in para.

15 of the written statement is true and valid? and if so, was the claim of Ponnuthayee satisfied in accordance therewith?"

At the hearing an additional issue was framed at the request of the contesting Defendants which raised the question as to whether the suit was barred by an earlier decision. It calls for no discussion now as their Lordships see no reason to dissent from the concurrent determination of the lower Courts that this issue must be answered in the negative.

And thus the only question that remains for decision is as to this alleged custom or usage. The plea which professes to formulate it has been forcibly criticised by the learned Subordinate Judge in the course of his careful and discriminating judgment. He points out that in its wider assertion it is untenable, and even in its narrower form it is not established. He might even have gone further and pronounced the pleading bad.

In the result he held that the devolution was governed by Mahomedan Law and declared the Plaintiffs entitled to the shares claimed.

The Defendants appealed, and to meet the criticism of the Subordinate Judge they narrowed the definition of the custom. The 9th ground is that "the Court below ought to have found the custom alleged at any rate as regards the Lubbai community residing in the villages mentioned in the written statement."

On appeal the High Court reversed the decision of the Subordinate Judge and dismissed the suit. The learned Chief Justice, instead of treating the custom or usage as a matter for proof by the contesting Defendants, held in effect that the Lubbai Mahomedans in that part of India at the date of their conversion from Hinduism to the Mahomedan faith elected to retain the Hindu rule excluding women, and that the real question in this suit was

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whether the Plaintiffs had proved an abandonment of the Hindu rule of exclusion.

Viewing the evidence in this light the Chief Justice held the evidence oral and documentary sufficient to show that the Defendants' family had adhered, with perhaps most of the Lubbais of the neighbourhood, to the Hindu rule excluding the succession of females.

Mr. Justice Srinivasa Ayyangar was more guarded in his opinion. Citing a passage from the judgment in *Fanindra Deb Raikat v. Rajeswar Das* (1) as a guide to the standard of proof required, he regarded it as probable that "many of the Lubbais being recent converts from Hinduism retained the mode of devolution of property according to Hindu usages even after their conversion."

He accordingly considered that the evidence to which he made special reference taken along with the evidence of the general prevalence of the practice was sufficient to prove the family custom set up.

But it is a misapprehension of the passage cited to treat it as a guide to the standard of proof in this case. There the question at issue was whether in the family then under discussion there was a legal power to adopt. Had its members been Hindus they would have been governed by Hindu law and there would have been this power. But though they affected to be Hindus, that in fact was not their status: the utmost that could be said was that though the family had introduced many Hindu customs, they in fact were governed by family customs. Of such a family it was manifestly appropriate to remark that "the question is not whether the general law is modified by a family custom forbidding adoption, but whether

with respect to inheritance the family is governed by Hindu law, or by customs which do not allow an adopted son to inherit." But such a comment can have no application to conditions as they exist in this case.

No doubt in *Abraham v. Abraham* (2) it is said that a convert upon his conversion may renounce the old law by which he was bound as he has renounced his old religion, or if he thinks fit he may abide by the old law notwithstanding he has renounced his old religion. It is not, however, suggested in the present case that the Lubbais as a community have thought fit to abide by the entirety of their old law: the utmost that is said is that they, or some of them in a particular locality, have followed the Hindu law, not in all respects, but in relation to property, succession and partition. In their essential characteristics, custom and an election to abide by the law of the old status differ fundamentally as sources of law, still, making every assumption in its favour, in the circumstances of this case and on the record as it stands there is no mode of proving this alleged election except by way of inference from actings and conduct that would establish a custom, so that along whatever line this case may be approached the custom must be established and the burden of proof of this is on the Defendants.

Their Lordships have dealt with this aspect of the case at some length as it has evidently influenced the judgment of the High Court. But there is another aspect of it by which (in their Lordships' opinion) their decision must be guided.

It is enacted by the Madras Civil Courts Act, III, of 1873, sec. 16, that all questions regarding inheritance, marriage, or any religious usage or institution shall be decided where the parties are Mahomedans

(1) L. R. 12 I. A. 72 at p. 81: s. c. I. L. R. 11 Cal. 463 (1884).

(2) 9 M. I. A. 195 (1865).

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by the Mahomedan Law or by custom having the force of law.

The litigants are Mahomedans to whom this Act applies so that *prima facie* all questions as to succession among them must be decided according to Mahomedan Law. In India, however, custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Mahomedan Law, governing the succession in a particular community of Mahomedans. But the custom must be proved. The essentials of a custom or usage have been repeatedly defined, but it will suffice to refer to the recent decision of *Abdul Hussain Khan v. Bibi Sona Dero* (3) where the essentials of a legal custom or usage and the requisites of proof are fully discussed. The following passage from the judgment in *Ramalakshmi Ammal v. Sivananthan Perumal Sethurayar* (4) was cited as a correct and authoritative pronouncement of the law on these points.

"It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

Though the custom or usage as pleaded is open to objection, still their Lordships will not reject the Defendants' contention on that ground, but will deal with the case as though the custom or usage had been pleaded in a form that was free from fault.

There is no suggestion on the record that the rule of exclusion on which the con-

testing Defendants rely has been established by judicial decision in the sense that this can be predicated of the rules of property and succession applicable to Khojas or Cutchi-Memons in the Bombay Presidency. Therefore it is necessary to examine the evidence to see whether it supports the rule of succession asserted by the contesting Defendants.

This evidence is documentary and oral, and as the former is more important and more trustworthy, their Lordships will first deal with that.

The documents on which the Defendants rely as proving the usage, begin in order of time with a decree of the Madras High Court in O. S. No. 5 of 1877, Exbt. XII, in which Mr. Justice Innes decided in its favour.

There was, however, an appeal from his decree which ended in a compromise, a circumstance which deprives his decision of much of its evidentiary value.

Moreover, in 1885, an Appellate Bench of the Court in *Mirabini v. Vellayanna* (5) decided that the custom of exclusion in the case then before them had not been proved, and this decision has been recently approved by the Judicial Committee in *Abdul Hussain v. Sona Dero* (3).

The next document in order of time is the judgment in O. S. 22 of 1904, dated the 26th of February, 1906, Exbt. III, where the custom was affirmed; but the decision in fact was based on that in O. S. 5 of 1877, and has little or no independent value.

Then reliance is placed on the judgment in O. S. 755 of 1906, dated the 26th of September 1910, Exbt. IX. But it is open to the comment that the decision was influenced by that given in O. S. 22 of 1904, as also was the judgment on Appeal Exbt.

(3) L. R. 45 I. A. 10: s. c. I. L. R. 45 Cal. 450; 22 C. W. N. 353 (1917).

(4) 14 M. I. A. 570 (1872).

(3) L. R. 45 I. A. 10: s. c. I. L. R. 45 Cal. 450; 22 C. W. N. 353 (1917).

(5) I. L. R. 8 Mad. 464 (1885).

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XVI. Thus on an examination of these documents it may fairly be said that the several judgments are substantially based on that pronounced in O. S. 5 of 1877, which is open to the comment that has been made on its value.

The documentary evidence on which the Plaintiffs rely starts with the judgment in *Mirabivi v. Vellayanna* (5). There the High Court held even in 2nd appeal that there was no evidence to justify the finding of the lower Courts in favour of the custom, and this decision, as already stated, has received the approval of this Board, in *Abdul Hussein Khan v. Bibi Sona Dero* (3).

Then there follows a series of documents, some negating the custom, others applying Mahomedan Law where the custom was not pleaded, and others proceeding on the assumption that it was Mahomedan Law that applied. In all these instances the parties before the Court were Tabbai Mahomedans. The first is a judgment of the 15th July 1890, in O. S. 85 of 1890, Exbt. T, followed by a judgment on appeal in that suit, Exbt. M, in both of which the right of a female to succeed under Mahomedan Law is recognised.

On the 3rd October, 1892, judgment was pronounced in O. S. 373 of 1891, Exbt. C, where the rights of females were treated as governed by Mahomedan Law.

On the 23rd January 1893, a Petition for a succession certificate, Exbt. F, was presented, and female members of the family were made counter Petitioners as though the rights of the parties were governed by Mahomedan Law.

On the 2nd August 1897, the High Court passed a decree, Exbt. G, confirming the decree of the lower Appellate Court, with

the result that the sisters' right to shares, according to Mahomedan Law, was established, though the custom had been pleaded.

On the 30th September 1901, it was decided by the judgment in O. S. 753 of 1900, Exbt. B, affirmed on appeal by the judgment of the District Judge, Exbt. B1, that a female in a Tabbai Mahomedan family was entitled to a share. In this case a custom was alleged that a woman is given by her family, at or about the time of her marriage, her share, or the equivalent of her share, in the estate of her own family. The custom was negatived, though the District Judge seems to have thought that the Appellants would have been entitled to more favourable consideration had they pleaded that they had retained the Hindu Law of inheritance and succession, instead of setting up a special custom at variance with the Mahomedan Law.

On the 5th of June 1903, a plaint in O. S. 337 of 1903, Exbt. O, was presented in which it was taken for granted that the rights of a female were governed by Mahomedan Law.

On the 30th March 1903, there was a judgment in O. S. 238 of 1902, Exbt. R, which assumed a right to a share in a female, though it held that in the circumstances of the case the female's right was barred under Mahomedan Law.

The judgment dated the 13th January 1904, in O. S. 36 of 1901, Exbt. H, and that dated the 4th December 1905, in O. S. 34 of 1894, Exbt. N, proceed on the same assumption.

On the 18th October 1906, and the 2nd January 1907, petitions for succession certificates, Exbts. K and P were presented by daughters, and on the 2nd September 1910, by a judgment in O. S. 33 of 1908, Exbt. Q, the right of a widow and daugh-

(3) L. R. 45 I. A. 10; s. c. I. L. R. 45 Cal. 450; 29 C. W. N. 353 (1917).

(5) I. L. R. 8 Mad. 464 (1885).

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ters to shares according to Mahomedan Law was affirmed.

It will thus be seen that over this series of years the rights of female members of the Lubbai Mahomedan community, under Mahomedan Law have been repeatedly asserted and recognised, and that on three occasions the rule of exclusion, when pleaded, has been expressly negatived.

When this documentary evidence is contrasted with that adduced in support of the alleged rule of exclusion, it cannot be said that the custom or usage is supported by clear and unambiguous evidence. On the contrary so far as the weight of documentary evidence goes the preponderance is on the side of the Plaintiffs.

Turning then to the oral evidence their Lordships cannot find in it sufficient proof to support the Defendants' plea.

The witnesses were all examined before the Subordinate Judge who made in his judgment a careful and critical examination of their evidence with the result that he was unable to find the custom or usage proved, and their Lordships can see no sufficient reason for questioning his appreciation of the evidence. He evidently did not consider that the witnesses called by the contesting Defendants held a position in the community entitling them to greater credit than those called by the Plaintiffs, and this appears to their Lordships to be a just estimate of their worth.

There is a witness who holds an office that should have enabled him to speak with some measure of authority and that is P. W. 5 a Khazi of Pallapati, and the same may be said of P. W. 7 a Moulvi, but the Subordinate Judge evidently was not impressed by either of them. For what it may be worth, however, both assert that a Lubbai's estate is divided according to Mahomedan Law.

Looking then at the whole of the evidence, documentary and oral, their Lord-

ships consider it falls far short of the standard of proof requisite to establish a custom or usage excluding females from succession.

It merits notice too that the custom as pleaded is not limited to the exclusion of females, but asserts as a part or at any rate an accompaniment of it that it is the custom to make a gift to female members at the time of or immediately after marriage in lieu of their shares; and it is alleged that consistently with that usage the Defendants' father gave jewels, cash and other moveables, worth about Rs. 4,000 to the mother of the second Plaintiff immediately after marriage.

This is negatived by the Subordinate Judge and from this conclusion the High Court expresses no dissent.

The result then is that their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside and the decree of the Subordinate Judge restored, with the variation that a day be fixed by the Court of 1st instance for the appointment of a Commissioner in lieu of the 7th February 1914, and that the contesting Defendants do pay to the Plaintiffs their costs in the High Court.

Six years have elapsed since the date of the decree under appeal, and as no satisfactory explanation is given of this long delay there will be no order as to the costs of this appeal.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Appellants.

G. D. M.

[TESTAMENTARY AND INTESTATE JURISDICTION.]

GREAVES, J.	} In the goods of
1922,	
26, April.	
	JNANENDRA NATH ROY,
	deceased.

Succession—Indian Succession Act (X of 1865), sec. 331—Probate and Administration Act (V of 1881), sec. 2—The Special Marriage Act (III of

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1872), secs. 2, 10, 16, 17—*Brahmo—A Hindu by becoming a Brahmo whether necessarily ceases to be a Hindu—A declaration under Act III of 1872, whether amounts to an abjuration of Hinduism for all purposes—Different sections of the Brahmo Community—Practice.*

A Hindu by becoming a Brahmo does not necessarily cease to be a Hindu. Something further than the mere becoming a Brahmo is necessary for a man to cut himself off from Hinduism.

A declaration under the Special Marriage Act, 1872, cannot be taken as an abjuration for all purposes of Hinduism but is merely a statement for the purposes of the Act itself.

Order of Greaves, J., passed in the exercise of Testamentary and Intestate Jurisdiction, dated the 26th April 1922.

The facts of the case will appear from the judgment.

Mr. H. D. Bose for the Applicant.—The application is for grant of letters of administration under the Indian Succession Act. The deceased was a Brahmo and so does not come under the category of Hindu, Mahomedan, Buddhist, etc. and so the Probate and Administration Act does not apply. Brahmoism is distinct from Hinduism and Brahmos cannot be called Hindus. Refers to *Bhagwan Koer v. J. C. Bose* (1). Here the deceased made a solemn declaration under the Act III of 1872 at the time of his marriage that he was not a Hindu.

Mr. M. M. Chatterjee, Solicitor, guardian of the infant, in person.—Brahmoism accepts the fundamental principles of Hinduism. It may be said to be a branch of Hinduism. Mere profession of Brahmoism does not necessarily make a man cease to be a Hindu unless he abjures the social rules of Hindus and declares himself not to be a Hindu. Refers to

(1) I. L. R. 31 Cal. 11 : s. c. 7 C. W. N. 895 (P. C.) (1908).

Bhagwan Koer v. J. C. Bose (1). A declaration under the Act of 1872 is necessary to validate a marriage between parties who do not like to go through the ceremony of a strictly Hindu marriage. The Act itself was passed with that object. A declaration under that Act does not necessarily change the status. Again except in the case of *In the goods of Benoyendro Nath Sen*,* who was more or less an ardent Brahmo, the universal practice has been to make similar grants under the Probate and Administration Act.

The JUDGMENT OF THE COURT was as follows :—

This is an application by the widow of the deceased for a grant to her out of this Court of Letters of Administration of her deceased husband's estate. There is no doubt that she is entitled to a grant but she asks for it under the Indian Succession Act (Act X of 1865) which (see sec. 331) does not apply to intestate succession to the property of any Hindu, Mohammadan or Buddhist and the question that falls for decision is whether, under the circumstances, the applicant is entitled to a grant under that Act or whether the grant should issue under the provisions of the Probate and Administration Act (Act V of 1881). The deceased left an infant son and if the grant issues under the former Act the widow will be entitled to 1/3rd of the estate, if under the latter Act she will only be entitled to the ordinary rights of a Hindu widow under Hindu law. Under these circumstances I directed that the infant son should be represented and a guardian *ad litem* was appointed and the matter was argued on his behalf.

The evidence is as follows. That the deceased was during his life time and at

(1) I. L. R. 31 Cal. 11 at p. 19 : s. c. 7 C. W. N. 895 (P. C.) (1908).

* Unreported.

IN THE GOODS OF JNANENDRA NATH ROY.

the time of his death a Brahmo by faith, that he was married under the Special Marriage Act, (Act III of 1872), that the marriage was registered under that Act after he and his wife had made declarations under the Act, that the *Namkaran* (naming) ceremony of the son of the deceased was performed under Brahmo rites, and that none of the ordinary rites and ceremonies usually observed in an ordinary Hindu family were observed by the deceased. The declaration made under Act III of 1872 is to the effect that the parties do not profess the Christian, Jewish, Hindu, Mahommadan, Parsi, Buddhist, Sikh, or Jaina religion. The preamble to the Act recites that it is expedient to provide a form of marriage for persons who do not profess (*inter alia*) the Hindu religion. Cl. 2 (4) provides (*inter alia*) that the parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal. Cl. 10 provides for the signature by the parties of the declaration already referred to. Cl. 16 provides that either party who contracts any other marriage during the life time of the other shall be liable to be punished for bigamy. Cl. 17 makes the Indian Divorce Act applicable to such marriages. Cl. 18 provides that the issue of any marriage solemnized under the Act shall be deemed to be subject to the law to which their fathers were subject as to the prohibition of marriages by reason of consanguinity and affinity. The short question which arises for decision is whether the deceased by becoming a Brahmo and remaining such until his death ceased to be a Hindu.

In *Bhagwan Koer v. J. C. Bose* (1) a similar question arose with regard to a

(1) I. L. R. 31 Cal. 11; s. c. 7 C. W. N. 895 (P. C.) (1903).

Sikh. The finding of the Chief Court of the Punjab was that the deceased in that case never renounced Hinduism, that he never became a professed Brahmo and that even if he did so he did not cease to be a Hindu thereby and that he was a Hindu within the meaning of sec. 2 of the Probate and Administration Act.

The Judicial Committee to whom the case went on appeal state at p. 33 as follows:—

“The second form in which the objection to the grant of Probate was put was that, assuming the testator as a Sikh to have been originally a Hindu within the meaning of the Probate and Administration Act, he had ceased to be either a Sikh or a Hindu by becoming a member of another religious body, the Brahmo Samaj. The learned Judges of the Chief Court examined the literature bearing upon the Brahmo society; they had before them much important evidence with reference to the Brahmos and the relation of their principles and their organisation to the Hindu system, and they came to the conclusion that a Sikh or Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born. They also found on the evidence that the testator never became a professed Brahmo at all. In both these conclusions their Lordships agree.”

I am inclined to think that this probably disposes of the matter so far as I am concerned as it seems to me to lay down that a man by becoming a Brahmo does not necessarily cease to be a Hindu, that is to say that something further than the mere becoming a Brahmo is necessary for a man to cut himself off from Hinduism. And I think that the passage is all the more forceful from the fact that it was not necessary for the purposes of the case for the Judicial Committee to express themselves on the point as it would have

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been sufficient for them to have merely adopted the finding that the Sikh in question never became a professed Brahmo at all.

But it is suggested that this case differs from the present by reason of the declaration made in the present case under Act III of 1872. It becomes necessary therefore to consider this declaration and as a result of so doing I have come to the conclusion that it cannot be taken as an abjuration for all purposes of Hinduism but merely as a statement for the purposes of the Act itself. I understand that the object of the Act was to assist those who having adopted Brahmoism felt scruples at being married under Hindu rites, some of which were repugnant to them, and who therefore desired some means of going through a form of marriage which would be legal and binding other than that prescribed by orthodox Hinduism. Moreover I think that the expression to which I have already referred in cl. 2 of the Act has some significance namely "according to any law to which either of them is subject." Now what is the personal law to which the contracting parties are subject? Surely it is Hindu law and no other, at least if this is not so I find some difficulty in saying what was the personal law of the parties. Moreover this is what the Judicial Committee's decision in *Bhagwan Koer v. J. C. Bose* (1) amounts to when they say that a Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born. And if this is so I cannot think that the declaration under Act III of 1872 was any more than the affirming of something which had actually taken place and that it could not by itself amount to an abjuration of the status and law under which the parties were born.

(1) I. L. R. 31 Cal. 11 : s. c. 7 C. W. N. 895 (P. C.) (1903).

It will perhaps not be out of place to refer to the passage in *Bhagwan Koer v. J. C. Bose* (1) which deals with the position of a Brahmo.

"The next question is whether Brahmos can be said to be included within the term Hindu. We do not think we need discuss this question in any great detail. The founder of the sect was a Hindu who never abjured his ancestral religion. In fact he was a mere reformer and professed to restore the ancient faith to its original purity. There are now three sections of which the *adi*, which professes to follow the principles of the founder, has the fewest points of difference from the old religion. They all widely differ in their tenets from those of other Hindus, but there are still many points in common between them and the highest form of Vidantism or Brahmanism. Brahmoism is a faith of Indian origin and considering the extreme tolerance of Hinduism in matters of mere belief we are disposed to think that a mere profession of Brahmoism does not necessarily make a man cease to be a Hindu unless he also abjures the social rules of Hindus and declares himself not to be a Hindu."

So far as the last line is concerned I have already dealt with the effect of the declaration under Act III of 1872.

I may add that I am told that, except in a single instance "*In the goods of Benoyendro Nath Sen*"* where a grant was issued under the Succession Act, the invariable practice of this Court has been to make such grants in the case of Brahmos under the Probate and Administration Act subject to the appointment of the applicant as guardian of her infant son for the purpose of applying for a grant.

(1) I. L. R. 31 Cal. 11 at p. 19 : s. c. 7 C. W. N. 895 (P. C.) (1903).

* Unreported.

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I direct a grant to issue to the applicant, under the Probate and Administration Act. She must give security. The costs will come out of the estate as between attorney and client. I certify for counsel. I understand, however, that this is not necessary as neither party asks for costs.

Mr. S. C. Ghosh, Solicitor, for the Applicant.

Mr. M. M. Chatterjee, Solicitor, for the Minor.

M. N. K.

(INSOLVENCY JURISDICTION.)

No. 36 of 1921.

GREAVES, J.

1921,

Heard,

9, August.

Re SCRAJMULL

MUNGLECHAND.

Judgment,

25, August.

Insolvency—Presidency Towns Insolvency Act (III of 1909), secs. 55 and 56—Application, to be made by the Official Assignee—Creditor, if may apply when the Official Assignee refuses to act.

An application under secs. 55 and 56 of the Presidency Towns Insolvency Act, 1909, should be made by the Official Assignee in whom the property of the insolvent is vested.

If the Official Assignee refuses to take action when asked, a creditor may make such an application with the leave of the Court.

Order of Rankin, J., dated the 25th August 1921 passed in the exercise of Insolvency Jurisdiction.

The facts of the case will appear from the judgment.

Mr. Gregory and Mr. S. Ghosh, Counsel, appeared for the Official Assignee.

Mr. A. N. Chaudhuri, Counsel, appeared for Madhoram Raghunath.

Mr. B. C. Ghosh, Counsel, appeared for Raghunath Dass Sewlal.

The JUDGMENT OF THE COURT was as follows:—

This is an application on behalf of Kissendass Banthia, the adjudicating creditor, asking for an order that Madhoram Raghunath do produce a certain deed of assignment executed by the insolvents in favour of Raghunath Dass Sewlal of all debts due to the insolvents and also another deed referred to in the summons executed by Raghunath Dass Sewlal assigning their interest under the first deed. The summons also asks that the first deed may be declared void and in the alternative that Raghunath Dass Sewlal do pay to the Official Assignee a sum of Rs. 30,000 received by them as consideration for the assignment executed by them above referred to.

A preliminary objection was taken that this application which is said to be made by virtue of the provisions of secs. 55 and 56 of the Presidency Towns Insolvency Act can only be made by the Official Assignee. I think the objection is well-founded and that such an application should be made by the Official Assignee in whom the property of the insolvents is vested and not by a creditor. If the Official Assignee, when asked to take action, refuses it may be that with the leave of the Court a creditor may make such an application but I have no evidence before me either that the Official Assignee has been asked to take action or that he has refused to move. This being so I think the preliminary objection must prevail and that on the materials before me I must refuse the application.

Mr. J. N. Chatterjee, Solicitor, for the Official Assignee.

Mr. C. C. Bose, Solicitor, for Raghunath Dass Sewlal.

Messrs. Khaitan & Co., Solicitors, for Madhoram Raghunath.

M. N. K.

[CIVIL APPELLATE JURISDICTION.]**APPEAL FROM APPELLATE ORDER**

No. 379 OF 1919.

WOODROFFE, J. }
 B. B. GHOSE, J. } **BINAYAKDAS ACHARYA**
 1922, **CHOWDHRY and ors.,**
 Appellants,
 Heard, 19, 20 and |
 31, January and | **v.**
 1, February. **SASI BHUSAN CHOW-**
 Judgment, **DHRY and ors.,**
 9, February: **Respondents.**

Civil Procedure Code (Act V of 1908), Sch. II, para. 21, filing award in matter referred to arbitration without intervention of Court—Agreement for reference to arbitration stipulating that heirs and representatives of the parties would be bound by the award—Award, if null and void when during pendency of the proceedings, some of the parties died and representative of one of them was not substituted and no guardian ad litem of the minor son of another was appointed.

Some parties referred their disputes to certain arbitrators stipulating in the agreement that they and their heirs and representatives would be bound by the award. After the hearing of argument was closed it was brought to the notice of the arbitrators that two out of the parties had died and the arbitrators allowed time for filing fresh achnamals and for appointment of a guardian for the minor heir of one of the deceased parties, but nothing was done. The arbitrators then made their award and on application being made to Court, the Court made the order for filing the award:

Held—That having regard to the subject-matter of the arbitration and the terms of the reference the legal representatives of the deceased persons would be bound by the reference to arbitration made by their predecessors.

RASHIDUN-NISA v. MAHOMED ISMAIL KHAN (1) and MANINDRA v. MAHANANDA (2) distinguished.

It is true as a general principle that a

(1) I. L. R. 31 All 572; s. c. 13 C. W. N. 1182 (P. C.) (1909).

(2) 15 C. L. J. 360 (1911).

person who is not a party to or properly represented in any proceedings should not be bound by those proceedings. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the Civil Procedure Code. If there is a binding reference to arbitration all that it is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. There is no rule of procedure by which the arbitrators could substitute representatives or appoint guardian ad litem for infants.

The question whether the award would be binding or not must depend upon the circumstances of each case. The interests of the minors not having been prejudicially affected and having been properly looked after by the adult members who were present, the award ought not to be set aside on the ground of the defect in procedure not affecting the merits where substantial justice has been done.

This was an appeal preferred on the 19th December 1919 against an order of Babu Mati Lal Ray, Additional Subordinate Judge of Zillah Faridpur, dated the 22nd September 1919.

The facts of the case will appear from the judgment.

Dr. Sarat Chandra Basak and Babu Prokash Chandra Mazumdar for the Appellants.

Babus Jogesh Ch. Roy and Romoni Mohon Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal is against an order made by the Subordinate Judge under para. 21 of Sch. II of the Civil Procedure Code for filing an award. The parties to the reference to arbitration were in different groups. They are owners in different rights of contiguous properties which for convenience have been described in the

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proceedings below as Patpasha Estate and Ujanchak Estate. The first party are owners of 6 annas share in the zamindari of Patpasha Estate. The second party known as Ula Babus are owners of another share of the same zamindari. Their entire share was let out in *patni* to the fourth party. The third party called the Kanchanpur Babus are owners of 6 annas share of Patpasha in zamindari and *patni* right and two annas share in *ijara* right and they are also owners of 8 annas share in the zamindari of estate Ujanchak. The fourth party as already stated are *patnidars* of the share of the second party in Patpasha, and the fourth *Ka* party are *jotedars* of Patpasha under the fourth party. The fifth party and sixth party are owners of remaining shares in the zamindari of Ujanchak. It appears there were long standing disputes between the parties about the boundary between the two estates with regard to certain *chur* lands alleged to be reformations *in situ*. It should be stated at the outset that owners of the share of the zamindari interest in Patpasha held by the third party in *patni* and *ijara* right were no party to the reference to arbitration. The reference was made by documents called *achalnamahs* executed by the parties in favour of the arbitrators and filed before them on the 16th October 1916. At the time of the reference a proceeding under sec. 145 of the Criminal Procedure Code was pending between the parties and there was further likelihood of other Civil and Criminal cases arising between them. The parties stipulated that they and their heirs and representatives would be bound by the award made by the arbitrators. Bijoy Kumar Mukherjee of the second party executed the *achalnamah* for himself and as guardian of two minor nephews. The arbitrators commenced their work in January 1917. During the continuance

of the proceedings before the arbitrators Bejoy Gopal Mukerji died. In May 1918 an *ekrarnama* was executed in favour of the arbitrators by Nripendra Kumar Mukherjee, son of Bejoy Gopal on his own behalf and as guardian of his minor brother Debendra Nath stating that they would be bound by all the conditions in the reference executed by Bejoy Gopal. Nagenendra Nath Mukherji who was an executant of the *achalnamah* of the second party also joined in this *ekrarnama* as guardian of the minors on whose behalf Bejoy Gopal had executed the *achalnamah* as guardian. The arbitrators commenced to hear arguments on behalf of the parties in June 1918. The first, second, fourth and fourth *Ka* parties were represented by the same pleader before the arbitrators. The hearing of arguments before the arbitrators was closed on the 29th of September 1918. Then on 5th October 1918 it was brought to the notice of the arbitrators that Nripendra Kumar and Nilmani Mukherji of the second party had died in July or August and on the application of the second party the arbitrators gave time till the 8th November 1918 for filing fresh *achalnamahs* on behalf of the representatives of Nilmani and for appointment of guardian for the minor. It appears that Nilmani left three minor sons one of whom Nirode Kumar Mukerji is said to have now attained majority. No fresh *achalnamah*, however, was filed nor was any guardian for the minor Debendra appointed. The arbitrators made their award on the 22nd of December 1918. Application for filing the award was made in Court on 20th March 1919, and the learned Subordinate Judge made his order from which this appeal is brought on 22nd September 1919.

The third, fifth and sixth party applied for an order for filing the award.

The first, second and fourth party ap-

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peal against the order of the Court below. The appeal is supported on the following grounds, (1) the arbitrators were guilty of misconduct, (2) on the death of two of the second party their representatives were not made parties and no new guardian was appointed for the minor Debendra and therefore the award is null and void, and (3) the award has determined a matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matter referred. The plea of misconduct is based upon two letters, Exbts. 12 and 13 which the arbitrators had placed on their record and it is urged that they had communications about the case with some of the parties without the knowledge of the others. We agree with the learned Subordinate Judge that there is absolutely no ground for the allegation, and that there was no misconduct on the part of the arbitrators. With regard to the second ground the fact is as has been already stated that no new guardian was appointed for Debendra on the death of his brother Nripendra, and the heirs of Nilmani, i.e., Nirode, Kalisadhan and Rabindra were not substituted as parties before the arbitrators. Debendra was the heir of Nripendra. It is conceded on behalf of the Appellants that having regard to the subject-matter of the arbitration and the terms of the reference the legal representatives of the deceased persons would be bound by the reference to arbitration made by their predecessors. But it is urged that when two of the second party died during the period when arguments were being addressed to the arbitrators and the representative of one of them were not brought on the record and no guardian was appointed for the minor who was already a party, the arbitrators could not proceed to make an award. Reliance is placed on the case of *Rashidun-nisa v. Mahomed Ismail*

Khan (1). In our opinion that case has no bearing on the present one. There a reference to arbitration was made on behalf of a minor by her sister who professed to act as guardian for the minor. In the award her sister was described as acting for herself and guardian for the minor, but at the date of the award an application was pending before the District Judge for her appointment as guardian which was subsequently rejected. Their Lordships of the Privy Council held that the statement in the award was unjustified and the award was a nullity so far as the minor was concerned. The minor's share in the property was in that case reduced by the award and her interest in the proceedings was adverse to that of another minor for whom also the alleged guardian purported to act. It should also be observed that it was on those grounds it was not seriously contended before their Lordships that the arbitration proceedings, so far as the interest of the Appellant before them was concerned, could be supported. The Appellant also rely on the case of *Manindra v. Mahananda* (2). The decision in that case does not support the Appellants. But they say relying on a passage in the report that as the hearing before the arbitrators had not been completed before the death of the persons referred to, it was necessary to bring their representatives on the record and to make them parties and as this was not done the award is a nullity. It is true as a general principle that a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained

(1) I. L. R. 31 All. 572: s. c. 13 C. W. N. 1182 (P. C.) (1909).

(2) 15 C. L. J. 360 (1911).

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in the Civil Procedure Code. If there is a binding reference to arbitration all that it is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. In this case the reference was binding on the representatives of Nilmoni. There is no rule of procedure by which the arbitrators could substitute those representatives or appoint guardians *ad litem* for infants. If we were to hold that the arbitrators could not go on with the arbitration as the representatives or some persons on their behalf did not choose to come before the arbitrators, the result would be that although the reference would not abate on the death of a party under the law the arbitrators would in fact be unable to make an award and the arbitration would come to an end. We are therefore of opinion that the proposition urged by the Appellant cannot be of universal application. The question whether the award would be binding or not must depend upon the circumstances of each case. Here all the investigations had been finished and all the documents had been produced before the arbitrators when the parties were alive. The arguments for the second party were addressed by the pleader who also represented the first and fourth parties, as their interest was the same. Nagendra of the second party was there and he represented all the minors in the proceedings in the Court below as their guardian and is also now appearing as their guardian in this Court. There were also other adult persons of the second party. Then it must also be borne in mind that the whole interest of the second party, including that of the minors, in the property had been let out in *patni* to the fourth party, and the first and the fourth parties are really the persons who are directly interested in the matter of arbitration and the second party who are en-

titled to receive a fixed rent for their share of the property from the fourth party, have only a remote interest in the controversy. No question as to the rights of the minors as between the other members of the second party was involved in the arbitration and whatever concern the family had in it, it was properly looked after by the adult members who were present. Nothing was stated to us as having prejudicially affected the interest of the minors in particular apart from other members of the second party. It has been pointed out to us that none of the adult members of the second party brought the fact of the death of two of their parties during the course of their argument before the arbitrators. It was several days after the arguments had been finished that this was done. It is stated in the award that the second party asked for time to take the necessary steps and time was given to them but nothing was done. Nagendra did not come forward with any fresh *ekrarnamah* as he had done along with Nripendra on the death of Bejoy Gopal. It is urged by the Respondents, not without good reason, that when the persons who now purport to take up the cause of the minors anticipated that the decision of the arbitrators would not be quite favourable to them, they acted in this way with the evident object of finding a loophole to attack the award in subsequent proceedings. To give effect to the contention of the Appellants would be in our opinion to declare the award a nullity on mere technical grounds, although it seems to have been made after a long and protracted investigation with regard to long standing disputes in which a large number of persons were concerned.

We think that an award made on proper reference ought not to be set aside on the ground of the alleged defect in procedure not affecting the merits where sub-

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stantial justice has been done. The Respondents also contend that even assuming that the interest of the minors cannot be affected by the award, the award cannot be held to be a nullity. The reference would have been good as regards the other parties without joining the predecessors of the minors as some of their co-sharers in the zamindari of Patpasha under whom the third party hold did not join in the reference. The Appellants reply that the others agreed to the reference because they knew that the second party was also prepared to execute an *achalnamah* and if some of the second party are not bound by the award the others are also not bound. It appears to us there is no substance in this because the second party did as a matter of fact execute an *achalnamah* in the same terms as others and if on account of death some of the second party cannot be bound by the award that would not affect the validity of the award as regards all. We are therefore of opinion that the award is not a nullity.

The third ground of the Appellants is formulated thus :—The disputed lands as pointed out by the parties to the Commissioner were comprised in Circuit No. 1 and Circuit No. 3 as depicted in the map of the Commissioner and therefore the arbitrators ought to have fixed the boundary line with regard to those two plots only and their award ought to have been confined to this. Instead of doing so they have declared that the land to the north of the district survey and settlement line from points A to B marked in the Commissioner's map appertain to Ujan-chak and so on. The result is that they have settled boundaries of lands which lie outside Circuit No. 1 and Circuit No. 3 of the Commissioner's map. It seems to us there is no substance in this objection. The reference was for fixing boundaries

between two estates. The reference and the award show that the question for decision before the arbitrators was the ascertainment of boundaries between the two estates and the directions given to the Commissioner was also for that purpose. The fact that the parties pointed out two plots of land as disputed plots would not confine the reference made and require the arbitrators to give an award only with regard to those two plots of land. We think the arbitrators were quite right in not restricting their award to the two plots and in fixing the boundary lines between the two estates, and we agree with the learned Judge below in holding that the arbitrators have not exceeded their authority and determined matters not referred to arbitration.

The grounds urged in support of the appeal fail and the appeal must be dismissed with costs. Hearing fee, we assess at 10 gold mohurs.

The 20th January 1922.

On the second day of hearing of this appeal an objection was taken on behalf of the Respondent that Respondents Nos. 35 and 36 are dead, that there has been no substitution of their heirs and that the appeal has abated and that it cannot proceed by reason of that fact. We are not informed even now when those persons died. As a matter of fact the persons who are the heirs of the deceased Respondents Nos. 35 and 36 are on the record and are represented here before us. They were substituted under an order of this Court, dated the 27th July 1920. No objection appears to have been taken at the time when the order was made and the order has in fact been acquiesced in for a period now running up to two years. We accordingly hold that this objection fails.

J. N. R.

Appeal dismissed.

[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

VISCOUNT CAVR.
LORD SHAW.
MR. AMER ALJ.

1921,
Heard, 17, 20 and
21, June.
Judgment,
15, July.

THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL, Appellant,

v.

RAJAGOPALA KRISHNA
YACHENDRA BAHADUR
VARU, RAJA OF
VENKATAGIRI, since
deceased, Respondent.

Lakheraj lands in the zamindari of Venkatagiri—Government, if may assess revenue thereon—Inam rules, if apply to them—Permanent settlement of revenue, if could be concluded apart from Reg. XXV of 1802 (Mad.)—Secs. 3 and 4—Reg. XXXI of 1802 (Mad.), scope of.

Sec. 4 of Reg. XXV of 1802 (Mad.), by which Government in concluding permanent settlement of revenue with the zamindars of the Madras Presidency reserved to itself the power of imposing additional revenue upon lakheraj lands, had no application to the Venkatagiri zamindari, inasmuch as the sunnud-i-milkeut istimrar granted by the Government to the zemindar in respect of it made no such reservation and must, in view of the provisions of sec. 3 of the Regulation and the necessity which arose of making separate arrangements with powerful zemindars, have been granted independently of the provisions of the Regulation.

Reg. XXXI of 1802 (Mad.) refers entirely to procedure appointed for the investigation of title to hold lands exempted from payment of revenue.

These were consolidated appeals against the judgment of the High Court of Judicature at Madras and five decrees passed in pursuance thereof dated the 29th March 1916, which affirmed the decrees passed by the District Court of Nellore and the Subordinate Court of North Arcot respectively in the suits mentioned in the following paragraphs.

The Plaintiff (Respondent) in each of the first four cases (in the District Court) was the Raja of Venkatagiri, who held the zamindari of Venkatagiri under a permanent settlement sanad. Within the ambit of his estate there were at the date of the sanad various parcels of land which had previously been alienated by inam grants. The first suit—which gave rise to the first of the present appeals—related to them generally, and he therein asked for and obtained an injunction restraining Government “from holding any investigation into the nature of and title to inams and lakheraj lands in the said zamindari and from dealing with the same under the inam rules . . . or resuming them or assessing them to public revenue.”

The second, third and fourth suits related to certain specific instances of such inams of the classes known as *devadayam*, *dharmadayam* and *brahmadayam* or religious inams. The inam lands in question in the second and third suits had been taken by the zamindar into his own occupation—the grants being (as the Plaintiff said) resumed—and that in question in the fourth suit had been bought up by him; and all were in the possession of the Plaintiff. In each case the Inam Commissioner had completed his enquiry, in the course of which he found that the inams should not be confirmed as such under the rules, and consequently ordered that they should be “resumed by Government,” i.e., assessed to public revenue. In each case the Raja obtained a declaration that such order was invalid.

The fifth suit (in the Subordinate Court) was similar to the fourth, the holder of an *agraharam* inam having sold the endowment, and a similar decree was passed; but the purchasers, viz., the Plaintiffs (the third and fourth Respondents) were not the zamindars, and the lands were within the ambit of the Kalahasti zamindari.

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The High Court having affirmed the said decrees on appeal—though its judgment did not proceed on the same grounds as those of the original Courts—the Defendant preferred these appeals from the Appellate decrees.

Mr. A. M. Dunne, K. C. (with *Mr. Kenworthy Brown*) for the Appellant referred to Reg. XXV of 1802 (Mad.), *Collector of Trichinopoly v. Lekkamani* (1), Proclamation of 23rd August 1800. Instructions of Government, 4th September 1799 and *Vedanta v. Kaniyappa* (2). Principle of *res judicata* was not applicable as previous decision did not deal with same property or same class of property.

Referred to *Mangalathammal v. Narayanaswami Aiyar* (3), *Natesa Chetti v. Vengu Nachiar* (4) and *Moosa Goolam Ariff v. Ibrahim Goolam Ariff* (5).

The sanad was accepted till 1897. "*Lakheraj*" cannot include "inam."

Referred to Reg. XXXI of 1802 (Mad.).

Taking the two Regulations together Government had the power to make the settlement. The letters are not admissible for construction of the sanad. *Badar Bec v. Habib Merican Noordin* (6) decided on whether a particular clause of a Will validates gifts. We started this enquiry under Inam Rules of 1859—22, 2, 3.

• *Mr. Kenworthy Brown* (following).—A Crown right must be parted with in express terms. The sanad is not an "act of State."

Mr. Upjohn, K. C. (with *Messrs. DeGruyther, K. C.* and *Dubé*) for the Respondents. Reg. XXV does not support their case. See cls. 3 and 4 of Regulation.

I am suggesting a view which would make *Mr. Dunne's* interpretation of cl. 4 agree with mine of cl. 12.

Aitchison's Treaties (1792) (Vol. V), p. 238. Treaty with the Nawab of Arcot. We are of Arcot. See Art. 5 of these treaties. We are one of these polygars mentioned. They say "*polygar peshcush*." This term is used there and is to be always the same.

The arrangement in 1802 was not a settlement of *peshcush*. There was a settlement of *peshcush* in 1792. Object in 1802 was to do away with military tenure and rights to make customary exactions such as *sayer*, etc.

Mr. A. M. Dunne, K. C. in reply: They have tried to make out that this is not a settlement under 1802, that there was already a *peshcush*, etc. We have nowhere anything against this that the only Regulation that made permanent settlements was that of 1802.

The sanad practically follows the Act except that it says nothing about *lakheraj*. It follows the Act throughout.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The facts of this litigation take their origin in the early establishment of British rule in the Madras Presidency. The Raja of Venkatagiri holds a zemindari of considerable extent in the modern district of Nellore. His ancestors were admittedly in possession of the estate since the Mohammedan times, subject first to the Emperors of Delhi and afterwards, on the disruption of the Mogul Empire, to his representatives in the Carnatic, usually styled the Nawabs of Arcot. Besides the payment of a fixed revenue or *peshcush* they were bound to maintain an armed force for the assistance of Government in times of disorder or rebellion.

(1) L. R. 1 I. A. 282, 305, 306 (1874).

(2) I. L. R. 9 Mad. 14 (F. B.) (1885).

(3) I. L. R. 30 Mad. 461 (1907).

(4) I. L. R. 33 Mad. 102 (1909).

(5) L. R. 39 I. A. 237 (1912).

(6) [1909] A. C. 615.

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In the year 1792 a treaty was entered into between the East India Company on the one side, and the Nawab of Arcot on the other, under which the administration of the country was assigned to the British. The arrangement, however, was found not to be satisfactory. It had left the Nawab a considerable amount of authority, which soon gave rise to cause of friction between him and the East India Company. Consequently, in 1801, a fresh treaty was executed under which the entire administration passed into British hands. In both the treaties the position of the Raja of Venkatagiri was maintained; and the revenue he became bound to pay to the East India Company continued to be the same as he had all along paid to the Mohammedan rulers.

In pursuance of the policy laid down by the Board of Directors, Lord Clive, who was at the time the Governor of Madras, proceeded to persuade the Raja of Venkatagiri and other polygars, who occupied a similar position, and whose zamindaries lay chiefly in Western Arcot, to abandon the system of maintaining an armed force for the assistance of Government. It was pointed out to them by the Governor in Council that the duty of maintaining an army for the service of Government imposed a heavy and costly responsibility; the East India Company would henceforward take over all charge for the preservation of law and order and thus relieve the zamindars of an irksome burden. They were at the same time assured that their fixed *peshcush* would remain invariable. The zamindars were thus induced to consent willingly to this arrangement, and in lieu of maintaining an army, which cost them a considerable amount of money, they undertook to pay an additional revenue on their estates, which was added to their *peshcush*.

Pursuant to this arrangement a sanad was issued, on the 24th August 1802, to the zamindar of Venkatagiri and other zamindars occupying a like position, embodying the terms which had been agreed upon. This document is called a "*sunnud-i-milkeut istimrar*, or deed of permanent property." The word *istimrar* denotes its character of perpetuity and permanency of revenue. The aggregate *peshcush* was, in the case of Venkatagiri, put down as 1,11,058 star pagodas. The clause in the sanad which relates to this particular arrangement is in these terms:—

"In consideration of your relief which your finances will derive from the relinquishment of your military service and from the discontinuance of the expenses to which you have on that account been liable, in consideration also of charging itself with the entire protection of the territories dependent on its power, the British Government has fixed your annual contribution, including equivalent for the military service and the established *peshcush* for every year, at the sum of star pagodas 1,11,058, which said amount shall never be liable to changes under any circumstances, and is hereby accordingly declared to be permanent annual demand of Government on your zamindari."

The only reservation in respect of the absolute abandonment on the part of Government of all claim to enhance the consolidated *peshcush* is contained in cl. 5, which runs thus:—

"The permanent *peshcush* fixed by this sanad in your zamindari is exclusive of the revenue derived from the manufacture and sale of salt and saltpetre, exclusive of the sayer or duties of every description, the entire administration of which the Government reserves to itself, exclusive of the tax on the sale of spirituous liquors and the intoxicating drugs, exclusive of all lands and rumsms heretofore appropriated to the support of the police establishment. The Government reserves to itself the entire exercise of its discretion in continuing or discontinuing temporarily or permanently.

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"The articles of all sorts included according to the custom and practice of the country under the several heads above stated."

It is clear, however, that at this time two policies were on foot; one with regard to the powerful zamindars who maintained large armies, with whom a settlement was essential on a separate basis; the other a measure of general assessment in accordance with the instructions issued to the Board of Revenue on the 24th September 1799. In the carrying out of this latter policy the Government passed Reg. XXV of 1802, which came into force on the 13th July 1802. The preamble of this Regulation is important. It declared:—

"Whereas it is known to the zamindars, merassydars, ryots, and cultivators of land in the territories subject to the government of Fort St. George, that from the earliest until the present period of time, the public assessment of the land revenue has never been fixed; but that, according to the practice of Asiatic Governments, the assessment of the land revenue has fluctuated without any fixed principles for the determination of the amount; and without any security to the zamindars, or other persons, for the continuance of a moderate land tax; that on the contrary, frequent enquiries have been instituted by the ruling power, whether Hindu or Mohammedan, for the purpose of augmenting the assessment of the land revenue; that it has been customary to regulate such augmentations by the enquiries and opinions of the local officers appointed by the ruling power for the time being; and that in the attainment of an increased revenue on such foundations it has been usual for the Government to deprive the zamindars, and to appoint persons on its own behalf to the management of the zamindari; thereby reserving to the ruling power the implied right, and the actual exercise of the proprietary possession of all lands whatever; And whereas it is obvious to the said zamindars, merassydars, ryots, and cultivators of land that such a mode of administration must be injurious to the permanent prosperity of the country, by obstructing the progress of agriculture, population and wealth; and destructive of the

comfort of individual persons, by diminishing the security of personal freedom, and of private property: Wherefore the British Government, impressed with a deep sense of the injuries arising to the State, and to its subjects, from the operation of such principles, has resolved to remove from its administration so fruitful a source of uncertainty and disquietude; to grant to zamindars, and other landholders, their heirs and successors, a permanent property in their land in all time to come; and to fix for ever a moderate assessment of public revenue on such lands, the amount of which shall never be liable to be increased under any circumstances."

And in sec. 2 it proceeded to enact that:—

"In conformity to these principles, an assessment shall be fixed on all lands liable to pay revenue to the Government; and in consequence of such assessment, the proprietary right of the soil shall become vested in the zamindars, or other proprietors of land, and in their heirs and lawful successors for ever."

Sec. 3 will be referred to later.

Sec. 4, which forms an important element in the consideration of the present case, is in the following terms:—

"The Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included according to the custom and practice of the country, under the several heads of salt and saltpetre; of the sayer, or duties by sea or land; of the abkarry, or tax in the sale of spirituous liquors, and intoxicating drugs; of the excise on articles of consumption; of all taxes personal and professional, as well as those derived from markets, fairs or bazars; of *lakheraj* lands (or lands exempt from the payment of public revenue); and of all other lands paying only favourable quit rents: the permanent assessment of the land tax shall be made exclusively of the said articles now recited."

The drafting of this section can by no means be commended for preciseness or lucidity, but it is clear that the reservations in respect of the power of Govern-

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ment are wider than in the sanads referred to above.

It appears that the Venkatagiri estate, when it came under British administration, included a large number of inam lands, which had been expropriated by the zamindars from time to time for charitable or pious purposes, either free of rent or on favourable rent. Some lands had also been granted to people for services to the estate. In respect of the latter the zamindar had an absolute right of resumption. As regards the others, which came within the category of pious grants, his power appears to have been limited: he could resume them only on specific and apparently valid reason.

In 1816 the Government attempted to enforce its rights against the zamindar in respect of some of these alienated lands. The dispute was as to whether the zamindar was entitled to take possession of them without any liability for the payment of additional revenue, or whether the Government was entitled to the benefit of the resumption and possessed the right to assess revenue on those lands. The dispute was decided in favour of the zamindar, *viz.*, that the Government had no such right as it claimed. Matters remained quiescent from the year 1822, when the action was decided in the Provincial Court, until 1897, when the Government again put forward the same claim as they had done in 1816 and attempted, by their Revenue Officers, to investigate into the title of the grantees who held the lands under the zamindar and to ascertain whether the grants were valid or not, and if they were not, to assess revenue on them. The Raja of Venkatagiri resisted the Government's claim, and after a good deal of correspondence brought in the Court of the District Judge of Nellore the four suits which form the principal foundation of the pre-

sent consolidated appeal. The fifth suit, which has been made a part of the proceedings, was brought against the Government on similar grounds by another person in the Court of the Subordinate Judge of North Arcot in respect of lands lying in another estate.

In para. 10 of the plaint the Raja states the nature of the grants and his rights with reference to the alienated lands, and in para. 11 he specifies his grounds of objection to the fresh assessment which the Government proposed to make on him. His ground of action is thus stated in the plaint:—

"That the Inam Deputy Collector of Nellore acting under the orders of Government, gave a notice to the Plaintiff that he would proceed to investigate the condition of *deyadayam* and *dharmadayam* inams in the Venkatagiri zamindari which had been granted prior to the permanent settlement, and that in order to enable him to do so, the Plaintiff should furnish him with a list of such inams containing the particulars specified in a statement annexed to the said notice, and that, in spite of the Plaintiff's repeated objections to the right of Government to resume such inams in the zamindari of Venkatagiri or deal with the same under the Inam Rules, the said Deputy Collector is proceeding with the investigation"

He pleaded *res judicata* on the basis of the proceedings in 1816, and alleged further that the Government by their own conduct were estopped from claiming the right of assessment. On these grounds he prayed for a declaration that the Secretary of State had no right to resume or assess to public revenue inams or *lakheraj* lands situate within the zamindari of Venkatagiri nor any reversionary right therein, or any such right in the inams or *lakheraj* lands which had already come in the Plaintiff's possession. He also asked for a permanent injunction restraining the Secretary of State and his

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officers from holding any investigation into the nature of and title to inams or *lakheraj* lands within his estate, and from dealing with the same under the Inam Rules sanctioned by Government on the 9th August 1859, or resuming them or assessing them to public revenue.

The Government joined issue with him on the question of the right of Government to resume and assess these expropriated lands; their principal contention being that under sec. 4 of Reg. XXV of 1802 the Government had expressly reserved its power and that the provisions in the sanad do not prejudice it or take it away.

The other objections in the written statement do not appear to their Lordships material for the purposes of the present judgment.

The District Judge states, in their Lordships' opinion, correctly and concisely the question for determination:—
“The main question really to be decided in this suit is, whether the reversion in respect of inams or *lakheraj* lands situated within the zamindari of Venkatagiri belongs to the Government or to the zaminder, and whether the Government is entitled to resume those inams or whether such right of resumption belongs to the zamindar.”

In a careful review of the facts, he held in substance that the Venkatagiri zamindari did not fall within the purview of the Regulation, and that consequently the contention of the Government was not maintainable; and he accordingly in the four suits before him made a declaration in favour of the Plaintiff's right and granted an injunction as asked for. On appeal to the High Court his decrees have been maintained, although the reasons which the learned Judges of the High Court have assigned for coming to the same conclusion as the first Court do not proceed on the same lines as those followed by the District Judge. In sub-

stance, however, there is absolute concurrence between the two Courts.

The Government appears to have failed also in the Court of the Subordinate Judge of North Arcot, and their appeal to the High Court was dismissed.

As their Lordships substantially agree with the conclusions arrived at by the Courts in India, they do not think it necessary to traverse at any great length the grounds upon which the High Court and the District Judge have rested their judgments. It has been argued before the Board that the sanad of the Plaintiff could not possibly override the express provisions of the Regulation, and that the executive Government had no power to convey to the grantee—*viz.*, the zamindar—larger rights than the statute provided. It was urged that the rights of the Crown cannot be taken away by implication, and it was stated that having regard to the terms of the section already referred to, the Government had absolute power at any time to direct an investigation into the title of the *lakheraj* lands to which the Plaintiff laid a claim as part and parcel of his estate not liable to assessment by Government. In view of this contention which has been strenuously pressed by learned Counsel for the Government, it becomes necessary to examine a little more closely the circumstances which led to the conferment of the sanad on the zamindar of Venkatagiri and the other zamindars who were in the same position with him, and to consider how far the grant is affected by the provisions of Reg. XXV of 1802.

As already observed, the British authorities appear to have taken in hand as early as the 24th September 1799, the regularisation of the land revenue in the Carnatics and to have issued instructions to the Board of Revenue as to the line of action to be taken, for the purpose of in-

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stituting a general enquiry into the conditions under which land was held within those territories. Reg. XXV of 1802 was an outcome of the enquiries made under those instructions to the Board of Revenue; but it appears that whilst these enquiries were proceeding with regard to a general settlement of revenue, simultaneously an enquiry was in progress respecting the amount the Venkatagiri estate should in addition to the "established *peshcush*" pay in lieu of its release from the liability to keep up an army for the service of Government.

Mr. Stratton, the *peshcush* Collector of North Arcot, had been deputed to make a thorough enquiry as to the resources of the different polygars, and the Report which he submitted to the Government on the 14th July 1801, contained all the requisite information, and upon that information the commutation which was granted to the zamindar of Venkatagiri in respect of his military force appears to have been fixed. He sets out in his Report the different kinds of inams, some of which the zamindar was at liberty to resume at his own discretion, others which he could not resume without sufficient reason, such as neglect of duty, etc. All these lands appear to have been taken into consideration in arriving at the estimate of the commuted amount.

The sanad to the zamindar of Venkatagiri was issued, as already stated, on the 24th August 1802, by the Governor in Council, Lord Clive, on behalf of the East India Company. The material terms of the sanad have already been referred to.

On the same date Lord Clive addressed a letter to the zamindar in terms which leave little doubt as to the meaning to be attached to the grant. He states first the object with which the sanad was granted, and goes on to say that—

"Under the circumstances, the amount

which your brave self has to pay annually in future is fixed as follows:—

"In consideration of military service—eighty-nine thousand three hundred and eighty-five star pagodas.

"The fixed *peshcush* (tribute)—twenty-one thousand six hundred and seventy-three pagodas.

"Total—one lakh eleven thousand and fifty-eight star pagodas."

and what follows is important. The document goes on to say:—

"As the above-mentioned amount is the maximum portion of your exalted self's zamindari which should annually be sent to the Government on account of the expenses for general protection, therefore, sanad (deed) of perpetual ownership, to the effect that the sum of one lakh eleven thousand and fifty-eight star pagodas should be paid to Government annually, by the zamindari of your brave self, by way of permanent jama (assessed revenue), is sent to you under the seal and signature of the Members of Government."

and again:—

"Accordingly, having this matter in view, all the incomes from the lands of Amaram and Kattubadi retained in possession of foot soldiers were not included in the account of the item of the consideration for their services."

On the 25th August 1802, a letter was addressed by the Secretary to the Government to the Collector of Western *peshcush*, which included the three zamindaries principally concerned, *viz.*, Venkatagiri, Calastry and Bonrauzepollam, making it clear that the revenues that were assessed upon these three zamindaries were deliberately fixed in the case of Venkatagiri at Rs. 1,11,058, to be paid annually by the zamindar.

Paragraph 10 of that document is important, and it is in these terms:—

"To remove from the minds of the zamindars all doubt of the permanency of the present arrangement the Governor-in-Council has caused *summad-i-milkeut istimrar* to be prepared under the seal and signature of His Lordship-in-Council for the purpose of

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being delivered to the zamindars, Kabooliats corresponding with these sanads are also transmitted, and the special commission desire that you will require the zamindars to sign and return them to you duly executed; to these kabooliats you will annex a kistbundy fixing the kists according to the seasons of produce."

In accordance with these instructions from the Government given to the Collector of Western *peshcush*, kabuliats were taken from the zamindar in identical terms, but before executing his kabuliyat the zamindar of Venkatagiri took particular care to have the extent of his zamindari inserted in specific terms in the sanad that was granted. That appears from Mr. Stratton's letter of the 17th September 1802. In para. 6 that officer states as follows:—

"The Venkatagiri zamindar further made objections to sign his kabooliat until I had specified therein the several Districts composing the Venkatagiri zamindari; considering this scruple of no material import, I was induced to accede to his request and at his suggestion to recommend to you that the districts under him should be particularised at the back of his sanad, for which purpose it is now accordingly returned."

So far as these documents are concerned, they leave no possible doubt that the Government, represented by the Governor-in-Council on the one side fixed a definite specific assessment on the whole zamindari of Venkatagiri irrespective of the particular assets derived from each particular unit of property within the estate, and that the zamindar, on his side, accepted that arrangement on that special understanding. The question now is whether that action of the Government was, in view of the provisions of Reg. XXV of 1802, valid or otherwise. As already stated, Counsel for the Appellant have strongly argued that, in view of the provisions of sec. 4 of that Regulation, excluding the "*lakheraj* lands (or lands

exempt from the payment of public revenue) and all other lands paying only favourable quit rents" from the permanent assessment of the land tax, it was not competent for the Governor-in-Council to grant a sanad of the character that is in issue in this case; and much stress is laid upon the instructions that were originally issued in connection with the enquiry into the general resources of the different estates in 1799. It is said that in that document the Government took care to reserve its right on all lands "at present alienated and paying no public revenue which may have been or may be proved to be held under illegal or invalid titles and the revenue of which is not included in the Committee's account."

In respect of this contention two considerations arise—firstly, whether the lands which are now sought to be assessed were in fact paying no public revenue, and secondly, whether, in view of the provisions of sec. 3, it is open to the Government to contend that the sanad should not be taken into account in the construction of sec. 4. Sec. 3 declares as follows:—

"Where the conditions of the permanent assessment of the revenue may have been adjusted, a *sunnud-i-milkut istimrar*, or deed of permanent property, shall be granted on the part of the British Government to all persons being, or constituted to be, zamindars or proprietors of land; and each zamindar or proprietor of land shall execute and deliver to the Collector of the district a correspondent kabooliat. The said sanads and kabooliat shall contain the conditions and articles of tenure by which the lands shall be held; in all cases of disputed assessment, reference shall be had to the sanads and kabooliats; and judgment shall be given by the Courts of Judicature, in conformity to the conditions under which the agreement may have been formed in each particular case."

The above section lays down a definite rule relative to the principles on which the

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provisions in the Regulation should be construed. Now the sanad in question contains no reference to the *lakheraj* lands within the Venkatagiri zamindari. It would follow, therefore, that in the case of this property the provisions of sec. 4 have no application, and that the assessment fixed upon it by virtue of the arrangements adopted in 1802 was upon a basis quite different from that provided in sec. 4 of the Regulation. In other words, both the assessment and the sanad are outside the Regulation under which the Government claims the right to resume the inam lands within the estate of the Plaintiff and to assess them separately.

It should also be observed that, although the Regulation was passed on the 13th July 1802, and the sanad was granted to the zamindar of Venkatagiri on the 24th August, the recommendation of the Commission of the 12th August 1802, on which the sanad was granted, recommended that the new assessment should be fixed to run from the 12th July of that year. After stating the principle on which they were proceeding in fixing the amount to be paid by the zamindar in commutation of the military service, in para. 40 they say as follows :—

“If the grounds on which we have now had the honour to propose that the assessment of public revenue should be fixed on the four Western zamindari, including the customary *peshcush* and equivalent for military service, be approved by your Lordship-in-Council, the total amount of revenue derived to the State from those valuable provinces will exceed the amount of the old *peshcush* by the sum of 1,72,296 pagodas, and the aggregate amount of *peshcush* and the equivalent will, in future, be 2,50,000 pagodas per annum. We conclude the subject by recommending that the permanent assessment of the public revenue on these zamindari be fixed accordingly at that rate, from the 12th day of July last.”

This also clearly shows that the arrange-

ment in respect of “the four Western zamindari” was made independently of the provisions of the Regulation. Another thing has to be observed in connection with this arrangement, *viz.*, the difference in the terms of this sanad from the sanads granted to the other zamindars under the Regulation itself.

In the view their Lordships take of the general evidence in the case they do not consider it necessary to express any opinion on the question raised by the Plaintiff that the controversy in dispute is *res judicata* in consequence of the decision of the Provincial Court in 1822; but it is desirable to point out that since that decision the Government at various times expressly assented to the position which the zamindar had taken up in respect of the inam lands within his estate. Their Lordships will refer only to three documents: first, Ext. K.—a letter of the 24th April 1823, addressed by the Secretary to the Board of Revenue to the Chief Secretary to the Government, in which it was stated as follows :—

“The permanent *peshcush* of the zamindari of Venkatagiri was fixed upon the principles as upon Bomrauze and Calastray, and for the same reasons which induced the Board to state upon a former occasion that they considered the zamindar of Bomrauze not to be entitled to remission on account of certain villages having been taken from him by a decree of Court inasmuch as by the operation of that decree there was taken from him nothing on which his contribution to Government was fixed; they are now of opinion that the zamindar of Venkatagiri is entitled to benefit by the resumption of any villages formerly alienated from his zamindari without question on the part of Government or being liable to assessment on the increase to his resources thereby acquired.”

Again in 1839 the Board of Revenue, in a letter addressed to the Chief Secretary to the Government (Ex. N), stated as follows :—

“The zamindar now rests his claim on the

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ground that as his permanent cowl was framed without any reference to its assets, and as it contains no reservation in respect to the right of resuming *lakheraj* land, as in the case of the northern and other zamindaries, the right to resume inams or *lakheraj* lands in the position of Peddapaloor belonging of right to him and by no means to the Government, and he cites a decree by the Provincial Court of the Northern Division in favour of the zamindar of Venkatagiri in a suit brought by the Collector of Nellore for the recovery of the village under similar circumstances."

and in para. 17 they say as follows :—

"On the other hand, the decrees of the Zillah Court of Chittoor and of the Provincial Court of the centre division are in favour of the right of Government to resume, in preference to that of the zamindar. But it will be noticed that they contain no allusion to the dissimilarity in the terms of the permanent settlement of Calcutta and the other Western polliams, assuming that the *peshcush* was fixed as on the zamindaries in the northern, upon the assets, and that Reg. XXXI of 1802 applies to the former as to the latter. By a reference to the kabooliat of the zamindar of Calcutta and the correspondence which passed at the time a permanent cowl was granted to him, it will be seen at once that the *peshcush* was not so fixed, and, as already shown, the Regulation above mentioned was not considered to apply to the case of the Venkatagiri zamindar."

On the 3rd September 1860, the Commissioner of the Division issued certain instructions for the guidance of the Deputy Collectors employed in inam investigation of the North Arcot district, and he correctly laid down the position with regard to the zamindar of Venkatagiri and the other zamindars who stood in the same position, in the following terms :—

"The private estates will be first noticed. The zamindaries of Kalahastri and Karvetinagar were, like the zamindari of Venkatagiri in the Nellore District, permanently settled in 1803 on the principle of the commutation of the military service tenure attached to them. The *peshcush* was not fixed upon the assets of the estates, but was a

proportion of the cost of the zamindar's military establishment, inclusive of amarams and kattu badis, diminished by the amount of revenue derived from salt, sayer and abkari, which were reserved by Government. The inams were not excluded by the terms of the settlement, and the Government have therefore no right of reversion in them."

The revenue authorities in that part of the Presidency, in the face of the expression of opinion to which reference has been made here, have attempted to reverse the arrangement expressly entered into in 1802. In their Lordships' opinion this attempt fails.

Some stress was laid on behalf of the Appellant on the provisions of Reg. XXXI of 1802. It is sufficient, however, to point out that that Regulation refers entirely to procedure appointed for the investigation of the title to hold lands exempted from the payment of revenue. Here the lands which are sought to be resumed were not exempted from the payment of public revenue; the revenue which was paid on the estate included the lands in question and the jama was assessed on the whole estate inclusive of the *lakheraj* and inam lands.

For the foregoing reasons their Lordships are of opinion that the judgments and decrees of the Courts in India are right and should be affirmed and that these appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor : *The Solicitor, India Office* for the Appellants.

Solicitor : *Mr. Douglas Grant* for the Respondent.

R. M. P.

[CIVIL APPELLATE JURISDICTION.]**PRIVY COUNCIL APPLICATIONS****Nos. 2 AND 3 OF 1922.**

SANDERSON, C. J.
RICHARDSON, J.
 1922,
 10, March

SHIVA PROSAD SINGH,
Defendant, Petitioner
 to England,
 v.
RANI PRAYAG
KUMARI DEBI and
ors., Plaintiffs,
Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 109, cl. (c), scope of "Order" in cl. (c), meaning of, as distinguished from "final order"—Jurisdiction of High Court to grant leave to appeal to King in Council against interlocutory order—Fit case for the exercise of such jurisdiction.

The term "order" in cl. (c) of sec. 109 is intended to cover not merely a "final order" but is wide enough to include an interlocutory order. It has a different meaning to the expression "final order" in cl. (a).

In a fit case the High Court has jurisdiction to grant leave to appeal to His Majesty in Council under cl. (c) of sec. 109 from an interlocutory order.

RADHA KRISHNA AYYAR v. SWAMINATHA AYYAR (1), BANARSI PERSHAD v. KASHI KRISHNA NARAIN (2) and DAMRA COAL COMPANY v. BENARES BANK (3) referred to.

This was an application for leave to appeal to His Majesty in Council against an order of a Division Bench of the High Court, dated the 9th February 1922 made in Civil Rules Nos. 91 of 1921 and 1 of 1922 in connection with appeals from original decrees Nos. 194 of 1921 and 51 of 1922.

The facts of the case will appear from the judgment.

Mr. S. R. Das, Counsel, and Babu Dwarkanath Chakravorty (Senior Govt. Pleader), Dr. Dwarkanath Mitter, Babus

(1) L. R. 48 I. A. 31 : s. c. 25 C. W. N. 630 (1920).

(2) L. R. 28 I. A. 11 at p. 13 : s. c. I. L. R. 23 All. 227 ; 5 C. W. N. 193 (1900).

(3) 21 C. L. J. 281 (1914).

Romesh Chandra Sen, Krishna Lal Banerjee and Krishna Chaitanya Ghosh for the Petitioner.

Mr. B. Chakraverty, Counsel, Babus Mohendra Nath Roy, Ram Chandra Majumdar, Promotha Nath Bondopadhyaya, Nagendra Nath Bose and Rama Prosad Mukerjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an application by one Shiva Prosad Singh for leave to appeal to His Majesty in Council.

The suit related to an impartible estate of one Raja Sangram Singh. He left three sons. Durga Prosad Singh was the descendant of the first son. He died on the 7th March 1916 leaving three widows who are the Plaintiffs in the suit. Shiva Prosad, the Appellant is the descendant of another son of Raja Sangram Singh. He is the Defendant in the suit. After the death of Durga Prosad the Defendant entered into possession of the estate. There was an installation ceremony held in March 1916 and the Defendant's name was registered as the proprietor of the estate under the Land Registration Act. Durga Prosad had left a Will dealing with certain jewellery and money, the Will containing among other matters a provision that each of the widows was to receive Rs. 300 a month by way of maintenance. No probate was taken out of the Will. But in August 1916 certain arrangements by means of certain documents were made for the purpose of carrying out the Will, and, there being some money in the Bank of Bengal a suit was brought by Shiva Prosad against the Bank and against the widows, in which a decree was made in favour of the present Defendant who was the Plaintiff in that suit, in August 1917.

The present suit was brought in March 1919 in the Alipur Court, and the main

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claims were, first, to recover the impartible estate; secondly, to recover certain moveable and immoveable properties which were alleged to be the self-acquired properties of Durga Prosad; thirdly, for a declaration that the Will was not a genuine one; fourthly, that the decree in the suit was not binding upon the Plaintiffs; and fifthly, that the documents, to which I have referred, whereby the parties agreed to give effect to the Will, were not binding on the Plaintiffs.

The total value of the properties involved in this suit is said to be about a crore of rupees.

A long time was occupied in the disposal of the suit: and eventually the learned Subordinate Judge gave his judgment on the 3rd of November 1921. He found that the present Applicant, the Defendant in the suit, was the rightful owner of the impartible estate. He found in favour of the Plaintiffs as regards the properties, which were alleged to have been self-acquired by Durga Prosad, and he valued them at about 13 lacs. It was said by the learned Counsel for the Applicant and I think not disputed by the other side, that the impartible estate as to which the Defendant succeeded was of the value of about 86 lacs and the Plaintiffs' success related to property which was of the value of about 13 lacs.

In November 1921, the Plaintiffs filed an appeal to this Court and they applied for and obtained a rule calling upon the Defendant to show cause why an order should not be made in the terms of the petition and an *ad interim* injunction was granted to restrain the Defendant, his servants and agents from

"(1) alienating or otherwise dealing with any portion of the property in suit pending the final determination of this suit,

(2) "realising and appropriating any

money in respect of the above-mentioned money-lending transactions, .

(3) "interfering with the Petitioners' possession of their said three-storied building at Jharia or any portion thereof or of any fixtures therein.

In December of the same year (1921) the Plaintiffs applied for execution of their decree by the arrest and imprisonment of the Defendant.

On the 4th of January 1922, the present Applicant Siva Prosad Singh appealed in respect of the decree in so far as it decreed the Plaintiffs' suit. On the 6th of January the Applicant obtained a rule which was issued by my learned brothers Mr. Justice Woodroffe and Mr. Justice Ghose calling upon the Plaintiffs to show cause why execution of the decree mentioned in the petition should not be stayed pending the disposal of the appeal on such terms as to this Court might seem fit. The interim injunction and rule to which I have previously referred were granted by my learned brothers Mr. Justice Mookerjee and Mr. Justice Cuming. Both these rules were heard by my learned brothers Mr. Justice Mookerjee and Mr. Justice Cuming, on the 20th of January. On the 9th of February the order from which it is desired to appeal, was made. The order runs as follows:—

"We have heard learned Counsel on both sides with reference to the various affidavits and counter-affidavits and have further ascertained the history of the case by an examination of the judgment under appeal. We have come to the conclusion that for the present, the following directions should be given and we order accordingly.

"(1) That the Defendant do deposit in this Court within four weeks from this date, a sum of three and a half lacs of rupees which the Plaintiffs will be entitled to withdraw from Court, in whole or in

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part, in partial satisfaction of the decree, upon furnishing security to the satisfaction of this Court for such amount as may be withdrawn by them from time to time.

“(2) That, with a view to expedite the disposal of both the appeals, the paper-book be prepared in the Office of the Court (under such special arrangements as may be necessary) and that the entire cost of the preparation of the paper-book be paid into Court by the Defendant in the first instance (within a time to be fixed later) the ultimate allocation of the costs to be determined by this Court at the time of the final disposal of the appeal.

“(3) That within six weeks from this date the Defendant do furnish security (other than the impartible Raj) to the satisfaction of this Court to the extent of five lacs of rupees for the due performance of such decree as may ultimately be made in the suit.

“(4) That Defendant do make over possession of premises No. 239, Lower Circular Road to the Plaintiffs and also of one of the Motor Cars decreed in their favour and the Defendant be restrained from interfering with the possession of the Plaintiffs of the three-storied building at Maria or any portion thereof or of any fixtures therein.

“(5) That the injunction already issued be maintained so as to restrain the Defendant from making alienations or entering into agreements to grant leases, or dealing or otherwise interfering with the estate, except with the express sanction of the Court previously obtained after due notice to the Plaintiffs.

“(6) That the Defendant do forthwith deposit in this Court, to the credit of the suit, all such sums as may from time to time be realised by him out of monies invested in the various money-lending businesses.

“We have not considered the question

of the appointment of a Receiver which was mentioned incidentally at the hearing. The order now made will in no way debar the consideration of that question hereafter or of such other questions as may arise during the pendency of the appeal.

“The costs of those rules will be costs in the appeals. The hearing-fee is assessed at ten gold mohurs in each rule.”

As I have said, the order deals with the matters raised by the two Rules and it is in respect of three matters mainly that this application has been made: first, with regard to the injunction, secondly, with regard to the order for the deposit by the Defendant of 3½ lacs of rupees in Court and thirdly, with regard to the security, other than the impartible estate, which the Defendant is called upon to give to the extent of five lacs of rupees for the performance of the decree which the Court might think right to make upon the hearing of the appeal.

It was urged that the learned Judges had no jurisdiction to make the order in the terms in which it stands. Further it was urged that grave and irreparable injury would be caused by the order to the Defendant unless the application for leave to appeal were granted: and thirdly, it was urged that by reason of the restrictions imposed upon the Defendant it was not possible for the Defendant to raise sufficient money even to enable him to protect his rights on the hearing of the appeal. It was urged that an order ought to be made under sec. 109 (c) of the Code of Civil Procedure that this is a fit case for appeal to His Majesty in Council under that clause.

With regard to the power of the Court to deal with applications such as this under that clause, it is desirable to refer to three cases. The first to which I refer is the latest in point of date, and it is the case of *Radha Krishna Ayyar v. Swami-*

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natha Ayyar (1). In that case Lord Buckmaster in referring to sec. 109, cl. (c) said "This does not cover the whole grounds of appeal, because it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money." It was urged "however, that definition of the cases which are contemplated by sec. 109 (c) was not exhausted and that that was clear from the judgment of Lord Hobhouse in the case of *Banarsi Pershad v. Kashi Krishna Narain* (2), because, whereas Lord Buckmaster had referred to questions of "wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money," Lord Hobhouse in his judgment in the case, which I have just mentioned, referred to matters of "private importance" as well as to matters of "public importance." The passage in the judgment is at page 13 dealing with the corresponding sec. 600 of the Civil Procedure Code, which was then in force and it is this: "That is clearly intended to meet special cases such for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion, evinced by the fitting certi-

ificate." And the last case, to which I think it is necessary to refer, is the judgment delivered by my learned brother Mr. Justice Mookerjee sitting with Mr. Justice Beachcroft in the case of *Damra Coal Company v. Benares Bank* (3). In that case the Petitioner had instituted a suit for a declaration that a mortgage decree obtained by the Opposite Party was fraudulent and for a permanent injunction to restrain the execution of that decree. The Subordinate Judge during the pendency of the suit had granted a temporary injunction against the execution of the decree which the Petitioner was alleging was fraudulent. On appeal, however, to the High Court that order was reversed and the application for temporary injunction was refused. Thereupon the Petitioner asked for leave to appeal to the Privy Council against the refusal of the temporary injunction. The learned Judges after coming to the conclusion that the order was not a final order within the meaning of sec. 109 (a) dealt with the application under sec. 109 (c). My learned brother Mr. Justice Mookerjee is there reported to have said, "It has been argued in the next place that this is a fit case for a certificate under sec. 109, cl. (c). It is to be observed that whereas in cl. (a) the expression "final order" is used, in cl. (c) the term "order" is used, and consequently on the discussion of the second point, no question arises whether the order in question is final or not. It has been pointed out to us that if leave is refused and the order of this Court is allowed to stand, grave injury might be done to the Petitioners and that needless complications might occur much to their detriment;" and acting in pursuance of the powers given by the Code under sec. 109 (c), the learned Judges came to the con-

(1) L. R. 48 I. A. 31 : s. c. 25 C. W. N. 630 (1920).

(2) L. R. 28 I. A. 11 at p. 13 : s. c. I. L. R. 28 All. 227; 5 C. W. N. 198 (1900).

(3) 21 C. L. J. 281 (1914).

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clusion that that was a fit case for appeal to His Majesty in Council.

I agree with the learned Judge's observations as to the meaning of the word "order" referred to in cl. (c) of sec. 109. The "order" there mentioned is obviously intended to be not merely a "final order" and the expression is wide enough to include an order such as that which the learned Judges were discussing in that case and that which we are now considering in this case. Obviously it has a different meaning to the words "final order" which are to be found in cl. (a).

In my judgment we have jurisdiction to certify that this is a fit case for appeal and the question arises whether, in our opinion, we ought to certify that this is a case which is fit for appeal to His Majesty in Council under cl. (c) of sec. 109.

The injunction is in very wide terms. It was argued that it goes beyond what is contemplated by Or. 39, r. (1). It was urged that it would prevent the Defendant from entering into an agreement for a lease, which was to come into force upon the disposal of the appeal and in the event of the Defendant succeeding in the appeal. It was further urged that though the Plaintiffs who had failed in their claim to the impartible estate could raise money on mortgage of their interest in the estate, if they could find any one to advance on such security, yet the Defendant, who had succeeded in the lower Court as regards the claim to the impartible estate and had been held to be the owner of the estate, was prevented from raising money on the estate even for the purpose of fighting the appeal or for meeting his liabilities to the Plaintiffs under the decree without the express sanction of the Court previously obtained after notice to the other side. It was further urged that the effect of the order was that, although the Defendant had succeeded as to the main question in

the suit to the extent of property valued at about 86 lacs of rupees, he has been placed under such stringent restrictions as regards that property and at the same time has been ordered to deposit in Court 3½ lacs of rupees and to find security to the extent of 5 lacs of rupees, apart from the property as to which he has succeeded, that grave injury has been done to him.

A further point was made that, apart from the question of the injunction, there was no jurisdiction to impose such conditions as are contained in the order in question, except as conditions for stay of execution and that there is no stay of execution comprised in the order. The rule which was granted by my learned brothers Mr. Justice Woodroffe and Mr. Justice B. B. Ghose was in these terms: "Let a rule issue calling upon the Opposite Party to show cause why execution of the decree mentioned in the petition should not be stayed pending the disposal of the appeal on such terms as to this Court may seem fit. Pending the hearing of the rule let further proceedings in the matter be stayed. The rule is returnable within one month from this date unless the Plaintiffs Opposite Party apply for an earlier hearing of the rule. Let this order be sent down at once." It appears therefore that the rule was confined to the question whether execution should be stayed on such terms as to the Court might seem fit. The learned Counsel for the Plaintiffs, when asked what was the position with regard to the rule, having regard to the order which was made by the learned Judges, at first said that the rule was still in abeyance and then later, when his attention was drawn to the order as regards costs, the learned Counsel contended that it must be taken that execution had been stayed on the terms mentioned in the order. He contended that that must have been the intention of the learned Judges

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and that at any event there was liberty to apply which would give the Defendant an opportunity of protecting himself if any attempt to carry execution was made. On the other hand, it was urged by the learned Counsel for the Defendant that execution had not in fact been stayed, that the rule had not been made absolute on terms and that it was uncertain what would be the consequences to the Defendant if he did not obey the orders made by the Court, that the orders were not conditional and it was even possible that he might be committed for contempt of Court if he failed to carry out any of such orders.

I am most unwilling to grant leave to appeal to the Judicial Committee in respect of an interlocutory order, such as this, which does not determine finally any of the rights of the parties as to the matters in dispute in the suit, but in my judgment in this case there is a question of real importance involved. It is clearly of great importance to the Defendant, who has alleged that grave injury will be done to him thereby and that although he has won in the first Court on the main issue he is so hampered by the terms of the order that he cannot carry out the terms thereof and that it will be difficult for him to provide even sufficient funds to enable him to protect his interests in the appeal. The question of a stay of execution must obviously depend upon the facts of each case and the order to be made in respect of an application in respect thereof is largely a matter of discretion. In my judgment, however, this is not merely a question of stay of execution as I have already pointed out, but there is involved a matter of real importance, namely, as to whether the Court has jurisdiction to make such an order as that which is involved in this case. We are not sitting here as a Court of Appeal and it must be clearly understood that I am not express-

ing any opinion as to the merits of the controversy between the parties as regards this matter. My judgment is confined to the conclusion that the case does involve a matter of such importance that, in my judgment, we ought to certify that the case is a fit one for appeal to His Majesty in Council under sec. 109 (c).

We grant a stay of execution of the order of 9th February 1922 pending this appeal to the Privy Council upon the undertaking given by Mr. Das on behalf of the Defendant to carry out all the directions in the order except those contained in cls. (1) and (3) until the hearing of this appeal by the Judicial Committee, and upon the condition that the Defendant deposits in Court rupees seven thousand and five hundred, which the Plaintiffs will be entitled to take out upon giving security to the satisfaction of the Court for such amount as may be withdrawn. With regard to the Rs. 7,500 or the security in respect thereof the parties will be subject to any directions that may be made by the Judicial Committee of the Privy Council. Mr. S. R. Das has given an undertaking on behalf of his client to prosecute the appeal with every despatch and to apply to the Judicial Committee for the hearing of the appeal at as early a date as may be convenient.

We give a direction to the office to expedite this appeal with a view to the transcript of the record being despatched to England by the Mail on Thursday the 6th of April.

The preparation of the paper-book in the High Court appeal will proceed in the ordinary course.

This order will also govern application for leave to appeal to His Majesty in Council No. 3 of 1922.

RICHARDSON, J.—I agree.

Leave is desired to appeal to England from an order of this Court in its Appellate Jurisdiction made on two applications,

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one preferred by the Plaintiffs in the suit, the three Ranis, widows of the late Raja of Jheria, and the other by the Defendant in the suit, cousin of the late Raja, who is in present possession of the Raj and whom the widows are seeking to oust. The Applicant for leave to appeal is the Defendant.

The value of the whole property in dispute is said to be one crore of rupees. In the trial Court the Plaintiffs have succeeded in respect of property said to be worth about 13 lacs and the Defendant has succeeded in respect of the remainder, said to be worth over eighty-six lacs. The Subordinate Judge's judgment was delivered on the 3rd November 1921, but the decree was not signed till the 6th December 1921.

Both parties have appealed. The Plaintiffs' appeal was filed on the 15th November 1921, before the decree was signed but no doubt a copy of the decree was supplied before the expiry of the time limited for appealing. On the same date the Plaintiffs applied for a rule upon the Defendant to show cause why he, his servants and agents should not be restrained from doing certain things. A rule was granted in terms of the petition with an interim injunction.

The Defendant filed his appeal on the 4th January 1922, and on the 5th January the Defendant obtained from another Bench of the High Court a rule upon the Plaintiffs to show cause why execution of so much of the decree as was in their favour should not be stayed on terms, pending the hearing of the appeals.

On the 20th January the two rules came on for hearing before Mookerjee and Cuming, JJ., the learned Judges who issued the first rule, and the order in question was made on the 9th February.

By this order the learned Judges gave

certain directions, among others "that the injunction already issued be maintained so as to restrain the Defendant from making alienations or entering into agreements to grant leases, or dealing or otherwise interfering with the "Estate, except with the express sanction of the Court previously obtained after due notice to the Plaintiffs."

Though exception is taken to the directions as a whole, a principal grievance is made of this direction in the nature of a temporary injunction to enure during the pendency of the appeals to this Court.

Rightly or wrongly, it is urged for the Defendant that the injunction is *ultra vires* in so far as it restricts him from entering into agreements for leases or sales, that the injunction unduly ties his hands and prevents him from complying with other directions requiring him to deposit money in Court and furnish security, that the order is so expressed that failure on his part to comply with any direction may expose him to attachment and imprisonment for contempt, that the order gives more to the Plaintiffs than they asked for, that the order has the appearance of being framed on the supposition that the decree of the Court below is erroneous so far as the Defendant is concerned, that no undertaking was given by or exacted from the Plaintiffs to indemnify the Defendant for any damage he might suffer by reason of the injunction, and that the liberty which the learned Judges gave to the parties to apply will not meet the difficulty in which the Defendant is placed. It is contended that the Defendant is entitled to the decision of their Lordships on these matters.

As to the time during which the injunction is likely to be in force we were told that the trial of the suit occupied five months, that twenty-four thousand documents were exhibited and that the judg-

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ment of the learned Subordinate Judge covers more than sixty folio pages in print. There may therefore be a considerable interval before the appeals to this Court are ready for hearing.

I am extremely loth to grant leave to appeal in respect of matters of merely temporary importance which have no bearing at all on the ultimate legal rights of the parties, matters which I feel might be better settled in India by some give and take on both sides and by the avoidance of that passionate hostility which litigation is apt to engender. The moves and countermoves so animated are the mere dust and ashes of controversy. They may multiply costs and delay the final decision but are of no avail when the merits come in the end to be considered in the dry light of reason.

All we have to determine, however, is whether leave to appeal should be given under cl. (c) of sec. 109 of the Civil Procedure Code. I see no reason to doubt that in a proper case leave to appeal from an interlocutory order may be given under that clause and cl. 40 of the Letters Patent. In support of that view the judgment of Mookerjee and Beachcroft, JJ., in *Damra Coal Company v. Benares Bank* (3) may be cited, though I understand that in the result the appeal for which leave was given was not prosecuted.

The question, then, is whether this is a proper case for such leave regard being had to the observations of their Lordships by the mouth of Lord Hobhouse in *Banarsi Pershad's* case (2) and by the mouth of Lord Buckmaster in *Radha Krishna Ayyar's* case (1). In these cases their Lordships were dealing with appeals from

final decrees which are ordinarily governed by cls. (a) and (b) of sec. 109 read with sec. 110 and which come within cl. (c) of sec. 109 only in exceptional cases of the nature which their Lordships specify. Interlocutory orders, such as that before us, stand on a different footing. In the first place they are in the nature of original orders not appealable to any Court in this country and in the second place, whatever the property or risk at stake may be, cl. (c) of sec. 109 is the only clause which applies to them. It may, I think, be fairly said that the observations of their Lordships were made without direct reference to interlocutory orders, though in dealing with such orders, we may still be guided by the spirit of those observations. At that point, it has to be conceded that even interlocutory orders may sometimes involve questions of principle or practice of much general importance, and that the present case, involving as it does very large interests, is of an entirely exceptional character.

In the circumstances I agree with the learned Chief Justice that leave to appeal should be given under cl. (c) of sec. 109.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2717 OF 1919.

CHATTERJEE, J.

NARENDRA CHANDRA

PEARSON, J.

LAHIRI, Defendant,

1922,

Appellant,

Heard, 16 and

v.

17, January.

MANINDRA CHANDRA

Judgment,

NANDY, Plaintiff,

27, January.

Respondent.

Lease of land under a compromise decree—Lessee, if entitled to suspension of entire rent when he does not get possession of a portion of the leasehold, known to both parties to be in the possession of a stranger—Liability for proportionate rent—Lessor's bonâ fides and malâ fides, effect of.

(1) L. R. 48 I.A. 31; s. c. 25 C. W. N. 630 (1920).

(2) L. R. 28 I. A. 11 at p. 13; s. c. I. L. R. 23 All. 227; 5 C. W. N. 193 (1900).

(3) 21 C. L. J. 280 (1914).

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A. purchased a jote at a sale for arrears of rent, but found the major portion of it in the possession of B. and the rest in the possession of C. He thereupon brought a suit against B. for declaration of his title to, and khas possession of, the land in B.'s possession. The suit was compromised and under the compromise B. took a lease of the entire jote, but did not obtain possession of the portion which was in C.'s possession. A. subsequently brought a suit against B. for arrears of rent of the entire jote:

Held—That where the lessor has evicted the lessee from a part of the land demised the entire rent is suspended.

SARADA PRASAD v. MONMOTHA NATH (1) referred to.

In the present case there is no question of eviction by the lessor or by any one claiming under him or by his procurement

HURRISH CHANDRA v. MOHINI MOHAN (2), BULLAN v. LALIT JHA (3), NARAINA SWAMI v. YERRAMALLI (4) and ANNADA v. MATHURA NATH (5) distinguished.

The present case is not an ordinary case of settlement, where the lessor has to deliver possession of the land demised to the lessee. The lessee was already in possession (though wrongful) of the major portion and took settlement of the entire jote with full knowledge that a portion of it was in the wrongful possession of a third party. These indicate an intention that the liability of the lessee to pay rent in respect of the portion in his possession already did not depend upon the delivery of possession of the other portion which was in another's possession. The lessor never put any obstruction in the way of the

lessee recovering possession and there is no question of malâ fides on the part of the lessor. Therefore the lessee cannot claim suspension of the entire rent, and he is liable to pay proportionate rent in respect of the portion of the jote in his possession.

MANINDRA CHANDRA v. NARENDRA NATH (6), STOKES v. COOPER (7), SMITH v. RALEIGH (8), REEVE v. BIRD (9) and NEALE v. MACKENZIE (10) referred to.

This was an appeal preferred on the 17th December 1919 against a decree of the Subordinate Judge of Rungpur (Jatindra Chandra Lahiri, Esq.), dated the 4th August 1919, modifying a decree of the Munsif at Kurigram (Babu Panna Lal Bose), dated the 4th May 1918.

Plaintiff purchased a jote of 244 and odd bighas at a sale for arrears of rent but found a portion of the jote in the possession of the Defendant and another portion in the possession of one Hellaluddin and others. The Plaintiff thereupon brought a suit for declaration of his title and recovery of possession against the Defendant. The suit was compromised and in the compromise petition 225 bighas of the jote were stated to be in possession of the Plaintiff and 19 and odd bighas in the possession of Hellaluddin and others. By the solenamah, the Defendant took lease of the entire 244 and odd bighas including the land in possession of Hellaluddin and others. The Defendant further stipulated to pay mesne profits for the 225 bighas at the proportionate rate of Rs. 184 taking Rs. 200 to be the rent for the entire 244 and odd bighas. The Plaintiff brought the present suit for recovery of arrears of rent with regard to the entire 244 and odd bighas and the Defendant pleaded that as

(1) 19 C. W. N. 870 at p. 871 (1914).

(2) 9 W. E. 582 (1868).

(3) 3 B. L. R. App. 119 (1868).

(4) I. L. R. 33 Mad. 499 (1910).

(5) 13 C. W. N. 702 (1909).

(6) 23 C. W. N. 585 (1919).

(7) 3 Camp. Rep. 513n (1814).

(8) 3 Camp. Rep. 513 (1814).

(9) 1 Cr. M. & E. 31 at p. 36 (1884).

(10) 1 Meeson & Welsby 747 (1856).

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he had not got possession of 19 and odd bighas of land in possession of Hellaluddin and others he was not bound to pay any rent at all. Both the Courts below gave a decree for proportionate rent against which the Defendant appealed to the High Court.

Babu Nagendra Nath Ghose (with *Babu Jatindra Nath Sanyal*) for the Appellant.—There was one entire rent for the whole area demised and it is impossible to say what portion of that rent is attributable to the lands in possession of Hellaluddin. Refers to *Manindra Chandra v. Narendra Nath* (6).

The cases of *Annada Prosad v. Mathura Nath* (5) and *Sarada Prosad v. Monmotha Nath* (1) do not apply as in these cases there had been acquiescence owing to payment of full rent after the eviction. Besides *Annada v. Mathura* (5) has been disapproved by Fletcher, J., in *Manindra v. Narendra* (6). The English case of *Stokes v. Cooper* (7) relied on by Chitty, J., in *Annada v. Mathura* (5) was disapproved by Ellenborough, C. J., in *Smith v. Raleigh* (8) and by Baron Parke in *Reeve v. Bird* (9).

In the absence of contract to the contrary the landlord is bound to give the lessee possession of the land demised. *Vide* sec. 108, Transfer of Property Act, cl. (b) and also *Hurriah Chandra v. Mohini Mohan* (2), *Bullan v. Lalit Jha* (3) and *Udhab Chandra Singh v. Narain Manjhi* (12). If the land is in possession of a third person to the knowledge of both the lessor and the lessee even

in that case it would be the duty of the lessor to make it possible for the lessee to take possession. Refers to *Naraina-swami v. Yerramalli* (4) and Halsbury's Laws of England, Vol. 18, p. 485. He who lets, agrees to give possession and not merely a chance of a law suit: refers to *Zemindar of Vizianugram v. Behara Suryanarayana* (13) and *Coe v. Clan* (14).

To make out a case for suspension of rent, it is not necessary to establish that the landlord has been guilty of tortious dispossession. It is enough that he has failed to do his duty in the matter of putting the tenant in possession of the entire land demised. The question of the *bonâ fides* or otherwise of the landlord's conduct is immaterial.

Babu Ram Charan Mitter (with *Babus Dwarikanath Chakraparty, Ram Chandra Mazumdar, Jyoti Prosad Sarbadhicary, Hemendra Nath Sen and Sarat Kumar Mitter*) for the Respondent.—The case of *Manindra Chandra v. Narendra Nath* (6) was quite distinguishable. Here the land was in possession of a trespasser to the knowledge of both the parties and the Defendant had paid mesne profits for the three years from 1317-1320 at the proportionate rate and owing to the payment of rent or mesne profits, whatever it may be called, there has been acquiescence. The *solenamah* was entered into on 30th May 1914 or 16th Jaistha 1321 but the lease was to operate retrospectively from the beginning of 1321 B. S. and the settlement was taken with full knowledge that 19 and odd bighas of the land was in possession of a trespasser. These indicate an intention that the liability of the Defendant to pay rent in respect of land in

(1) 19 C. W. N. 870 at p. 871 (1914).

(2) 9 W. R. 582 (1868).

(3) 3 B. L. R. App. 119 (1869).

(5) 13 C. W. N. 702 (1909).

(6) 23 C. W. N. 585 (1919).

(7) 3 Camp. Rep. 513n (1814).

(8) 3 Camp. Rep. 513 (1814).

(9) 1 Cr. M. & R. 31 at p. 36 (1834).

(12) 58 Ind. Cas. 186 (1920).

(4) I. L. R. 33 Mad. 499 (1910).

(6) 23 C. W. N. 585 (1919).

(13) I. L. R. 25 Mad. 587 at p. 598 (1901).

(14) 5 Bing. 440 (1829).

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his possession did not depend on the delivery of possession of land possessed by Hellaluddin.

In this case there has been no request by the tenant to be put in possession.

The whole of the land having already been demised to the Defendant the Plaintiff could not have sued Hellaluddin in ejectment.

Babu Nagendra Nath Ghose in reply.—In the written statement the Defendant stated that he made repeated requests to be put in possession and this question was not gone into by either of the Courts below. The Plaintiff might have asked the Defendant to join him in a suit to recover possession from Hellaluddin.

The fact that an increment of Rs. 5 in the rental was given shows that the landlord was to deliver possession.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for rent. It appears that the Plaintiff purchased a *jote* of 244 bighas 18 cottahs 14 chitaks at a sale for arrears of rent but found that 225 bighas were in the possession of the Defendant and the rest in the possession of one Hellaluddin and others. He therefore brought a suit for declaration of his title to, and *khas* possession of, the 225 and odd bighas in the possession of the Defendant against him. This suit was compromised, and under the compromise the Defendant took a lease of the entire land 244 bighas 18 cottahs 14 chitaks at a rent of Rs. 200 from the Plaintiff from the year 1321 B. S. It was stated in the *solenamah* that the Defendant would pay mesne profits for the 225 bighas of land which were in his possession for the years 1317 to 1320 at the rate of Rs. 184 per year, that being the proportionate rent payable in respect of the lands which were in his possession. A decree was accord-

ingly passed upon the *solenamah*. It is found that the Defendant did not obtain possession of the 19 and odd bighas of land which were in the possession of Hellaluddin. The Courts below held that the entire rent should not be suspended and gave the Plaintiff a decree for proportionate rent in respect of the 225 bighas in the possession of the Defendant, and disallowed the rent for the 19 bighas and odd which were not in his possession.

The Defendant has appealed to this Court, and it is contended that the Plaintiff having failed to deliver possession of the 19 and odd bighas of land, there should be suspension of the entire rent.

There is no doubt that where the lessor has evicted the lessee from a part of the land demised the entire rent is suspended [see the cases on the point collected in the case of *Sarada Prosad v. Monmotha Nath* (1)]. In the present case, however, there is no question of any eviction by the lessor or by any one claiming under him or by his procurement. The question is whether the Plaintiff not having delivered possession of the 19 bighas of land which were in the wrongful possession of a third party, the entire rent should be suspended. That question was not directly decided in any of the cases cited before us. In the cases of *Hurish Chandra v. Mohini Mohan* (2) and *Bullan v. Lalit Jha* (3), the tenant did not obtain possession of the demised land at all, and it was held that he was not liable to pay rent. In *Narainaswami v. Yerramalli* (4), it was held that where the lessor does not put the lessee in possession, but there is no obstruction or likelihood of obstruction to the lessee taking possession of the same, and he neither tries nor requests the lessor to put

(1) 19 C. W. N. 870 at p. 871 (1914).

(2) 9 W. R. 582 (1868).

(3) 3 B. L. R. App. 119 (1869).

(4) I. L. R. 33 Mad. 499 (1910).

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him in possession, the lessee is bound to pay rent. In that case the learned Judge (sitting singly) observes:—"But if the land is already in possession of a third person to the knowledge of both the lessor and the lessee I should be inclined to hold that it would be the duty of the lessor to make it possible for the lessee to take possession by removing the third person from the possession thereof, even though no express request for the purpose is made by the lessee." The lessee in that case appears not to have obtained possession of the land demised at all, and the observations were *obiter*. In *Annada Prosad v. Mathura Nath* (5), the lessee was prevented from taking possession of a portion of the demised land by another lessee to whom the said portion was demised by a subsequent lease. One of the Judges, Chitty, J., was of opinion that there was no eviction, properly so called, of the lessee by the landlord, while Vincent, J., was of opinion that there was eviction of the first lessee by the second by the procurement of the landlord. The land in that case was in the Sunderbans; there was a dispute as to the boundaries of the lands let out to the two lessees respectively, and the landlord was found not to have acted *malâ fide*. The lessee (under the first lease) so far from repudiating the lease kept possession of the remaining portion and even paid rent subsequently to the creation of the second lease, and it was held by both the learned Judges that the lessee could not ask for a suspension of the whole rent and was bound to pay proportionate rent. Chitty, J., in that case observed:—"It may be questioned how far the technicalities to be found in the English law should be allowed to affect the relations of landlord and tenant in this country. In one respect the principle underlying the English decisions appears

(5) 13 C. W. N. 702 (1909).

to be inapplicable to the present case. Eviction is regarded as a wrong done by the landlord to the tenant, for which the former is to be penalised. Here not only, as I have said, was there no eviction properly so called, but there is no proof of *malâ fides* on the landlord's part. It may be that by a careless statement of boundaries in the two *pattahs*, lands which should be included in the Defendant's holding are also included in those of Rasik Lal Dutta. But that is all that can be alleged against the Plaintiff. On the facts of this case as admitted and as found by the lower Appellate Court, I think that the Defendant has no defence to the Plaintiff's suit for rent."

In the case of *Manindra Chandra v. Narendranath* (6) (which was between the same parties as in the present case) Fletcher, J., appears to have taken a different view. He pointed out that the case of *Stokes v. Cooper* (7) relied upon by Chitty, J., had been disapproved in *Smith v. Raleigh* (8) and also in another case [*Reeve v. Bird* (9)], and that in England there is no difference between the case when the landlord has ousted the tenant from a portion of the holding and the case where the landlord has let out the property to the lessee having already put an earlier and prior lessee in possession of it and referred to the case of *Neale v. Mackenzie* (10).

Those cases, however, are distinguishable from the present, as the lessee in those cases could not obtain possession, nor could the lessor deliver possession by reason of the lessor having granted a lease in favour of a third person in respect of a portion of the land demised to the lessee

(6) 23 C. W. N. 585 (1919).

(7) 3 Camp. Rep. 513n (1814).

(8) 3 Camp. Rep. 513 (1814).

(9) 1 Cr. M. & R. 81 at p. 86 (1834).

(10) 1 Meeson & Welsby 747 (1836).

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in question. The Defendant in the present case pleaded that the Plaintiff was in possession of the 19 bighas by letting out the same to Hellaluddin. That case has not been accepted by the Courts below. The learned Pleader for the Appellant however referred to a passage in Halsbury's Laws of England, Vol. 18, p. 485, where it is stated "where part of the premises is held by a third person rightfully claiming under a title adverse to the lessor, so that the lessee cannot obtain possession, the result is the same as in the case of unlawful eviction by the lessor, and no part of the rent is recoverable. [*Holgate v. Kay* (11)]. Reference was also made to sec. 108 (b) of the Transfer of Property Act, which provides that in the absence of a contract to the contrary the lessor is bound on the lessee's request to put him in possession of the property. It is pointed out that the Defendant in the written statement stated that he had requested the Plaintiff to put him in possession of the land. The question, however, does not appear to have been gone into in either of the Courts below.

It is unnecessary in the present case to consider the broad question whether ordinarily the entire rent should be suspended when the lessor is unable to deliver possession of a portion of the land demised whatever might be the reason for his inability and whether the view taken by Chitty, J., in the case of *Annada v. Mathura* (5), that the English rule should not be applied to this country is correct.

The present case is not an ordinary case of settlement, where the lessor has to deliver possession of the land demised to the lessee. The Defendant was already in possession (though wrongful) of 225 bighas for several years, and as stated above

19 bighas of land was on the date of the *solenamah* in the possession of Hellaluddin. The *solenamah* was executed on the 30th May 1914, corresponding to the 16th Jaistha 1321, but the tenancy in respect of 244 bighas was to be operative retrospectively from the beginning of 1321, i.e., 1st Bysaksh 1321. The Defendant took a settlement of the entire 244 bighas though he was perfectly aware that a portion of it, viz., 19 bighas, was in the wrongful possession of a third party. These indicate an intention that the liability of the Defendant to pay rent in respect of the 225 bighas which were in his possession already did not depend upon the delivery of possession of the 19 bighas which were in the possession of Hellaluddin. The Plaintiff never put any obstruction in the way of Defendant's recovering possession and there is no question of *malā fides* on the part of the Plaintiff. We think that in the circumstances of the case, the Courts below were right in holding that the entire rent should not be suspended, and that the Defendant is liable to pay proportionate rent in respect of the 225 bighas of land in his possession.

The appeal is accordingly dismissed. Each party to bear his own costs.

J. N. R.

Appeal dismissed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 226 OF 1922.

GOSTA BEHARY BOSU

and ors., Accused,

Petitioners,

v.

BAISTAM DAS DEURA,

Complainant,

Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 260—Summary procedure adopted in the middle of a trial, if legal—Such change of procedure causing prejudice to accused—Illegality of conviction—Trial before new Magistrate.

5) 13 C. W. N. 702 (1909).

(11) 1 Car. & Kir. 341 (1844).

GOSTA BEHARY BOSU v. BAISTAM DAS DE URA.

The Petitioners were summoned under secs. 186 and 206, I. P. C. After the examination in chief of the witnesses for the prosecution in the regular manner the Magistrate being of opinion that no offence under sec. 206 was made out changed the procedure to that applicable to summary trials and ultimately convicted the Petitioners under sec. 186, I. P. C. :

Held—That the procedure adopted by the Magistrate was not authorised by law and caused prejudice to the accused and the conviction was therefore liable to be set aside.

The case was sent back for retrial by a new Magistrate upon the Petitioner undertaking not to ask for the prosecution witnesses to be again examined in chief.

This was a rule against an order of the Sub-Deputy Magistrate of Uluberia (Mr. R. L. Acharji), dated the 2nd December 1921, convicting the Petitioners under sec. 186, I. P. C. and sentencing them to pay fines of Rs. 150, 30 and 75 respectively, an application for reference of which case to the High Court was rejected by the Sessions Judge of Hughly (Mr. S. C. Mallick), on the 23rd January 1922.

The facts of the case will appear from the judgment

Babus Nagendra Nath Ghosh and Dwijendra Krishna Dutt for the Petitioners.

Babu Narendra Nath Chowdhury for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The Petitioners have been convicted under sec. 186, I. P. C. and sentenced to pay fines of Rs. 150, 30 and 75 respectively. The Magistrate purported to dispose of the case under summary procedure. So under sec. 414, Cr. P. C.,

the Petitioners had no right of appeal. They moved the Sessions Judge for a reference to this Court, but without success.

The circumstances under which we issued a rule are as follows :—The Petitioners were summoned under sec. 186 and sec. 206, I. P. C. Offences under the latter section cannot be tried summarily, and the learned Magistrate began to try the case under Chap. XXI, recording the evidence in the manner prescribed in Chap. XXV. Seven witnesses for the prosecution were thus examined in chief on September 17th : the accused were also examined on that day. Then the Magistrate recorded this order : “As no offence under sec. 206, I. P. C. has been made out, the case will go on under secs. 186, 143, I. P. C. and will be tried under sec. 260, Cr. P. C.” Afterwards, on the 29th of September, the prosecution witnesses were recalled for cross-examination. Then defence witnesses were examined and the Magistrate then made use of one of the forms authorized for use in summary trials, and recorded a judgment which began on the first page of that summary form.

So far as the examination of the witnesses is concerned, it may be that the record is as full as it would have been if there had been no change of procedure. The cross-examination of the prosecution witnesses covers a fair amount of paper, and save for the fact that the usual details of parentage, residence and occupation are not given the same is true of the evidence given by the defence witnesses.

The argument pressed before us and the ground on which we issued the rule is that the learned Magistrate could not after examining the prosecution witnesses in chief in the regular manner, change his procedure to that allowed by Chap. XXII.

The Magistrate in his explanation has drawn our attention to several reported decisions but none of them touch the point

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now raised. We are not concerned with the question whether a Magistrate may strip a story of its embellishments, but with the question whether he may change his procedure in the middle of a trial.

The Code itself provides by the second clause of sec. 260 (2) for the converse of what has happened here, and requires in effect a *de novo* trial. I doubt, however, whether any useful inference can be drawn from the absence of any provision as to what should be done when in the course of a regular trial, it appears desirable that the case should be tried summarily.

It appears to me that the question resolves itself into the question whether the Petitioners have been prejudiced or not. The learned Magistrate says that they have not been prejudiced. I cannot agree. On the contrary I think the Petitioners have suffered prejudice in two ways. The first is in the recording of evidence. Possibly in fact the record is as full as it would have been had the Magistrate continued to try the case in the regular manner, but we have to look at what the law required of the trying Magistrate, and an accused person may reasonably complain of a procedure which has caused the examination in chief of the prosecution witnesses to be recorded in the form of a narrative under sec. 359, Cr. P. C., while the cross-examination of those same witnesses and the whole evidence of the defence witnesses need appear on the record at all. The second and graver prejudice is that two of the Petitioners have lost the right of appeal. That is a loss which needs no comment. I only wish to point out that the gravity of the prejudice seems enhanced rather than lessened by the fulness of the record actually prepared by the Magistrate. *Primâ facie* there is material on which an Appellate Court could exercise its judgment, but a few words in the order sheet

and the use of a form with a particular heading have deprived two of the Petitioners of the right they would otherwise have had.

In my opinion the rule must be made absolute on the ground that the Magistrate's procedure is not authorised by law and has caused prejudice to the Petitioners.

The result is that the convictions and sentences are set aside; and it is ordered that the fines, if paid, be refunded.

We are asked to say that the case should not be retried by the same Magistrate as he has shown cause before us and also before the Sessions Judge, and consequently he may find it difficult to approach the case with an open mind. As the learned Pleader on behalf of the Petitioners undertakes that his clients will not ask for the prosecution witnesses to be again examined in chief, I think this concession may be allowed. The case will go back to be tried by some competent Magistrate, other than Mr. R. L. Acharji, to be nominated by the District Magistrate; and such Magistrate will proceed with the case from the point which it reached on 17th September, and dispose of it in accordance with law.

SUHWARDY, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD BUCKMASTER.

LORD CARSON.

SIR JOHN EDGE.

1921,

Heard, 20, December.

1922,

Judgment, 20, January.

JAGARNATH

DASS, Appellant,

v.

JANKI SINGH and

ors., Respondents.

Bengal Tenancy Act (VIII of 1885), as amended by Act I, B. C., of 1907, secs. 3 (3), 4, 116, Sch. III, Art. 1 (a)—Khamat land, tenant of, for a term—Suit to eject after expiry of term—Limitation—Tenant if non-occupancy raiyat—Effect of repeal of sec. 45.

JAGARNATH DASS v. JANKI SINGH.

It is only under Chap. VI of the Bengal Tenancy Act that the status and rights of a non-occupancy raiyat can be acquired, and as that chapter does not apply to the private lands of a proprietor, a tenant of such land for a term of 9 years did not acquire the status of a non-occupancy raiyat, and, at the expiry of his term, became liable to be ejected as a trespasser.

Art. 1 (a) of Sch. III of the Bengal Tenancy Act did not apply to the landlord's suit to eject such a person.

Art. 1 (a) of Sch. III of the Act did not extend the limitation of six months to suits to eject persons who had not been non-occupancy raiyats within the meaning of the repealed sec. 45.

Sec. 3 (3) is merely a definition and sec. 4 merely a section specifying the classes of tenants to which the Act applied. Secs. 3 (3) and 4 did not separately or conjointly create or confer upon any one any status or any right.

GANPAT MAHTON v. RISHAL SINGH (1) and DWARKA NATH CHOWDHURI v. TAFAZAR RAHMAN SARKAR (2) referred to.

This was an appeal from a decree of the Full Bench of the High Court, Patna, dated the 24th July 1917, reversing a decree of the said Court passed by Atkinson, J., dated the 7th February 1917, which affirmed a decree of the Additional Subordinate Judge of Monghyr, dated the 29th March 1915, modifying a decree of the 1st Court of the Munsif at Begusarai, dated the 31st March 1914.

The suit was brought on the 5th December 1912 by the Plaintiff-Appellant to eject the Respondent Janki Singh from certain land in Behar.

The Plaintiff alleged that the land was his "*khamat, khudkasht*" and sought to eject the Respondent, who was lessee

thereof for a term of 9 years expiring on the 31st May 1912.

The Respondent in his written statement denied the Plaintiff's claim, alleged that the land was "*raiya mal*" in which he had a right of occupancy, and contended that the question whether the land in dispute was or was not the proprietor's private land was barred by limitation.

The Munsif in his judgment held that the land in suit was "*khudkasht* of the Plaintiff" and that the claim was not barred by limitation. On appeal the Subordinate Judge found that the land was "*khamat*" land, and that there was no bar by limitation and he dismissed Janki Singh's appeal.

From this decision the Respondent appealed to the High Court and his appeal was dismissed by Atkinson, J., who held that the land in suit was the "*zirat*" or "*khamat*" land of the Plaintiff and that the suit was not barred by the limitation of six months provided by Art. I (a) of Sch. III of the Bengal Tenancy Act.

Against this decree Janki Singh further appealed under the Letters Patent, and his appeal was heard by a Full Bench of the Patna High Court.

The majority of the Judges (*viz.* Chamier, C. J., Mullick, and Roe, JJ.), held that the limitation provided by the Bengal Tenancy Act was applicable and dismissed the suit, while the other two Judges (Chapman and Jwala Prasad, JJ.) were of opinion that the limitation applicable was that provided by the Indian Limitation Act. Against the last mentioned decree the Plaintiff appealed to His Majesty in Council.

Messrs. Parikh and R. M. Palat for the Appellant (*Ex parte*).—Janki Singh's lease was for 9 years and terminated in May 1912. The suit for ejectment was not brought until December 1912, *i.e.*, more

(1) 20 C. W. N. 14 (1914).

(2) 20 C. W. N. 1097 (1916).

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than six months after the expiration of the term.

If Janki Singh during his tenancy became a non-occupancy *raiyyat* the suit for ejectment would be barred under Art. I (a) of Sch. III of the Bengal Tenancy (Amendment) Act, 1907.

All the Courts have found that these lands are "*zirat*" or "*khamat*" lands, and no right of occupancy can be acquired in such lands, provided they are leased out for a term of years.

See secs. 116, 45 and Chaps. V and VI of the Bengal Tenancy Act, VIII of 1885.

Non-occupancy tenants are defined in sec. 4 and sec. 41 of the Act.

Janki Singh was admittedly not a *raiyyat* holding at fixed rates, nor an occupancy *raiyyat*.

He does not therefore of necessity become a non-occupancy *raiyyat*. There can be other classes of tenants besides those mentioned in sec. 4.

At the conclusion of his term Janki Singh was a mere trespasser.

Sheo Nandan Roy v. Ajodh Roy (3), *Damodar Narayan Chowdhuri v. Dalglish* (4).

As to whether the limitation of six months does or does not apply to *zirat* lands there are conflicting decisions: *Ganpat Mahton v. Rishal Singh* (1) and *Dwarka Nath Chowdhuri v. Tafazar Rahman Sarkar* (2), but in the former case the lands were not *zirat* and the decision is *obiter*.

These lands have always been preserved to owners as lands in which you cannot create permanent tenancies and there is nothing in the Act to remove this impression.

Bhugwan Bhagat v. Jug Mohun Roy (5).

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal from a decree, dated the 24th July 1917, of the High Court at Patna, which dismissed the Plaintiff's suit to eject the Defendant No. 1, Janki Singh, from certain land in Bihar. The suit was dismissed by the High Court on the ground that it had not been brought within time. The land in question is small in extent and in value, but the question of limitation involved is of importance in Districts to which the Bengal Tenancy Act, 1885, as amended by the Bengal Tenancy (Amendment) Act, 1907, applies.

The land in question is within the meaning of sec. 116 of the Bengal Tenancy Act, 1885, proprietor's private land known in Bengal as *khamar*, *nij*, or *nij-jot*, and in Bihar as *zirat*, *nij*, *sir* or *khamat*. The Plaintiff is the proprietor of the land, as was his predecessor in title before him. Janki Singh held the land as a tenant under a lease which had been granted by the predecessor in title of the Plaintiff for a term of nine years, which expired on the 31st May 1912. On the expiration of the term the Plaintiff demanded possession of the land, but Janki Singh refused to quit and give up possession: hence the suit in which this appeal has arisen. The suit was brought on the 5th December 1912, in the Court of the Munsif of Begusarai in the District of Bhagalpur. The only question which it is now necessary to consider is—Was the suit brought within time? That question depends on whether the period of limitation applicable in this case is that prescribed by Art. I (a) of Sch. III of the Bengal Tenancy Act, 1885, which for

(1) 20 C. W. N. 14 (1914).

(2) 20 C. W. N. 1097 (1916).

(3) I. L. R. 26 Cal. 546 (1899).

(4) L. R. 38 I. A. 65; s. c. I. L. R. 38 Cal. 432; 15 C. W. N. 345 (1911).

(5) 20 W. R. 308 (1873).

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suits "to eject a non-occupancy *raiyat* on the ground of the expiration of the term of his lease," is six months from the expiration of the term, or is that prescribed by Art. 139 of Sch. I of the Indian Limitation Act, 1908, which is twelve years from the determination of the tenancy.

In his plaint the Plaintiff alleged that the land in question was his *khudkasht* land, prayed for a declaration that the land was his *khamat* land, and that he was entitled to possession, and asked for a decree for possession, and for mesne profits. In his written statement Janki Singh denied that the land was *khamat khudkasht* land of the Plaintiff, alleged that Plaintiff's claim for a declaration that the land was his *khamat khudkasht* was barred by limitation, and alleged that the land was *raiyati-mal* land in which he had a right of occupancy. It is to be noticed that Janki Singh in his written statement did not suggest that he was a non-occupancy *raiyat* or had any right of a non-occupancy *raiyat* to resist the Plaintiff's suit to eject him. Janki Singh in his written statement was apparently relying upon a failure of the Plaintiff at the trial to prove that the land was the Plaintiff's private land as proprietor, his *khamat zirat* land.

The fifth issue as fixed by the Munsif was "whether any part of the claim is barred by limitation?" In his judgment the Munsif stated that the fifth issue had been "left untouched in arguments" by Janki Singh's pleader, and he decided the issue of limitation against Janki Singh.

The seventh issue, which was considered by the Munsif to be the most important issue in the case, was not directed to the question of limitation, but had indirectly a bearing on that question: it was, "Whether the land in suit is the *khudkasht* of the Plaintiff, or the *raiyati-jote* of the Defendant first party." The

Munsif's finding on that issue was that the land in suit was "*khudkasht* of the Plaintiff and not *raiyati-jote* of" Janki Singh. It is not quite clear what the Munsif precisely meant by "*khudkasht* of the Plaintiff." He probably meant land cultivated by the Plaintiff as his own. In the plaint the land in question was alleged to be the Plaintiff's *khudkasht khamat* land—that is, *khudkasht* private land of the Plaintiff as proprietor. In his observations on the sixth issue the Munsif apparently treated *zirat* and "*khudkasht* of the Mahanth (the Plaintiff) alone" as convertible terms. In his observations on the seventh issue the Munsif mentioned sec. 120 of the Bengal Tenancy Act, 1885, which relates to the recording by a Revenue Officer of a proprietor's private land (*khamar*, *khamat*, *zirat*, etc.). On the whole, their Lordships are of opinion that the Munsif by his finding on the seventh issue meant that the land in question was the proprietor's private land (*khamat*, *zirat*), and was not land in which Janki Singh had, or could have, a right of occupancy. The Munsif had the Bengal Tenancy Act, 1885, before him, and he should have used the terms specified in the Act and not terms which might be ambiguous. The Munsif, on the 31st March 1914, gave the Plaintiff a decree for possession, and dismissed his claim for mesne profits.

From that decree Janki Singh appealed to the Court of the Subordinate Judge of Monghyr on the ground that the suit was barred by limitation, and that the land was not *khamat* (private, *zirat*) land of the Plaintiff. The Plaintiff entered a cross-appeal against the dismissal of his claim for mesne profits. The Additional Subordinate Judge, before whom the appeals came, found that the land was *khamat* land, and that Janki Singh had no right to hold over, after the expira-

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tion of the term of his lease. In his judgment he said: "It is faintly urged that the suit is barred by limitation. But there is nothing to show that the rule of limitation of six months applies to the case. Moreover, the character of the land being *khamat* no limitation arises in the case," and he, on the 29th March 1915, made a decree dismissing Janki Singh's appeal, and in the cross-appeal decided that the Plaintiff was entitled to mesne profits and directed the Munsif's Court to assess the mesne profits in the executing of the decree. The rule of limitation, which the Additional Subordinate Judge held did not apply as the land was *khamat* land, was that of Art. I (a) of Sch. III of the Act.

From the decree of the Additional Subordinate Judge Janki Singh appealed to the High Court at Calcutta. The appeal came on for hearing as a second appeal before Mr. Justice Atkinson in the High Court at Patna. The only grounds of the appeal to which it is now necessary to refer are that the suit was barred by limitation: that the land in question was not *khamat* land; and that the Additional Subordinate Judge had erred in decreeing costs and mesne profits. The ground that the land in question was not *khamat* land was concluded by the finding of fact of the Additional Subordinate Judge. The ground that the Additional Subordinate Judge had erred in decreeing costs and mesne profits does not appear to have been supported in the High Court. In the course of the arguments in the appeal a decision of Mookerjee and Beachcroft, JJ., in *Ganpat Mahton v. Rishal Singh* (1), in which they had held that Art. I (a) of Sch. III of the Bengal Tenancy Act, 1885, did apply to *zirat* land, and the decision of Woodroffe and Chaudhuri, JJ. (overruling a decision of Newbould, J.),

in *Dwarka Nath Chowdhuri v. Tafazar Rahman Sarkar* (2) in which they had held that Art. I (a) did not apply to *khamar* lands, were cited. Mr. Justice Atkinson rightly regarded the decision of Mookerjee and Beachcroft, JJ., as academical, as those learned Judges had already in the appeal before them decided that the land there in question was not *zirat* land. Mr. Justice Atkinson agreed with the decision of Woodroffe and Chaudhuri, JJ., that Art. I (a) of Sch. III did not apply to private land of a proprietor, and by his decree of the 7th February 1917, dismissed Janki Singh's appeal with costs in the High Court, in the lower Appellate Court, and in the Munsif's Court.

From that decree of Atkinson, J., Janki Singh appealed under the Letters Patent of the High Court, and as the appeal raised a question of limitation of considerable importance, it was heard by a Full Bench of the High Court at Patna, constituted of Sir Edward Chamier, C. J., Chapman, Mullick, Roe and Jwala Prasad, JJ. These learned Judges differed on the question of limitation, the Chief Justice, Mullick, and Roe, JJ., holding that Art. I (a) of Sch. III of the Bengal Tenancy Act, 1885, applied, dismissed the suit as barred by limitation. On the other hand, Chapman and Jwala Prasad, JJ., held that the article did not apply. Each Judge gave his own reason for his conclusion, and some of the judgments contain much historical information.

Although the question as to whether this suit, when it was brought on the 5th December 1912, was or was not barred by limitation must depend on the true construction of the Bengal Tenancy Act, 1885, as amended by the Bengal Tenancy (Amendment) Act, 1907, some historical information as to the origin and develop-

(1) 20 C. W. N. 14 (1914).

(2) 20 C. W. N. 1097 (1916).

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ment in Bengal of rights of occupancy in agricultural land held by *raiyats* is interesting. It appears that in the Permanent Settlement of Bengal the proprietor's private lands (*zirat*, demesne lands), which were kept for his own and his family's cultivation, as distinguished from his lands which were usually let to *raiyats*, were recognised; that it seems to have been the policy of the Government for many years that no rights of occupancy in such private lands should be acquired by *raiyats*; and that the legislature for the first time by sec. 6 of Act X of 1859 defined how a right of occupancy could be acquired. By sec. 6 of Act X of 1859 it was further enacted "but this rule (as to acquiring a right of occupancy) does not apply to *khamar*, *nijjot*, or *sir* land belonging to the proprietor of the estate or tenure and let by him on lease for a term or year by year. . . ."

The Bengal Tenancy Act, 1885, repealed Act X of 1859, and by Chap. V it was enacted how rights of occupancy could be acquired by *raiyats*. Chap. VI apparently created the "non-occupancy *raiyyat*," and for the first time conferred upon him a status and rights, but by sec. 116 of that Act it was enacted:—

"116. Nothing in Chap. V shall confer a right of occupancy in, and nothing in Chap. VI shall apply to, a proprietor's private lands known in Bengal as *khamar*, *nij* or *nijjot*, and in Bihar as *zirat*, *nij*, *sir* or *khamat*, where any such land is held under a lease for a term of years or under a lease from year to year."

By sec. 40 of the Bengal Tenancy (Amendment) Act, 1907, sec. 116 of the Bengal Tenancy Act, 1885, was amended, and as amended it is as follows:—

"116. Nothing in Chap. V shall confer a right of occupancy in, and nothing in Chap. VI shall apply to, lands acquired under the Land Acquisition Act, 1894 for the Government or for any Local Authority or for a Railway Company, or belonging to the Gov-

ernment within a cantonment, while such lands remain the property of the Government, or of any Local Authority or Railway Company or to a proprietor's private lands known in Bengal as *khamar*, *nij* or *nijjot*, and in Bihar as *zirat*, *nij*, *sir* or *khamat*, where any such land is held under a lease for a term of years or under a lease from year to year."

Sec. 45 of the Bengal Tenancy Act, 1885, which was in Chap. VI as it stood before the amending Act of 1907 was passed, was as follows:—

"45. A suit for ejectment on the ground of the expiration of the term of a lease shall not be instituted against a non-occupancy *raiyyat* unless notice to quit has been served on the *raiyyat* not less than six months before the expiration of the term, and shall not be instituted after six months from the expiration of the term."

As that section contained a prohibition against instituting a suit unless a notice to quit had been served six months before the expiration of the term, it was properly inserted in Chap. VI and not in a schedule of limitations. Sec. 45 was repealed, and the 'period of limitation which had been prescribed by it was by the Bengal Tenancy (Amendment) Act, 1907, inserted in Sch. III as Art. I (a). As sec. 45 stood in Chap. VI no one could have doubted that the non-occupancy *raiyyat* to whom it referred was a person who had obtained the status and rights of a non-occupancy *raiyyat* by reason of his having been a person upon whom that status and those rights had been conferred by Chap. VI.

But it would appear from the judgments of the Chief Justice, and Mullick, and Roe, JJ., that those learned Judges considered that the effect of the repeal of sec. 45 and the insertion of Art. I (a) in Sch. III was to extend the limitation of six months to suits to eject persons who had not been non-occupancy *raiyyats* within the meaning of sec. 45. It is quite

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clear that Art. I (a) did not create or confer upon any one the status or rights of a non-occupancy *raiyyat*, and did not extend the limitation of six months to suits to eject persons who had not been non-occupancy *raiyyats* within the meaning of the repealed sec. 45. The non-occupancy *raiyyat* of Art. I (a) must be a person who before his term had expired had acquired the status and rights of a non-occupancy *raiyyat*.

The crucial question in this case is—When, if at all, and how had Janki Singh acquired, before the 31st May 1912, the status and rights of a non-occupancy *raiyyat*? He had not acquired that status or those rights under Chap. VI, as that Chapter does not apply to the private lands of a proprietor, and it appears to their Lordships that it was only under Chap. VI that the status and rights of a non-occupancy *raiyyat* could be acquired.

The learned Chief Justice apparently was of opinion that Janki Singh had acquired the status and rights of a non-occupancy *raiyyat* by virtue of the definition of a "tenant" in sec. 3 (3) of the Bengal Tenancy Act, 1885, read in conjunction with sec. 4 (c) of that Act. As the decisions of the Chief Justice deservedly command respect, their Lordships will now in conclusion refer to secs. 3 (3) and 4 (c). Sec. 3 (3) is as follows:—

"3. 'Tenant' means a person who holds lands under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person."

That is merely a definition. That definition applied to the position of Janki Singh during the continuance of the term for which he held the land, and did not apply to Janki Singh's position after his term had expired, as then, in the circumstances of this case, Janki Singh became a trespasser liable to be ejected.

Sec. 4 of the Act is as follows:—

"4. There shall be, for the purposes of this Act, the following classes of tenants (namely):—

"(1) Tenure-holders, including under-tenure-holders,

"(2) Raiyats, and

"(3) Under-raiyats, that is to say, tenants holding, whether immediately or mediately, under raiyats;

and the following classes of raiyats (namely):—

"(a) raiyats holding at fixed rates, which expression means raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity,

"(b) occupancy-raiyats, that is to say, raiyats having a right of occupancy in the land held by them, and

"(c) non-occupancy-raiyats, that is to say, raiyats not having such a right of occupancy."

Sec. 4 was merely a section specifying the classes of tenants to which the Act applied; it did not confer upon any tenant a status or any right, that was done by Chaps. III, IV, V, VI, and VII. Secs. 3 (3) and 4 did not separately or conjointly create or confer upon any one any status or any right. With reference to (a) and (b) of sec. 4 the Chief Justice correctly said that Janki Singh was not a *raiyyat* holding at a fixed rate or an occupancy *raiyyat*, and then continued: "*Primâ facie* he was a non-occupancy *raiyyat*." But the Chief Justice did not suggest how or when Janki Singh had obtained the status and any right of a non-occupancy *raiyyat* in the land in question. The mere fact that Janki Singh had been for a term a tenant of private land (*zirat* land) of the Plaintiff and had not been a *raiyyat* holding at fixed rates or an occupancy *raiyyat* did not raise any presumption that he had acquired the status or the rights of a non-occupancy *raiyyat*. It is obvious from a passage which occurs towards the conclusion of his judgment that the Chief Justice doubted that it had been intended that Art. I (a) of Sch. III should apply to

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such a case as this. The passage is as follows :—

“I think it is doubtful whether the legislature intended by the amendments made in 1907 to compel a landlord to sue for ejectment of a tenant of his private land within six months of the termination of the lease held by the tenant, and it may be that the result of holding that a *raiya* of *zirat* land is or may be a non-occupancy *raiya* will be that landlords will be placed in a less favourable position than the framers of the Act intended, but we must take the Act as we find it, and on a consideration of the Act as it now stands it appears to me that the only possible conclusion is that Art. I (a) of Sch. III applies to such a suit as the one now before us.”

Their Lordships are of opinion that Art. I (a) of Sch. III of the Bengal Tenancy Act, 1885, does not apply to suits to eject persons who were not in law non-occupancy *raiya*s of the land, and consequently does not apply to this suit, and that the suit was brought within time, and they will humbly advise His Majesty that this appeal should be allowed; that the decree of the High Court of the 24th July 1917, should be set aside with costs; and that the decree of the 7th February 1917, should be restored. Janki Singh must pay the costs of this appeal.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellant.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

Re P. C. APPLICATION NO. 2 OF 1922.

<p>SANDERSON, C. J. RICHARDSON, J. 1922, 27, April</p>	<p>SHIVA PRASAD SINGH, Appellant to England, v. RANI PRAYAG KUMARI DEBI and ors., Respondents to England.</p>
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Privy Council appeal—Bench to which application for direction regarding the preparation of paper-books is to be made.

All applications for directions with respect to the preparation of paper-books in Privy Council appeals should be made to the Bench taking Privy Council business, and not to the Bench which passed the judgment or order appealed against.

This was an application made by the Defendant, Appellant to England, to set aside the order of the Registrar made on the 24th April 1922.

The facts of the case will appear from the judgment.

Mr. S. R. Das, Counsel, Babu Dwarkanath Chakraverty (Senior Government Pleader), Dr. Dwarkanath Mitter and Babus Romesh Chandra Sen, Krishna Lal Banerjee and Krishna Chaitanya Ghose for the Appellant to England.

Mr. B. Chakraverty, Counsel, and Babus Mahendra Nath Roy, Ram Chandra Majumdar, Pramatha Nath Bando-padhyaya, Nagendranath Bose and Ramaprasad Mookerjee for the Respondents to England.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an application made by the Defendant in the suit, who is the Appellant to the Judicial Committee of the Privy Council, to set aside an order made by the Registrar on the 24th April 1922 and for a direction that the papers referred to therein may be excluded from the printed record or in the alternative that the Appellant's petition of objection be also included therein or for such other order as the Court may deem fit and proper.

The circumstances leading up to this application are unusual and it is desirable to state the facts. Both the Plaintiffs and the Defendant in the suit filed appeals to this Court from the decision of the lower Court.

On the 9th February 1922 a certain

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order was made by my learned brothers Mookerjee and Cuming, JJ., in respect of two rules obtained by the respective parties.

An application was made by the Defendant in the suit to the Bench (consisting of my learned brother Richardson, J. and myself) taking Privy Council business for leave to appeal to His Majesty in Council against the above-mentioned order.

On the 10th March 1922 leave was granted. Inasmuch as it was an appeal against an interlocutory order and it was desirable that no time should be lost in bringing the matter before the Judicial Committee, we gave certain directions for expediting the appeal, as will appear on reference to our judgment.

On the 24th March 1922 the matter was before the Registrar on a question as to whether certain "suggestions" should be included in the paper-book, which is to be used in the appeal to the Judicial Committee. The Registrar made the following order: "I do not think it necessary to include the suggestions in the paper-book."

The "suggestions" referred to appear to be "suggestions" which were submitted in writing at the request of the Court by the learned Counsel for the respective parties to my learned brothers Mookerjee and Cuming, JJ., during the argument on the rules, in respect of which the order of the 9th February 1922 was made.

The Registrar having made the above-mentioned order, the Respondents in the appeal to the Privy Council made an application to my learned brothers Mookerjee and Cuming, JJ., that "they would issue directions to the effect that the suggestions made by the parties before the Hon'ble Judges on the 20th January 1922 and which are on the record of the said

rules be treated as part of the record of the aforesaid rules Nos. 91 (F) of 1921 and 1 (F) of 1922" or to pass such other orders as the Court might deem fit.

On this application the learned Judges Mookerjee and Cuming, JJ., on the 6th of April 1922 made what is in the nature of a statement, I do not know if it should be called a judgment or order. It was as follows: "With regard to this application it is sufficient to state what took place when the rules were heard by us on the 20th January 1922. In the course of the arguments, Sir Benode Mitter, Counsel for the Defendant, and Mr. Chakraverty, Counsel for the Plaintiffs, suggested certain terms on which the rules might be made absolute. To make sure what those suggestions were, we directed the learned Counsel to put their suggestions into writing and to hand them over to the Bench Clerk. This was done, and the suggestions on each side were set out in writing. Under our direction, those papers were made part of the records of the rules, and we took the suggestions into consideration when we delivered our judgment on the 9th February 1922. We may add that direction No. 5 in our judgment was given with reference to the suggestion No. 1 filed on behalf of the Defendant in Rule No. 91 (F) of 1921."

The "suggestions" were endorsed by the Bench Clerk under date 8th April 1922 as having been filed in Court on the 20th January 1922.

The matter then came before the Registrar again and he made a further order on the 24th April 1922.

"In view of their Lordships' statement that these papers were to be part of the record of the rules and were taken into consideration when judgment was delivered, I order that the suggestions referred to and their Lordships' order, dated

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the 6th April 1922, do form part of the paper-book.

"To save time, let the Appellants' application be returned to their Vakil to enable him to present it to the Privy Council Bench, if so advised."

It is this order which the Appellant to England now seeks to have set aside.

Amongst other arguments, it was urged by the learned Counsel for the Appellant to England that the suggestions submitted by Counsel should not be included in the paper-book, as they were really no more than arguments of Counsel as to what orders should be made by the Court; that no reference was made to the "suggestions" in the judgment of the learned Judges of the 9th February 1922: that, when the application to this Bench was made for leave to appeal to the Judicial Committee, no reference was made to these "suggestions" except incidentally, and that no argument was based on them.

It was further urged on behalf of the Appellant that when the Registrar by his order of the 24th March 1922 refused to include the "suggestions," the application in respect thereof should have been made to this Bench, which was dealing with the Privy Council business, and that the statement made by the learned Judges on the 6th April was in reality an addition to their judgment of the 9th February against which leave to appeal to the Judicial Committee had already been given. Particular stress was laid upon the last sentence of the learned Judges' statement, *viz.*, "We may add that direction No. 5 in our judgment was given with reference to the suggestion No. 1 filed on behalf of the Defendant in Rule No. 91 (F) of 1921," which it was urged was really an added reason for the judgment.

We do not propose to take upon ourselves the responsibility of excluding these documents.

We think it right, however, to draw attention to the fact, that the judgment of the 9th February 1922 does not refer to the "suggestions" and to state that during the hearing of the application for leave to appeal to the Judicial Committee, it was not suggested that the judgment had been in any way based on the "suggestions." Para. 7 of the affidavit of J. C. Das, affirmed on the 25th April 1922, if read literally, might be taken to mean that the learned Counsel had drawn our attention to the "suggestions" and to the terms thereof. This was not so; and the learned Counsel (for the Plaintiff-Respondents) stated in Court that the words "incidentally" should have been added after the word "referred" in that paragraph.

My own recollection is that towards the end of the argument, it was mentioned incidentally that "suggestions" had been made by the learned Counsel as to the order which it was contended should be made by the learned Judges. The terms of the "suggestions" however were not submitted to this Bench and the impression on my mind was that, although "suggestions" had been made by the learned Counsel on the hearing of the rules, nothing had come of such "suggestions" and that the Court had delivered its judgment independently thereof.

It was not suggested that the order was in any way a consent order.

I express no opinion as to the argument that the above-mentioned statement is an addition to the judgment. It is not now necessary for me to say anything except that the facts, that the "suggestions" were made part of the record and that the direction No. 5 in the learned Judges' judgment of the 9th February 1922 was given with reference to the suggestion No. 1 filed on behalf of the Defendant in Rule No. 91 (F) of 1921, were brought to the notice of this Bench for the first time,

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when the statement of the learned Judges, dated the 6th April 1922, was read to us yesterday.

We are informed by the Officer of the Court that the printing of the paper-book is almost completed and if the order of the Registrar were to stand, it would cause considerable delay. Our object all along has been to avoid delay, though our efforts do not seem to have met with most success.

We therefore vary the Registrar's order and direct that the documents referred to in his order of 24th April 1922 are not to be included in the printed paper-book but that they are to be transmitted in the form of a supplementary paper-book.

By agreement between the parties the supplemental paper-book will include besides the documents, mentioned in the Registrar's order, the Appellant's objection to the inclusion of the papers mentioned in the Registrar's order, the Appellant's present petition presented to this Bench, and the Respondents' answer to that petition; the orders of the Registrar, dated 24th March and 24th April 1922, the Respondents' application to my learned brothers Mookerjee and Cuming, JJ., and Mr. Cooper's report, dated 23rd March 1922, and the Respondents' petition to the Registrar, dated 11th April 1922.

The learned Counsel for the Appellant submitted that in view of the learned Judges' statement of the 6th of April 1922, he desired to submit further grounds of appeal; we give him leave to add such grounds, which are to be filed to-morrow.

Before leaving this matter, I desire to add that in my judgment the application of the Respondents to England in respect of the Registrar's order of the 24th March 1922, by which he refused the inclusion of the "suggestions" in the paper-book should have been made to this Bench and

not to my learned brothers Mookerjee and Cuming, JJ.

This is the Bench, which is dealing with Privy Council business; this was the Bench which made the order, giving leave to appeal to the Judicial Committee and if directions became necessary with respect to the preparation of the paper-book, application should have been made to this Bench.

It is not necessary for me to dwell at any length on this point, for during the argument on this application the learned Counsel for the Respondents, in answer to a question by me, expressed his personal view that the application should have been made to this Bench.

I need hardly point out that if the application had been made to this Bench and if this Bench had thought it necessary to refer to the Bench, which made the order of the 9th February 1922, for the purpose of ascertaining what documents had been placed on the record, there would have been no difficulty in making such a reference and a considerable amount of time, expense and trouble would have been saved.

This judgment will be included in the supplemental paper-book.

The utmost despatch is to be given to the preparation of the supplemental paper-book. The costs of the supplemental paper-book are to be paid by the Appellant in the first instance. But, we direct the Registrar, Appellate Side, to assess the extra costs, which will be incurred with reference to the supplemental paper-book by reason of the Respondents to England not applying to this Bench in respect of the Registrar's order of 24th March 1922. Such extra costs are to be paid by the Respondents to England in any event, no matter what may be the result of the appeal.

The costs of this application, which we

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assess at five gold mohurs will be costs in the appeal.

RICHARDSON, J.—Leave was given by this Bench on the 10th March to appeal to England from the order, dated the 9th February, of another Divisional Bench of this Court. It appears that during the hearing of the rules on which that order was made, learned Counsel on either side handed up to the learned Judges suggestions in writing as to the directions or terms which the order should include. My recollection is that if the fact that such suggestions were made was referred to at all in the hearing before us of the application for leave to appeal, it was referred to only incidentally. Our attention was not drawn to the suggestions in the sense that we were made aware of their nature or of any special importance attaching to them or of the fact that the papers were extant on the record.

It further appears that the Registrar refused an application made to him on behalf of the Respondents to England to include these papers in the paper-book of the appeal. Thereupon an application was made by the Respondents to learned Judges upon which they made the order, dated the 6th April. In view of that order the Registrar then directed that the papers containing the suggestions should form part of the record of the appeal and part of the paper-book.

The application now before us is in effect an application to discharge the Registrar's second order on the grounds that the papers ought not to form part of the paper-book and that the order of the 6th April is an addition to the judgment of the 9th February.

I agree and I feel bound to express my agreement with the observation made by the learned Chief Justice that an unusual course was taken by the Respondents or their advisers. It was out of the ordinary

course to apply to the learned Judges for an order upon an interlocutory matter arising upon an application for leave to appeal to the Privy Council, an application which had already come before the present Bench as the Divisional Bench dealing with Privy Council matters. The Chief Justice generally presides over that Bench but the principle of course is the same however the Bench may, for the time being, be constituted. If the Registrar's original order was mistaken, the application for the rectification of the mistake should, in my opinion, have been made to the Bench then dealing with Privy Council matters. Upon that if any question of fact had arisen as to what had occurred before the learned Judges who made the order of the 9th February, means could have been found of ascertaining the fact from those Judges. But it is unnecessary to say more as to the inconvenience which might arise if it became a general practice that more than one Bench should deal with the same subject-matter. It is unnecessary because the learned Counsel for the Respondents, though speaking, as he says, not for his clients but for himself, has conceded that the course adopted in the present case was irregular and there would, therefore, seem to be no present danger that that course forms a precedent for the future.

As to the particular application before us the order of the 6th April must be approached with all the respect due to an order made by two learned Judges of this Court. Nor are we sitting in appeal from that order. From the terms of the order, the learned Judges must, as it seems to me, have intended that it should become a part of the record of the appeal and I am clearly of opinion that in the circumstances we should not be justified in withholding from the Privy Council the written suggestions to which I have re-

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ferred and the order relating to them. Those suggestions and the order must therefore be included in a supplementary paper-book to be laid before their Lordships of the Privy Council as a part of the record of the appeal, and if that be so the parties are agreed that the supplementary paper-book should also contain the connected documents which my Lord has specified.

It also appears to me to be fair that the Appellant to England should be at liberty to add to his grounds of appeal the supplementary ground which he will file to-morrow.

With these observations I concur in the order which my Lord has proposed.

S. C. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

RANKIN, J.	}	Re ALLEN BROS. & CO.
1922,		v.
21, February		BANDO & CO.

Calcutta Rent Act (III, B. C. of 1920), sec 15—Order of Rent Controller refusing application for standardisation of rent on the ground of confusion in the number of premises in question—Scope and effect of sec. 15—Jurisdiction of High Court to revise orders made under sec 15—Government of India Act, sec 107.

The Controller of Rents refused an application under sec. 15 of the Calcutta Rent Act for the standardisation of the rent of certain premises on the ground that there was no satisfactory evidence to prove the Municipal number of the premises in question :

Held—That sec. 15 of the Calcutta Rent Act makes it obligatory on the Rent Controller to grant a certificate certifying the standard rent.

That in the present case the rooms let were certain, easily ascertainable and subject to no doubt, and the order of the Rent Controller rejecting the appli-

cation for fixing a standard rent was liable to be set aside.

That the Rent Controller was a Court subordinate to the High Court which had jurisdiction to revise orders made under sec. 15 of the Rent Act under sec. 107 of the Government of India Act.

The facts of the case will appear from the judgment.

Mr. B. L. Mitter appeared for Allen Bros. & Co. in support of the Rule.

Mr. H. D. Bose appeared on behalf of Messrs. Bando & Co. to show cause.

The JUDGMENT OF THE COURT was as follows :—

The Applicants Messrs. Allen Brothers & Co. (India), Ltd. obtained a rule nisi on the 4th January 1921 calling upon the Respondents Messrs. Bando & Co. to show cause why an order made by the Controller appointed under the Calcutta Rent Act, 1920, should not be set aside. This rule was issued both under sec. 115 of the Code and under cl. 15 of the Letters Patent.

The Applicants are tenants of certain premises in Hare Street and hold under the Respondents. Their complaint is that an application made by them to the Controller under sec. 15 of the Rent Act, for a certificate certifying the standard rent of the said premises, has been dismissed contrary to the terms of the section, which oblige the Controller to fix the standard rent and to certify the same.

In my opinion, upon the question of merits there is no answer to the Applicants. The judgment of the Controller is before me. It appears that in Hare Street there is a large building which is numbered 3, 4, 5 and 6, and there is some confusion on the part of many people as to which part of the whole building is properly designated by one or other of these numerals. It appears, however, that

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there is no doubt at all as to the rooms which were let to the Applicants. They are occupied by Messrs. Holling Hurst & Co. and the three rooms in question which Messrs. Holling Hurst occupy under the Applicants and which the Applicants took from Messrs. Bando & Co. are easily ascertainable. The Rent Controller in the course of his judgment says:—

“From the above it will be seen that there is no satisfactory evidence upon the record to prove the number of the premises comprising the three rooms let out to the Applicants, whether the number of the premises is 4 and 5 or 5 and 6 or 4, 5 and 6, Hare Street. On this very ground the suit fails.”

He also states that there is no satisfactory evidence before him to show what the rent of these identical rooms was in November 1918. The judgment concludes by saying that “in the circumstances stated above as there is a confusion in the number of premises of which the rent is required to be standardized, I dismiss this application.”

In my opinion, sec. 15 of the Calcutta Rent Act makes it obligatory on the Rent Controller to grant a certificate certifying the standard rent. In the present case it is beyond dispute that the rooms in respect of which the application is made are perfectly certain, easily enough ascertainable, and are subject to no doubt at all. Either the Rent Controller or any Surveyor appointed by him could have been taken and shown the actual rooms which Messrs. Holling Hurst & Co. are occupying. It is nowhere suggested and it is not the fact that the Controller required the Applicant to give him further particulars and that the Applicant made any default in complying with such order. In these circumstances it matters nothing whatsoever whether the premises in question have got three numbers or one num-

ber or have got no number at all, and there is no justification for the Rent Controller's refusal to comply with sec. 15 of the Calcutta Rent Act. Nor can any such justification be extracted from the fact that it may be difficult, owing to confusion of numbers, to say at what rent these very three rooms were let in any previous period. By the terms of sec. 15 the Controller may fix the standard rent at such amount as he deems just in any of a series of cases, and one of the cases in which he may act in that manner is thus defined: “where for any reason any difficulty arises in giving effect to this Act.” For these reasons I do not think that there can be any serious question that if I have jurisdiction to do so I should send the case back to the Rent Controller with a direction to hear and determine the application according to law.

Mr. H. D. Bose, showing cause, takes as his main point the preliminary objection that this Court has no power of superintendence and no revisional jurisdiction as regards the Controller. It is not however contended that such jurisdiction, if it exists in the High Court cannot properly be exercised by a single Judge sitting on the Original Side in a case such as this where the premises are situated within the limits of the Ordinary Original Civil Jurisdiction. This point of Revisional Jurisdiction has been considered and adjudicated on in more than one case on the Appellate Side, and on the Original Side before now a good many applications have been entertained for a revision of orders passed by the Rent Controller. Mr. Bose contended that the decisions and in particular the decision which contains the fullest treatment of the matter, *H. D. Chatterjee v. L. B. Trivedi* (1) can be shown to proceed upon cases which are not in point and upon prin-

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ciples which are not sound. He also contended that insufficient attention had been paid to the fact that the Rent Controller's Court is subject to a rule-making power which is vested, not in this Court, but in the Local Government. For these reasons he asked leave to argue this question of jurisdiction, and in the circumstances I allowed that to be done.

The decisions of an Appellate Side Bench are technically speaking not binding upon me. This is owing to the fact that in many cases the law administered on the Original Side is not the same as the law administered with reference to cases arising in the mofussil. The present question, however, is exactly the same on whichever side of the Court it arises. The only authority known to me as a guide upon this sort of question is the dictum of Mr. Justice Norris in *The Oriental Banking Corporation v. Govindlal Sil* (2). The learned Judge said that he was not prepared to say that he would consider every judgment of an Appellate Bench binding upon him when sitting on the Original Side, yet every such judgment should receive respectful consideration and careful attention and should be followed unless he was very clearly of the opinion that the conclusion arrived at was an erroneous one.

The questions raised, quite properly, by Mr. H. D. Bose are both numerous and difficult. I think it would be no recommendation of anyone's opinion to say that he was very clearly of opinion that the contrary view was erroneous. I propose to deal with this matter fully and carefully both out of respect to Mr. H. D. Bose's argument and because I think his client is entitled to this, but in my opinion it is not true that in the end the question has been decided upon a wrong footing, and it is a question on which, though with some

difficulty, I incline to the opinion that the decision of the Division Bench is right.

In the first place it must be noted that the argument before me proceeded without either party calling into question the validity of the Calcutta Rent Act or the validity of the rules made thereunder. The first question on this basis is as to what the local Legislature has in fact done. In my opinion the Controller, in discharging his duty under sec. 15, and the President of the Tribunal in discharging his duties under sec. 18 act as Courts of Justice. Whether they are Civil Courts within the meaning of any particular enactment is another question but they are both Civil Courts in the general sense; they are authorised to decide judicially, and by judicial methods only, between persons seeking their Civil rights. [*Nilmoni v. Taranath* (3)]. Such functions as they perform under secs. 15 and 18 are neither administrative nor ministerial. It is written large, both over the Act and the rules, that the procedure to be followed is in general the procedure of a Court of Law.

By sec. 18, when the Controller has given a decision fixing the standard rent, and in that event only, a certain right is given to the parties. It is not called a right of appeal but a right "to apply for revision" of the Controller's order. As sec. 24 provides that the procedure shall be that laid down in the Code for the regular trial of suits "as nearly as may be," it seems that the right is to have a retrial before a higher Court. It is not what is technically known as "revision" or "reference" and it does not seem to me exactly the same thing as "appeal by way of re-hearing" means in England. But however the right in question is denominated or defined, its existence puts

(2) I. L. R. 9 Cal. 604 at p. 607 (1888).

(3) L. R. 9 I. A. 184; s. c. I. L. R. 9 Cal. 298 at p. 301 (1882).

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the Controller in the position of a Court subordinate to another Court, not simply as a matter of dignity or precedence, but in the sense that the one Court controls the other, to confirm, vary or nullify the orders of the other. If I may adopt the language used in *Birendra Kishore Manikya v. The Secretary of State* (4) "the index of the relation of superior and inferior tribunal" is there. The form of jurisdiction may or may not be one hitherto unknown in India as a form of Appellate Jurisdiction. It is by no means an unknown form elsewhere.

As regards the two classes of Courts that are mentioned in sec. 18, two features are clear: first that the decision shall be final, secondly, in addition to a general power to make rules "to carry out the purposes of the Act" the Local Government has a particular power to make rules regulating the procedure of these Courts. This power must doubtless be read with sec. 24.

By sec. 15 of the Indian High Courts Act, 1861, now replaced by sec. 107 of the Government of India Act, power of superintendence is given over all Courts subject to the Appellate Jurisdiction. By the respective secs. 9 and 106 of the same statutes the several High Courts have such Appellate Jurisdiction as is vested in them by Letters Patent. On turning to the Letters Patent to find what is the Appellate Jurisdiction, one finds that it is "from the Civil Courts of the Bengal Division of the Presidency of Fort William" and "from all other Courts subject to its superintendence." These last words appear to make a vicious circle but are explained by the fact that sec. 9 of the Act of 1861 had transferred to the High Court every power and authority vested in the Courts which the High Court

superseded. As neither the Rent Controller nor the President of the Tribunal were Courts known in 1861 a right of superintendence can only be made out under the Letters Patent in one or other of two ways: by establishing that it or some other form of Appellate Jurisdiction has been since granted with reference to the Rent Controller or the President, or secondly, by establishing that the High Court inherited a general jurisdiction over all Courts of Civil Jurisdiction established or to be established. "The High Court," as has been stated, "has superintendence where it has Appellate Jurisdiction, and has Appellate Jurisdiction where it has superintendence," *Abdul Karim v. Municipal Officer, Aden* (5), but some jurisdiction must be shown before the rest can be inferred.

In my opinion the position is in no way altered if the question be considered upon the language of the Code. The word "Subordinate" is not defined by the Code because sec. 3 is not a definition. This section does not claim to be and is not intended to be exhaustive: [*Purshottam Janardan v. Mahadev Pande* (6)]. Though not defined, the word "subordinate" plays an important part in the Code as may be seen from secs. 23, 24, 100, 115, 133, 136 and 137. There are also in the Code several phrases that may be contrasted and compared, thus:—Court of a grade inferior (sec. 3); any Court (sec. 113); Civil Courts subject to their superintendence (sec. 122); any Court of Civil Jurisdiction (sec. 141). The words "Civil Court" in the Code appear to have a special meaning though this again is nowhere defined. I take them to mean Civil Courts exercising all the powers of Civil Courts as distinguished from Courts which only exercise powers over civil

(4) I. L. R. 48 Cal. 766 at p. 776; s. c. 25 C. W. N. 80 (1920).

(5) I. L. R. 27 Bom. 575 at p. 582 (1903).

(6) I. L. R. 37 Bom. 114 (1912).

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matters of a special class or classes, *e.g.*, the Rent Courts under Act X of 1859, and the Land Acquisition Judge. The two broadest phrases in the Code are to be found in secs. 113 and 141. The latter in no way touches upon questions of subordination; the former does, because reference is a form of Appellate Jurisdiction [*Birendra v. Secretary of State* (4)] but Or. 46 cuts down its application and it does not apply to the Rent Controller or the President. It may be argued that the High Court has superintendence over "any Court" because it has power to alter the Order and so to give a power of reference to "any Court." Beyond those arguments, which in reference to special statutory Courts unknown to the Code seem very precarious, I can see nothing in the Code which even promises to be of any assistance on the present question unless it be that a comparison between secs. 23 and 24 appears to show that a Court may be subordinate within the meaning of the Code in a purely administrative sense.

It was contended by Mr. B. L. Mitter in support of the rule that all other Courts of Civil Jurisdiction are subordinate to the High Court and under its Appellate Jurisdiction in a wide sense unless the Legislature has expressly provided to the contrary. I assume that for the purposes of this proposition some form of territorial limit is presupposed and I pass over the difficulty that arises from the fact that such a limit may be imposed in various ways. The proposition may mean that if a new Court was established for a new purpose and nothing was said to the contrary then there would be an unlimited right of appeal in the narrow sense as well as subordination in other ways. But if this is not meant then I think the proposition is seen to be indefinite and to stand

in need of support and definition by authority. As a general proposition applicable to Bengal it seems to me that on the face of the Act of 1861 and the Letters Patent no proposition so simple and wide can possibly be correct. It is nowhere expressed and the several jurisdictions carefully defined and conferred are not to be extended or enlarged indefinitely upon general principles to the rigour of which His Majesty is in no way committed. The simple proposition is always tempting yet I know of no case decided on this simple principle. In many of the decided cases it would have been a complete answer to the problem, yet the Courts have met a heavy weather before arriving at another answer. As the present case arises within the Ordinary Original Jurisdiction it may be said that this principle was implicit in the authority of the Supreme Court and that, if so, it is continued by sec. 9 of the Act of 1861 and by the Government of India Act. This has not been argued before me. My own consideration of the matter leads me to reject the argument. This depends upon the charter of the Supreme Court of 1774. As cl. 21 applies only to the Courts and Magistrates therein specified as having been established or appointed by the charter of 1753 it has no application here. The only other clause that can be founded on is cl. 4. As to this clause, both Jenkins, C. J. and Stephen J., in *The Amrita Bazar Patrika* case (7) were of opinion that it refers to the individual Judges and not to the Courts. The frame of the charter, when the purview of its successive clauses is examined, strongly supports this reading. I would say that nothing that I am now stating is intended to abridge by a single inch the doctrine laid down with reference to cases which are

(4) *L. R.* 48 Cal. 768 at p. 776: s. c. 25 C. W. N. 80 (1920).

(7) 17 C. W. N. 1253 at pp. 1283 and 1289 (1918).

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within the revisional power, that "there is no form of judicial injustice which this Court, if need be, cannot reach" [*Lekhraj Ram v. Debi Pershad* (8)].

It remains therefore to enquire whether the Calcutta Rent Controller as a Court is under the High Court in any one of ways in which Appellate Jurisdiction can be exercised. The decisions of the Division Benches, in particular the case already cited [*H. D. Chatterjee v. L. B. Trivedi* (1)] deal with the problem in this way, in no way proceeding upon any more general principle.

The position under the Calcutta Rent Act of 1920 is this. The Act to begin with applies only to Calcutta in the sense of Municipal Calcutta, and the word "Calcutta" throughout the Act has that particular meaning. So far as I can find, the area to which the Act extends has never been enlarged since the Act was passed. The appointment of the Rent Controller is to be found in the Calcutta Gazette of 5th May 1920 No. 24 T. M. and is "as Controller for Calcutta for the purposes of the said Act." The rules made by the Local Government under the Act are dated 13th July 1920; the only amendment is dated 8th September 1921 and in no way affects the present question. The result is therefore that at present, taking the institution as it exists, no decision of the only Rent Controller appointed is in fact subject to revision by any Civil Court. If even the Act is extended to another area it will be in the option of the Local Government to appoint another officer as Controller for the new area or to appoint the same officer either as a separate office or by way of extension of the area over which his present jurisdiction holds. No doubt mere extension of his area by an administrative

act would put him within the control of a Civil Court. As matters stand the only facts connecting him in any manner with the Appellate Jurisdiction of the High Court are these: that he is, as I think, subordinate to the President; that awards of the Tribunal made under the Calcutta Improvement Act (Bengal Act V of 1911) are appealable to this Court under Act XVIII of 1911; that in some cases the President may himself give decisions which are deemed to be decisions of the Tribunal; and that where the word "Judge," as distinct from "Court," appears in the Land Acquisition Act of 1894, the President is deemed to be the Judge. As between the Rent Controller on the one hand and the High Court on the other, the question is, is this a link or a gap?

Certain lines of decisions have been thought to touch this question. I will refer first to the cases under the Rent Act (Act X of 1859). By that Act certain suits were made cognisable only by the Collector's Court and upon the terms of the Act. In certain suits the judgment of the Collector was to be final; and in these, if they were tried by the Deputy Collector, an appeal lay to the Collector whose decision was to be final. In other suits, an appeal lay to the Zilla Judge or the Sadar Court according as the amount in dispute was under or over Rs. 5,000. In 1861 therefore the Sadar Court possessed Appellate Jurisdiction over the Collector's Court by the terms of the Act of 1859 itself and the High Court inherited therewith a power of superintendence. The cases were fully discussed in *Chaitan Pajjosi v. Kunja Behari* (9). They show that a right of appeal, however limited, will let in the full general power of superintendence, but the right of appeal in those cases is clearly given by the special

(1) 26 C. W. N. 78 (1921).

(8) 12 C. W. N. 678 (1908).

(9) 1. L. R. 38 Cal. 822; a. c. 15 C. W. N. 888 (1911).

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Code itself and applies to cases within the special jurisdiction conferred thereby. I may observe here that in dealing with a long line of decisions the important point to observe is the principle upon which the authorities in the end settle down. That is far more important than general language used in the earliest cases. The earliest case was apparently a Full Bench case [*Govind Coomar v. Kristo Coomar* (10)], where the order assailed was made under sec. 151 of Act X. There was no complaint that the Court of limited jurisdiction had exceeded its authority. The point was that the Court had refused to do something on the ground that it had no power. In that case the judgment of Mr. Justice Loch showed by its reference to "cases in which no appeal lies to the Judge" that there is no reason to attribute the decision to any wider principle than I have mentioned. Wider language was used in *Deanutóollah's* case (11), where the Collector had in fact exceeded his jurisdiction but I do not read that as laying down that every Court of limited jurisdiction must be under the superintendence of the High Court. The true basis of the Court's interference under the Act of 1859 was considered in *Umacharan v. Midnapur Zemindary Coy.* (12), where it is rested on the provision for appeals. Perhaps the latest illustration of this reasoning is afforded by the case of *Kartik Chandra v. Gorachand* (13), a decision under the Chota Nagpur Tenancy Act (Bengal Act VI of 1908), where a general power of revision was based on the fact that by sec. 224, sub-cl. (2) a second appeal lay to this Court in certain cases. These cases deal also with difficulties as to

whether the Acts expressly or impliedly vested power of superintendence elsewhere or took it away. They show that the rule-making power or even greater powers vested elsewhere do not avail to take away those powers of the Court which follow from its position as a Court of appeal, though a provision that the Commissioner shall be the High Court has this effect, *Darbari Panjarth v. Bhola Roy* (14) as also a provision that the appeal shall lie to the Commissioner, *Umacharan v. Midnapur Zemindary Coy.* (12). These cases therefore are in my opinion, as Mr. H. D. Bose argued, of no very direct application to the case of the Rent Controller.

By the Land Acquisition Act of 1894 an appeal lies to the High Court from any award of the Court established by the Act. Leaving on one side the cases in which the Collector's duty was not a judicial duty, I come to those in which it has been held that in acting under sec. 18 the Collector is a Court and his proceedings are subject to revision. [*Administrator-General of Bengal v. Land Acquisition Collector, 24-Pergannahs* (15) and *Krishna Das v. Land Acquisition Collector of Patna* (16)]. The latter case simply followed the earlier and not without doubt. In the earlier case attention was almost entirely devoted to the question whether the Collector's function was judicial. The reasoning on that assumption is very condensed but if this Court is a Court of appeal from the award it would certainly seem to have superintendence over judicial proceedings for the initiation of the reference.

It is clear enough that under all these special statutes an appeal lies to the High

(10) 7 W. R. 520; B. L. R. Sup. 714 (F. B.) (1867).

(11) 10 W. R. 341 (1868).

(12) 19 C. L. J. 300 (1914).

(13) 1 L. J. B. 40 Cal. 518 (1913).

(12) 19 C. L. J. 300 (1914).

(14) 1 L. R. 41 Cal. 128; s. c. 18 C. W. N. 575 (1914).

(15) 12 C. W. N. 241 (1905).

(16) 16 C. W. N. 327 (1911).

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Court. "For the purpose of the application of the power of superintendence it is not necessary that an appeal should lie to this Court in the very proceeding in which the power of superintendence is invoked," *Umacharan v. Midnapur Zemindary Coy.* (12). If a case should arise by reason of an extension of the area under the Calcutta Rent Act, 1920, in which a Civil Court should have jurisdiction, a question would then emerge which the cases I have been referring to do not answer. That question but for the specific right of appeal conferred by the Land Acquisition Act would have arisen under it also. The question is this: where a new and special jurisdiction is conferred upon an ordinary Civil Court so as to make it for certain limited purposes a Court of special jurisdiction, the powers and duties of which are defined by statute, has the High Court in the absence of any special provision conferring Appellate Jurisdiction in any form as regards those purposes a right of superintendence arising out of the ordinary relationship between the two Courts. As I understand the view of the Division Bench in *H. D. Chatterjee v. L. B. Trivedi* (1), they answer this question in the affirmative, and I am in no way prepared to dissent. But the question at present is not solved by any reference even to this principle. From the Act of 1861, from the Letters Patent, and from the decisions, I draw this conclusion that it is not enough for the purposes of the Code or the Letters Patent which deal on definite principles with a regular order of Courts, that from the limited nature of the powers conferred, or from a mere comparison with other Courts, or from possible relationships thereto not yet subsisting, a new Court may be styled an "inferior Court." An actual relation-

ship to this Court must be established: an existing thread of connecting authority must be disclosed. The President of the Tribunal is the person who is set up as a Court by sec. 18 of the Rent Act of 1920. Under the Calcutta Improvement Act of 1911 a "Court" is set up but that "Court" is the Tribunal and not the President (sec. 70). The Act of the Governor-General in Council of the same year deals with appeals from awards of the Tribunal as the preamble shows. For the purpose of determining what is the award of the Tribunal the President's decision is in certain cases the only thing that matters, and in certain cases he is entitled to sit alone and to exercise all powers of the Tribunal (sec. 77). In addition to that the Calcutta Improvement Act has made the President the "Judge" in the sense of the Land Acquisition Act, wherever the word "Judge" occurs. Now superintendence is over Courts, not over jurisdictions. The present question must, it seems to me, be decided ultimately upon consideration whether the giving of a new jurisdiction to the President is to be regarded as a new jurisdiction conferred on an existing Court or to be regarded as the setting up of a new Court for a new purpose. On that question I have entertained much doubt. The position is not quite the same as where a new jurisdiction is given to the Civil Courts. This Tribunal or the President has no general jurisdiction at all. On the question whether there is one Court from which in one jurisdiction an appeal lies to this Court or two Courts which should be regarded as absolutely separate, I have come to the conclusion that the decision of the Division Bench has all the common sense of the matter even if it may be doubted whether it has all the strict logic on its side. After all the President for some purposes is "the Judge" and is "the Tribunal;"

(1) 26 C. W. N. 78 (1921).

(12) 19 C. L. J. 300 at p. 303 (1914).

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appeals within the Calcutta Improvement Act lie mostly from his decisions; and in view of the fact that appeals from a Rent Controller's decisions may come as occasion arises either to the Civil Courts of the District or, in Calcutta, to the President, I am in no way prepared to hold that an opinion which has been entertained by some four or five Judges of this Court is not the better opinion.

For these reasons perhaps I should say in these circumstances the rule will be made absolute with costs.

Messrs. B. N. Basu & Co., Solicitors for the Applicants (*Messrs. Allen Bros. & Co.*).

Mr. M. N. Mitra, Solicitor for the Respondents (*Messrs. Bando & Co.*).

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1678 of 1919.

CHATTERJEA, J.	SM. NIRODE BARANI
PEARSON, J.	DASI and anr., Plaintiffs
1922,	Appellants,
Heard, 25 and	v.
26, January.	MANINDRA NARAYAN
Judgment,	CHANDRA and ors., De-
27, January.	fendants, Respondents.

Civil Procedure Code (Act V of 1908), Or 21, rr. 98, 99, 101, 103, order under, dismissing case for default—Suit by party against whom order made—Limitation—Limitation Act (IX of 1908), Art. 11A.

In view of the decisions under secs. 332 and 335 of Act XIV of 1882 and the fact that the language of these sections has not been altered in the new Code, Art. 11A of the Limitation Act will apply only to an order under r. 98, r. 99 or r. 101 of Or. 21, which has been made upon investigation.

KUNJ BEHARY LAL *v.* KANDH PRASAD NARAIN SINGH (6) *followed*.

(6) 6 C. L. J. 362 (1907).

NAGENDRA LAL CHOWDHURY *v.* FANI BHUSAN DAS (2), VENKATARATNAM *v.* RANGANAYAKAMMA (3), PONNUSAMI PILLAI *v.* SAMU AMMAL (4) and SATINDRA NATH BANERJI *v.* SHIVA PRASAD BHAKAT (5) *distinguished*.

An order dismissing an application for default is not an order passed upon investigation.

This was an appeal preferred on the 15th August 1919 against a decree of the Subordinate Judge of Burdwan (Babu Phanindra Mohan Chatterji), dated the 14th May 1919, reversing a decree of the Munsif of Katwa (Babu Haripada Banerji), dated the 31st July 1916.

The facts of the case will appear from the judgment.

Babus Sarat Ch. Roy Chowdhury and *Haradhan Chatterjee* for the Appellants.

Babu Samatul Ch. Dutt for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for establishment of right to, and recovery of possession of, the property in dispute from which the Plaintiffs were dispossessed by the Defendants Nos. 1 to 15 who purchased the property in execution of a decree which they obtained against one Baidya Nath Sircar.

It appears that the Defendants Nos. 1 to 5 took possession of the property in dispute through Court, and the Plaintiffs applied to the Court under Or. 21, r. 100. On the day ultimately fixed for the hearing of the case, namely, on the 14th February 1914, neither the Petitioners nor their pleader appeared and the petition was accordingly dismissed for default.

(2) I. L. R. 45 Cal. 785 : s. c. 23 C. W. N. 376 (1918).

(3) I. L. R. 41 Mad. 985 (F. B.) (1918).

(4) 31 Mad. L. J. 247 (1916).

(5) 26 C. W. N. 126 at p. 127 (1921).

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The present suit was instituted on the 27th July 1915 which was more than one year after the date of the said order.

The question is whether the suit is barred by the provisions of Art. 11A of the Limitation Act (IX of 1908).

The Court of first instance decided both the questions of title and limitation in favour of the Plaintiffs. The Lower Appellate Court has held that the suit is barred by limitation under Art. 11A of the Limitation Act.

Or. 21, r. 97 deals with a case of obstruction or resistance by any person to a holder of a decree for the possession of immoveable property, or the purchaser of any such property sold in execution of a decree; and sub-r. 2 of that rule lays down that the Court shall fix a date for investigating the matter and rr. 98 and 99 state what is to be done according to the result of the investigation.

R. 100 deals with the case of any person other than the judgment-debtor who is dispossessed of immoveable property by the holder of a decree for the possession of such property, or where such property has been sold in execution of a decree by the purchaser thereof.

Sub-r. 2, r. 100 lays down that the Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

R. 101 provides that the Court, if satisfied that Applicant was in possession of the property on his own account, or on account of some person other than the judgment-debtor, shall direct that the Applicant be put into possession of the property.

Then comes r. 103 which provides that any party not being a judgment-debtor against whom an order is made under r. 98, r. 99 or r. 101, may institute a suit

to establish the right which he claims to the present possession of the property, but subject to the result of such suit (if any), the order shall be conclusive.

There were similar provisions in Act XIV of 1882, sec. 332 of which dealt with the case of dispossession of any person other than the judgment-debtor by the holder of a decree for possession; sec. 334 dealt with cases of obstruction to the purchaser of any immoveable property by the judgment-debtor or anyone on his behalf; and sec. 335 dealt with cases where the purchaser of any such property was resisted or obstructed by any person other than the judgment-debtor claiming in good faith a right to the present possession thereof, or where in delivering possession any such person was dispossessed.

There is no doubt that upon an application being made to the Court under Or. 21, r. 100, the Court has to hold some sort of investigation as expressly laid down by sub-r. 2 of r. 100 and r. 101.

In this case there was no investigation and the case was dismissed for default. The question is whether under these circumstances the special limitation contained in Art. 11A of the Limitation Act applies.

The provisions of Or. 21, rr. 97 to 103 are analogous to secs. 278 to 283 of the Civil Procedure Code, Act XIV of 1882, (corresponding to Or. 21, rr. 58 to 63 of the present Civil Procedure Code). Those sections relate to claims preferred to attachment of immoveable property.

There have been numerous decisions on the question whether the one year's limitation under Art. 11 of the Limitation Act, Act XV of 1877, applies to cases where there has been no investigation of a claim under sec. 278 or objections under sec. 332 or 335, C. P. C. (Act XIV of 1882). The decisions are not uniform.

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In the case of *Sirdhari Lal v. Ambica Pershad* (1) in dealing with a case under sec. 278 of Act XIV of 1882 the Judicial Committee observed that the policy of the Act evidently is to secure the speedy settlement of questions of title, and pointed out that the Code does not prescribe the extent to which the investigation should go. That indicates that in their Lordships' opinion (as the sections expressly laid down) there should be some investigation before the order can be treated as conclusive. There are various other cases in which it has been held that there must be some investigation by the Court before the order can be held to be conclusive and Art. 11 of the Limitation Act may be applicable to the case.

It is to be observed however with reference to claim cases, that secs. 278 to 282 provided for an investigation, and sec. 283 provided that "the party against whom an order under secs. 280, 281 or 282 is passed, may institute a suit to establish the right which he claims to the property in dispute but subject to the result of such suit, if any, the order shall be conclusive." But the corresponding provision of the present Code of Civil Procedure (Act V of 1908), viz., Or. 21, r. 63 provides that "where a claim or an objection is preferred, the party against whom an order is made, may institute a suit to establish the right which he claims to the property in dispute but subject to the result of such suit, if any, the order shall be conclusive." It is to be observed therefore that whereas in sec. 283 of Act XIV of 1882 there was express reference to secs. 280, 281 or 282 which dealt with investigation into a claim, Or. 21, r. 63 does not make any mention of any specific rules under which orders in claim cases are passed. Upon these grounds, it has been held in

some recent cases that there has been a change in the law and that the decisions under the old Code are no longer in force.

In the case of *Nagendra Lal Chowdhury v. Fani Bhusan Das* (2), it was held that where an application had been dismissed with or without investigation, a regular suit, if instituted, must be commenced within one year from the date of such order. The learned Judges held as follows:—"All that is now necessary is that a claim should be preferred under r. 58 and that there should be an order either allowing or rejecting it. The party against whom the order is made, may then bring a suit in the language of r. 63 to establish the right which he claims to the property in dispute."

The same view has been taken in the case of *Venkataratnam v. Ranganayakamma* (3), where a Full Bench of the Madras High Court referring to the general policy of the previous Code as explained by the Judicial Committee in *Sirdhari Lal v. Ambica Pershad* (1) said that sec. 283 of the Codes of 1877 and 1882 only gave a right of suit to the party against whom an order had been passed under secs. 280, 281 or 282 and did not provide for the case when the Court under sec. 278 refused to investigate the claim on the ground that it had been designedly or unnecessarily delayed. In such cases, sec. 283 failed to provide for the speedy settlement of questions of title raised by the claim. The learned Judges held that the intention of the Legislature was to widen the scope of the rule in accordance with the general policy of this legislation as explained by the highest tribunal. It may be mentioned that in the case before

(1) L. R. 15 I. A. 123; s. c. I. L. R. 15 Cal. 521 at p. 525 (1888).

(2) I. L. R. 45 Cal. 785; s. c. 23 O. W. N. 375 (1918).

(3) I. L. R. 41 Mad. 985 (F. B.) (1918).

(1) L. R. 15 I. A. 123; s. c. I. L. R. 15 Cal. 521 (1888).

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the Madras Full Bench, there was no order either allowing or rejecting the claim and the Court directed that the allegations of the claimant would be notified to the bidders with the remark that she "did not take steps to have her claim inquired into during the last 10 months."

A similar view has also been taken in the case of *Ponnusami Pillai v. Sanu Ammal* (4), where it is held that, "the language of Art. 11 in the new Act is more comprehensive than that of the previous Act and that has been construed in this Court as covering orders after full investigation as well as orders passed on default." See also observations on the point in the case of *Satindra Nath Banerji v. Shiva Prasad Bhakat* (5).

These decisions relate to claim cases and, as stated above, they are based upon the alteration in the wording of r. 63, Or. 21 as compared with sec. 283 of the old Code.

So far as the provisions of r. 103 are concerned, there has been no change in the Civil Procedure Code as compared with secs. 332 and 335 of the old Code.

Sub-r. (2) of r. 100 and r. 101 (as also rr. 97 to 99) expressly provide that the Court shall investigate the matter and any order made under r. 101 (or r. 99) must therefore be the result of such investigation. When, therefore, r. 103 lays down that any party, not being a judgment-debtor, against whom an order is made under r. 98, r. 99 or r. 101, may institute a suit to establish the right which he claims to the present possession of the property but subject to the result of such suit (if any) the order shall be conclusive, it evidently contemplates an order passed after investigation as laid down in rr. 97 to 99 or rr. 100 and 101. The conclusiveness therefore attaches to an order made after

investigation under those rules. The question has been considered with reference to sec. 335 of the old Code in the case of *Kunj Behary Lal v. Kandh Prasad Narain Singh* (6), where the learned Judges held that "it is manifest from the language of the Code itself that the only order upon which the character of finality is impressed is an order made upon enquiry" and that where there has been no investigation at all and no judicial determination and the Court without any enquiry dismissed the application for default and withdrew the proceeding, it is impossible to say that the order is of the description contemplated by sec. 335, and they approved of the decision in the case of *Sarat Chandra v. Tarini Prasad* (7).

We have been referred by the learned pleader for the Respondent to the cases of *Shagun Chand v. Musammam Shibbi* (8) and *Chandi Prasad v. Nand Kishore* (9) in support of the proposition that one year's rule of limitation has been applied even to cases where there has been no investigation. But in the first case it appears that the pleader for the Applicant appeared and stated that his client did not wish to adduce any evidence and the application was accordingly dismissed. In the second case, the pleaders for both parties were present; no evidence was adduced; and the learned Judges held that the dismissal of the petition under those circumstances could not be treated as dismissal for default of appearance. Neither of these cases therefore was dismissed for default.

It is also contended that the principle upon which it has been held that the limitation of one year applies to orders

(6) 6 C. L. J. 362 (1907).

(7) 1 L. B. 34 Cal. 491 : s. c. 11 C. W. N. 487 (1907).

(8) 3 All. L. J. 626 (1911).

(9) 20 Ind. Cas. 369 (1913).

(4) 31 Mad. L. J. 247 (1916).

(5) 26 C. W. N. 126 at p. 127 (1921).

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passed in connection with claim cases, even where there has been no investigation, should also be applied to a case like the present. But as pointed out above, r. 63 does not refer to orders passed under rr. 60, 61 or 62 of the Code under which the orders are made, and it is upon that ground that the learned Judges in *Nagendra Lal Chowdhury v. Fani Bhusan Das* (2) and some other cases referred to above held that the law had been changed.

So far as Or. 21, r. 103 is concerned, there has been no change in the law. That rule like sec. 335 of Act XIV of 1882 refers to the previous rules, viz., rr. 98, 99 and 101 under which orders are to be made after investigation. The distinction appears to be a narrow one, because orders under the claim sections have also to be made after investigation. But having regard to the fact that although there was express reference to secs. 280 to 282 in sec. 283 of Act XIV of 1882, there is no reference to those sections (corresponding to rr. 58 to 62) in r. 63, whereas in Or. 21, r. 103 there is express reference to rr. 98, 99 and 101 under which the investigation is to be made, and having regard to the decisions referred to above we are constrained to hold that in cases coming under Or. 21, rr. 98, 99 or 101, an order in order to be conclusive must be an order passed after investigation.

The next question for consideration is what constitutes "investigation," and it is a question of some difficulty in some cases.

As pointed out by the Judicial Committee (in connection with claim cases) in *Sirdhari Lal v. Ambika Pershad* (1), the Court does not lay down to what ex-

tent the investigation should go. There seems to be a divergence of opinion as to what constitutes "investigation."

In a number of cases, mostly relating to claim cases, where the claimant did not adduce evidence and the claim was dismissed, it was held that a suit brought more than a year after the date of the order was barred. Some of the decisions were based on the ground that, where a party was allowed an opportunity of adducing evidence but failed to do so and there was an order rejecting the claim purporting to be made under sec. 281, there was investigation sufficient to bring the case under sec. 281. See *Rahim Bux v. Abdul Kader* (10) and the earlier cases of *Gooroo Das Roy v. Sona Monce Dassya* (11) and *Srimuntho Hazrah v. Syed Tajooddin* (12).

In some cases where the party was not even present as in *Tripura Soonduree Debya v. Ijjatounnissa Khatun* (13), *Gulab v. Mutsaddi Lal* (14) and *Jugol Kishore v. Ambika Debi* (15) (the last two cases being under the present Code) and *Lachmi Narain v. H. C. Martindell* (16) (a case under the Rent Act XII of 1881), the same principle was applied.

On the other hand, in some other cases it was held that the limitation did not apply where the order was passed dismissing the case for default of appearance [see *Kallar Singh v. Toril Mahton* (17) and *Sarala Subba Rau v. Kamsala Timmayya* (18)].

It is difficult to reconcile all these decisions. It may be said (as it was urged in

(1) L. R. 15 I. A. 123 : s. c. I. L. R. 15 Cal. 521 (1888).

(2) I. L. R. 45 Cal. 785 : s. c. 23 C. W. N. 375 (1918).

(10) I. L. R. 32 Cal. 537 (1904).

(11) 20 W. R. 345 (1873).

(12) 21 W. R. 409 (1874).

(13) 24 W. R. 411 (1875).

(14) I. L. R. 41 All. 623 (1919).

(15) 16 C. W. N. 882 (1913).

(16) I. L. R. 19 All. 253 (1897).

(17) 1 C. W. N. 24 (1895).

(18) I. L. R. 31 Mad. 5 (1908).

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some of the cases) that there is no reason why the limitation should apply where the party appears and is unable to, or does not, adduce evidence; and that the limitation should not apply where the party takes care not to come to Court on the day fixed for hearing. But a distinction has been drawn in the Civil Procedure Code between a case where it is dismissed for default, and a case where the party appears and fails to adduce evidence and the case is in consequence dismissed in which event the dismissal is not one for default.

It is pointed out on behalf of the Respondent that Art. 11A of the Limitation Act does not refer to any section or rule of the Civil Procedure Code and is very general in its terms. It is accordingly contended that an order passed under r. 103 dismissing a case for default comes under Art. 11A of the Limitation Act.

Art. 11A refers to a suit by a person against whom an order has been made under the Code (among others) upon an application by a person dispossessed of immoveable property in the delivery of possession thereof to the decree-holder or purchaser. But although the article does not refer to any section, the order must be an order under Or. 21, r. 103. That rule expressly refers to rr. 98, 99 and 101 and these rules provide for investigation into a petition of objection. The right of suit is given by r. 103 only when there is any order under rr. 98, 99 or 101, and Art. 11A merely provides for limitation applicable to such suits.

We do not think it satisfactory to hold that although the provisions relating to claims and those relating to delivery of possession are similar in nature, different periods of limitation should be applied, but as already stated, having regard to the decisions under secs. 332 and 335 and to the fact that the language of secs. 332 and 335 has been retained in Or. 21, r. 103

though the language of Or. 21, r. 63 has been altered from that of sec. 283 of Act XIV of 1882, we must hold that the order dismissing the application under Or. 21, r. 101 for default is not barred by the provisions of Art. 11A of the Limitation Act.

The appeal must accordingly be allowed. The decree of the Lower Appellate Court is set aside and that of the Court of first instance restored. We make no order as to costs of this Court and of the Lower Appellate Court which will be borne by each party.

H. D. C.

Appeal allowed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ATKINSON.

LORD PHILLIMORE.

SIR JOHN EDGE.

1921,

Heard, 10 and

13, June.

Judgment, 12, July.

SACHINDRA NATH

ROY and ors.,

Appellants,

v.

MAHARAJ BAHADUR

SINGH and ors.,

Respondents.

Sub-mortgage by deposit by mortgagee of mortgage deed—Discharge of mortgage by mortgagor—Indemnity, deed of, by mortgagee to mortgagor—Preliminary decree on sub-mortgage, appealed to Privy Council—Appeal dismissed for non-prosecution—Application for order absolute when barred—Limitation Act (XV of 1877), Sch. II, Art. 179—Payment of decree more than three years after, if covered by deed of indemnity.

The mortgagor of certain properties after having created an equitable sub-mortgage by depositing the mortgage deeds with a firm S. K. C. accepted payment of his mortgage dues and by a deed, dated 23rd April 1894, released the mortgaged properties from all claims under the mortgage and covenanted to indemnify the mortgagor from all losses, damages, actions, claims, etc., in respect of the mortgage deeds or any money owing or due thereunder or otherwise howsoever or for any act done by him the mortgagee in re-

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spect of the mortgage deeds. The firm of S. K. C. recovered a preliminary mortgage decree inter alia against the mortgagor on their sub-mortgage on 26th August 1905, against which the mortgagor appealed to the Privy Council. But before the appeal was ready for hearing, the mortgagor on 2nd February 1910 made payments to an assignee of the decree, who having acknowledged satisfaction, the appeal to the Privy Council was not further prosecuted and the appeal was dismissed for want of prosecution on 16th April 1910. The mortgagor on 9th September 1912 sued the mortgagee to recover the amount paid to the assignee of the decree on the basis of the deed of indemnity.

Held—That the decree of 26th August 1905 became unenforceable under Art. 179 of Sch. II of the Limitation Act of 1877 by proceedings commenced after 26th August 1908, and time did not run either from the date when the appeal to the Privy Council was dismissed for default or from the expiry of the six months given for redemption in the decree of 26th August 1905, but from 26th August 1905 the date of the decree.

ABDUL MAJID v. JAWAHIR LAL (1) and BATUK NATH v. MUNNI DEI (2) referred to.

That the payment of the decree on 2nd February 1910 was voluntary in the sense that the mortgagor could not have been compelled by any proceeding founded upon the decree to make the payment.

That in view of the wide terms of the deed of indemnity, the fact that the payment was voluntary did not preclude the mortgagor from demanding payment from the mortgagee of the amount which they paid to the decree-holder in order to rid the property of the incumbrance which had

been created by the mortgagee depositing the title deeds with the firm of S. K. C.

This was an appeal against a judgment and two decrees, dated the 21st July 1916, of the High Court of Judicature at Fort William in Bengal reversing a judgment and decree, dated the 12th August 1914, of the Court of the Subordinate Judge of Murshidabad.

The main question for determination in this appeal is whether under a contract, dated the 21st April 1894 and made between the predecessors in title of the Plaintiffs-Appellants and one Rai Dhanpat Singh Bahadur in the appeal represented by the first four Respondents the Appellants were entitled to be indemnified and if so to what extent by the said Respondents.

On the 8th March 1886 the predecessors of the Appellants who are referred to in the record as the Roys gave the said Rai Dhanpat Singh Bahadur a mortgage on certain valuable zamindari properties as security for a loan of Rs. 3,00,000 and interest thereon. On the 12th May 1887 they gave him a second mortgage thereon to secure an advance of Rs. 20,000 with interest and on the 12th May 1892 a third mortgage as security for a further advance of Rs. 15,000 and interest.

On the 3rd June 1893 Rai Dhanpat Singh Bahadur borrowed Rs. 70,000 from Raja Gokul Das and others who carried on business at Calcutta under the name and style of Shewaran Khoshal Chand and hereinafter referred to as the Firm and deposited with them as security for the loan the said three mortgage deeds. He also agreed to give and subsequently gave the Firm promissory notes (Hundis) as collateral security.

Early in 1894 Rai Dhanpat Singh brought two suits against the Roys on the three mortgages claiming Rs. 2,26,450 as the total balance due under them but he

(1) I. L. R. 36 All. 350; s. c. 18 C. W. N. 963 (P. C.) (1914).

(2) L. R. 41 E. A. 104; s. c. I. L. R. 36 All. 284; 18 C. W. N. 740 (1914).

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did not make the sub-mortgagees parties to the suit.

The Roys contested the suits but on the 21st April 1894 the parties entered into compromise whereby Rai Dhanpat Singh Bahadur agreed to accept Rs. 1,20,000 in full satisfaction of all his claims against the Roys on the three mortgagees as well as "under any other deed or any account whatsoever" and to give them an undertaking to indemnify them against any loss they might be put to owing to any claims made against them by anybody under the mortgagees "or otherwise howsoever or for any act done by him the said mortgagee with respect to the said deeds." The Roys paid the amount and Rai Dhanpat Singh Bahadur executed a deed, dated the 21st April 1894, in favour of the Roys embodying the terms of the settlement the material portion of which is set out in their Lordships' judgment.

The parties thereupon presented petitions to the Court praying that the suits be decreed as being amicably settled and the Plaintiffs' claims satisfied and a decree in each of the suits was accordingly made.

In order to pay Rai Dhanpat Singh Bahadur and for other purposes the Roys borrowed Rs. 2,00,000 from the Eastern Mortgage and Agency Company, Limited (hereinafter referred to as the Company), for which they executed in its favour a mortgage, dated the 23rd April 1894, of the properties comprised in the three mortgages.

On the 17th July 1896 Rai Dhanpat Singh Bahadur paid to the Firm Rs. 42,000 in part payment of the amount due on the said promissory notes. The firm in consideration of that payment gave Rai Dhanpat Singh Bahadur and the latter accepted a release from further liabilities on the part of the latter under the promissory notes but the release was subject to

a condition which was stated in the document executed by the Firm in favour of Rai Dhanpat Singh Bahadur as follows:—

"This release to you is without prejudice to our rights to enforce our lien for the balance due under the said Hundis from the properties comprised in the said mortgages from Bhagabati Charan Roy and others or their assigns or any persons having or claiming any interest in the said properties. It is clearly understood between us that we do not hold you in any way liable for the said balance."

On the 11th May 1897 the said Firm brought a suit in the Court of the Subordinate Judge of Murshidabad against the Roys and the Company to enforce its claim as to the balance due on the said promissory notes. The Firm's case was that they were equitable sub-mortgagees and had priority over the mortgage of 1894 in favour of the Company and that they were entitled to enforce their claim on the properties comprised in the said three mortgages as well as against the Roys personally. The Roys and the Company contested the suit and Rai Dhanpat Singh Bahadur having died his heirs and legal representatives, the first four Respondents to the present appeal, were made Defendants by an order of the High Court. On the 28th February 1903 the Subordinate Judge delivered judgment in favour of the Firm and gave them the usual mortgage decree subject to the Company's mortgage for Rs. 27,223-4-9 including costs with interest thereafter until realisation at the rate of 6 per cent. per annum. Against that decree the Firm and the Roys appealed separately to the High Court and on the 26th August 1905 that Court delivered judgment allowing the Firm's appeal with costs and dismissing the Roys' appeal with costs. In the result two decrees both dated the 26th August 1905 were drawn up. The one in

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the Firm's appeal was in lieu of the decree appealed from and ordered the Roys or the Company to pay the Firm within six months from that date Rs. 24,305 with interest from the date of suit until realisation at 6 per cent. per annum together with costs and interest thereon at the same rate, that the Firm's lien to have priority over the Company's mortgage and that in default of payment on the appointed day the properties comprised in the said three mortgages should be sold. The second decree was drawn up in the Roy's appeal. Against the said two decrees the Roys duly obtained from the High Court leave to appeal to His Majesty in Council and the record was printed and sent over to the Privy Council Office where the appeal was numbered 56 of 1910.

On the 28th June 1907 the Firm assigned their decrees for Rs. 23,000 to one Edward Hugh Bray who was thereupon made party to the said appeal to His Majesty in Council. On the 2nd February 1910 the Roys paid Mr. Bray Rs. 50,000 in full satisfaction thereof. Thereupon the Roys ceased to further prosecute their said appeal to His Majesty in Council and on the 6th April 1910 it was dismissed for want of prosecution. On the 15th November 1910 Mr. Bray filed an application certifying the payment made to him and praying for an order that the said decrees were fully satisfied. To these proceedings the first four Respondents were parties and though notices were duly served upon them no objection was taken by them. On the 24th May 1911 the Subordinate Judge made an order that "the decree be noted as finally disposed of in full satisfaction."

On the 10th September 1912 the Roys instituted the suit giving rise to this appeal in the Court of the Subordinate Judge of Murshidabad. The Defendants

were the first four Respondents who are in possession of the estate of the late Rai Dhanpat Singh Bahadur and are herein-after referred to as the Defendants. The fifth Respondent was made a Defendant as one of the mortgaged properties stood in her name. The Roys claimed that under the said deed, dated the 21st April 1894, they were entitled to be indemnified from the estate of the late Rai Dhanpat Singh Bahadur in respect of the said sum of Rs. 50,000 paid by them to Mr. Bray together with interest and costs and prayed for a decree against the Defendants for Rs. 70,000 with further interest and costs of the suit to be realised from the said estate.

The first Defendant-Respondent who was the son of the late Rai Dhanpat Singh Bahadur filed a written statement and Defendants Nos. 3 and 4 who were trustees to his estate filed another written statement. Defendant No. 2 a third trustee did not appear. Their defence so far as it is now material was that the payment made on the 2nd February 1910 by the Roys to Mr. Bray was a voluntary payment and that in any event the Plaintiffs were entitled to recover only Rs. 27,130 which was the amount claimed by the Firm in its suit and not any costs of the said litigation.

The Subordinate Judge settled thirteen issues of which the following are material.

(1) Was the payment made on the 2nd February 1910 by the Roys to Mr. Bray voluntary?

(2) Are the Defendants estopped from raising the first point by their failure to raise it in the proceedings on Mr. Bray's application to enter satisfaction?

(3) What amount, if any, are the Plaintiffs entitled to recover under the said deed?

On the 12th August 1914 the Subordinate Judge delivered judgment. He held

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that the execution of the decree in satisfaction of which the said payment was made was not barred on the 10th February 1910 and consequently it was not a voluntary payment and that as the Defendant neglected to raise the first point in the proceedings on Mr. Bray's said application they were estopped in this suit from raising it. He however held that the Roys ought not to have appealed against the said decree of the Subordinate Judge dated the 28th February 1903 and consequently they were not entitled to recover costs and interest incurred and accruing thereafter and that they were entitled to a decree for Rs. 27,223-4-9 with proportionate costs and interest on the decretal amount from the date of the decree until realisation.

A formal decree dated the 12th August 1914 was accordingly drawn up.

Against the said decree of the Subordinate Judge both parties appealed to the High Court at Calcutta and on the 21st July 1916 that Court delivered judgment allowing the Defendants' appeal and dismissing the Roys' appeal as well as their suit with costs in both Courts. The learned Judges upheld the Defendants' contention and held that the said payment was voluntary, and that the Defendants were not estopped from raising the point. Two decrees both dated the 21st July 1916 giving effect to the judgment were then drawn up.

Sir George Lowndes, K. C. (with *Mr. J. M. Parikh*) for the Appellants.—The point is that I paid Dhanpat Singh by borrowing from the Eastern Agency Company (whose agents were Gillanders). Decree on the equitable mortgagee was under sec. 89 of the Transfer of Property Act and was assigned to Bray. I had to pay Bray and I sue to recover.

Even under the old law payment was not barred and still less under the new

law. Under sec. 89 of the Transfer of Property Act, they had to apply within 6 months as per terms of contract and make decree absolute. See sec. 90.

I paid while the appeal was pending. I paid in February. Appeal was not dismissed till April. I was acting in 1910; the decision of Board in *Batuk Nath v. Munni Dei* (2) and *Abdul Majid v. Jawahir Lal* (1) was in 1914. Act IX of 1908 has changed the law of limitation. An application under sec. 89 of the Transfer of Property Act was not governed by Art. 179 of the Limitation Act. This was the Calcutta view. Only applications under the Civil Procedure Code was contemplated by Art. 178. There must really be a second application under sec. 89. They did not make a second application. Law in Calcutta was firmly settled that the three years' rule did not apply.

Purna Chandra v. Radha Nath (3).

Suppose Art. 179 did apply, then application must be made within three years of the effective date of the decree.

Munna Lal v. Sarat Chandra (4). Under new Act of 1908, Art. 182 does not apply at all.

Now clearly Art. 181 of Act IX of 1908 applies, Art. 182 does not apply.

Application now is for a new decree and not for an order absolute by way of execution. This right to apply for a decree did not come till the new Act came into force.

There are two other small points.

One is that there is no consideration as the suit was barred. I say he could keep the deeds and so I gave the money for consideration.

[*Mr. Kenworthy Brown* for the Re-

(1) I. L. R. 36 All. 350; s. c. 18 C. W. N. 963 (P. C.) (1914).

(2) L. R. 41 I. A. 104; s. c. I. L. R. 36 All. 284; 18 C. W. N. 740 (1914).

(3) I. L. R. 33 Cal. 867, 875 (1906).

(4) L. R. 42 I. A. 88; s. c. I. L. R. 42 Cal. 776; 19 C. W. N. 561 (1914).

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spondents.—This was never suggested in the pleadings.]

As to what "decree" means. See *Rameshwar Singh v. Homeshwar Singh* (5), *Batuk Nath v. Munni Dei* (2) and *Abdul Majid v. Jawahir Lal* (1).

Mr. Kenworthy Brown for the Respondents.—An application for sale by holder of mortgage decree has to be made under Art. 179 of Act XV of 1877 within three years. *Batuk Nath v. Munni Dei* (2) and *Abdul Majid v. Jawahir Lal* (1).

The only question open to the other side now is limitation and on this question, the decision of the High Court, *Abdul Majid v. Jawahir Lal* (1), is on all fours with the present case. *Munna Lal v. Sarat Chandra* (4). The date of decree is the point of time. *Rameshwar Singh v. Homeshwar Singh* (5). That was an application under Arts. 181 and 178 of old Act. There sec. 179 (b) did not apply.

[*Mr. Lowndes*.—But see top of p. 181.]

The next point is whether the change of law in 1908 affects this case assuming that the other side could add six months. Does that really affect the matter?

[*LORD ATKINSON*.—When this arrangement was made by the Company to pay off Rs. 50,000 no evidence was given whether Bray got the deeds or the Roys asked for them, no evidence as to who has the deeds now.]

My objection is that this was not raised at the hearing when it might have been cleared up.

[*LORD ATKINSON*.—When a holder of property pays money to get rid of an en-

cumbrance, is it a voluntary payment, when he merely pays off an equitable charge on his property?]

Had Bray the deeds? Had the Roys the deeds at all in their mind? Both are questions of fact. *North Staffordshire Ry. Co. v. Edge* (6) and cases cited therein. There as here a belated attempt was made to raise the effect of certain rights.

Other side should prove that Bray had the title deeds.

Sir George Lowndes.—The words in deed of indemnity are "loss, damages, etc." They would cover anything Dhanpat Singh did. Question of voluntary and compulsory payment not essential. They would cover anything done in reason.

Sec. 89 of the Transfer of Property Act says that I am entitled to get back the deed. *Het Ram v. Shadi Lal* (7).

I have paid this which Dhanpat Singh actually got, it was his debt, substantial justice is on my side.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—The financial dealings between the several parties concerned out of which the appeals in this case have arisen are somewhat complicated. It is, however, necessary to examine them in order to understand clearly the points calling for decision. On the 8th March 1886, the 12th May 1887, and the 12th May 1892, the predecessors in title of the Appellants in this litigation, styled the Roys, borrowed from one Dhanpat Singh three sums of Rs. 3,00,000, Rs. 20,000 and Rs. 15,000 respectively, and secured the repayment thereof with interest at the rates stipulated by three mortgages bearing the above respective dates of certain

(1) I. L. R. 36 All. 350: s. c. 18 C. W. N. 963 (P. C.) (1914).

(2) L. R. 41 I. A. 104: s. c. I. L. R. 36 All. 284; 18 C. W. N. 740 (1914).

(4) L. R. 42 I. A. 88: s. c. I. L. R. 42 Cal. 776; 19 C. W. N. 561 (1914).

(5) L. R. 48 I. A. 17: s. c. 25 C. W. N. 337 (1920).

(6) [1920] A. C. 254, 262 and 266 (1919).

(7) L. R. 45 I. A. 130: s. c. I. L. R. 40 All. 407; 22 C. W. N. 1033 (1918).

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immoveable property belonging to them, the Roys. These mortgages were presumably in the ordinary form, conveyances of the absolute interest in the property pledged with the usual provision for redemption, coupled with covenants by the mortgagors to pay the debt due under them. The Transfer of Property Act permits in Calcutta the creation of equitable mortgages by deposit of deeds. Accordingly Dhanpat Singh on the 3rd June, 1893, created at Calcutta an equitable mortgage of the property of the Roys, comprised in these mortgage deeds, by depositing these latter documents with a firm trading at Calcutta as Shewaran Khoshal Chand, hereinafter styled the firm, to secure the repayment of Rs. 70,000 lent by them to him, with interest till paid. It is not clear whether at this particular date the Roys had notice of this transaction. Early in the year 1894, Dhanpat Singh instituted two ordinary mortgagees' suits against the Roys to recover the amount secured by the three first-mentioned mortgages. The equitable mortgagees, the firm, were not made parties to these suits or either of them. The Roys contested these suits and ultimately, a settlement was come to whereby Dhanpat Singh accepted a sum of Rs. 1,20,000 in full satisfaction and discharge of the amount due to him for principal and interest on the three legal mortgages. The Roys had not this sum of Rs. 1,20,000 available.

They were in consequence obliged to raise the money to pay Dhanpat Singh the arranged sum of Rs. 1,20,000. They accordingly borrowed from the Eastern Mortgage Agency Company, hereinafter styled the Company, a sum of Rs. 2,00,000, and secured the repayment of it with interest by executing to this Company a mortgage, dated the 23rd April 1894, of all the property comprised in the

three first-mentioned mortgages. By reason, apparently, of the existence of the equitable mortgage created by the deposit of the mortgage deeds, an expedient was adopted. A deed of even date with the mortgage, namely, the 23rd April 1894, was executed by Dhanpat Singh, by which after he, acknowledging the receipt of the sum stipulated for, released the lands and premises mentioned in the three mortgages from all claims, etc., under these instruments and protected the Roys by a covenant in the words following from all claims which might be made against them in respect of any of the matters therein mentioned. The covenant ran thus:—

"2. The mortgagee doth hereby for himself, his heirs, executors, administrators, representatives and assigns, covenant with the mortgagors, their heirs, executors, administrators, representatives and assigns in manner following:—

"(a) That the mortgagee, his heirs, executors, administrators, representatives and assigns shall at all times hereafter keep the mortgagors, their heirs, executors, administrators, representatives and assigns, their and each of their estate and effects harmless and indemnified against all losses, damages, actions, claims, suits, demands and accounts in respect of the said three several hereinbefore recited deeds of mortgage, or any money owing or due thereunder or otherwise howsoever or for any act done by him, the said mortgagee, with respect to the said deeds.

"(b) That the mortgagee shall forthwith cause the said two suits, respectively numbered 75 and 301 of 1894, now pending in the Court of Subordinate Judge in the district of Murshidabad to be forthwith compromised on these terms and petitions to that effect filed accordingly."

The deed containing this covenant was duly registered on the day it bears date. The Plaintiff Dhanpat Singh in each of the two suits instituted by him lodged, in pursuance of the terms of settlement a petition praying that these suits might be disposed of according to the terms of the

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settlement which had been arrived at. The Court granted the prayer of this petition, and made in the first suit a decree dated the 5th May 1894, and in the second suit a decree dated the 7th May 1894, whereby it was in each suit respectively decreed that the suit having been amicably settled it should be disposed of, that the claim of the Plaintiff should be taken to have been satisfied, and that each party should bear his own costs.

On the 17th July, 1896, Dhanpat Singh paid to the firm on foot of the hundis he had made to them, Rs. 42,000, and procured from the firm a release from all further liability on all these hundis on the terms that this compromise was to be without prejudice to the Company's rights to enforce their lien against the properties comprised in the three mortgages.

On the 11th May 1897, the firm instituted a suit against the Roys and the Company in the Court of the Subordinate Judge of Murshidabad to recover the sum due under their equitable mortgage, which latter they claimed had priority over the legal mortgage executed to the Company on the 23rd April 1894, and further, that they were entitled to enforce their claims against the properties comprised in the three original mortgage deeds deposited with them, and also against the Roys personally. The heirs and personal representatives of Dhanpat Singh, deceased, were by the order of the High Court made Defendants in the suit. They are the first four Respondents in the present appeals. The Roys and the Company contested this suit, and on the 28th February 1903, the Subordinate Judge delivered judgment in favour of the Plaintiff firm, holding that they, under their equitable mortgage were, as regards the Roys, entitled to the sum of Rs. 27,223-4-9 for principal interest and costs with interest at 6 per cent, till paid,

subject to the mortgage to the Company of the 23rd April 1894, which he held had priority over the equitable mortgage of the firm, and made the decree usual in ordinary mortgage suits that the Roys should pay the sums found to be due, with 6 per cent. interest, within six months from the date of the decree, failing which the properties covered by the three first-mentioned mortgages should be sold subject to the lien of the Company.

Against this decree both the Roys and the firm appealed to the High Court of Fort William. The appeal of the Roys was dismissed with costs. The Court held that the mortgage of the Company had not priority over the equitable mortgage of the firm. that the appeal of the latter should be allowed. and made a decree declaring that the firm was entitled to a valid equitable charge on the lands covered by the three mortgages, and that in default of payment either by the Company or the Roys of what was due upon that security, the mortgaged property or a sufficient part of it should be sold to meet the Plaintiffs' claim, and that unless the parties should agree as to the amount due to the Plaintiffs, an account should be taken of what was due. No absolute order for sale in default of payment of the sum due was ever made on this decree. Against these two decrees the Roys obtained from the High Court liberty to appeal to His Majesty in Council. The Record was printed, No. 56, 1910, and sent to the office of the Privy Council. Meanwhile, however, the firm, by deed dated the 28th June, 1907, reciting the execution of all the deeds hereinbefore mentioned, the creation of the equitable mortgage, the granting of the several decrees made in the litigation which had taken place between the parties, and further, that the two decrees of the High Court dated the 26th August 1905, made

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in the appeals, Nos. 184 and 208 of 1903 respectively, were still unsatisfied, that there was due thereon to the firm the sum of Rs. 45,377-5-16 with interest calculated up to date, that the firm had agreed to assign the said decrees to one Edward Hugh Bray (party thereto) at the "price or sum" of Rs. 23,000, assigned to him the two aforesaid decrees dated the 26th August 1905, and all moneys now or hereafter to become due thereunder respectively and all benefit and advantage under the said decrees respectively, *including the charge created on the lands and premises described in the schedule thereto*, to hold the decrees and all other the premises thereby assigned or mentioned or intended so to be assigned unto the said Edward Hugh Bray, his executors, administrators and assigns, absolutely and for ever. This deed was duly registered.

This Edward Hugh Bray was a director of a Company which acted as agents for the Company, the mortgagees in the deed of the 23rd April 1894. The Roys desired to pay to Bray the sum of Rs. 50,000 due under the two decrees assigned to him. They apparently had not money at their command for that purpose, and accordingly they borrowed from the principal, the Company, to pay that Company's agent, Bray, this Rs. 50,000. By deed bearing date the 1st February 1910, made between the Roys and the Company, reciting that the Roys had requested the Company to lend them the sum of Rs. 50,000 to enable them to pay and satisfy the amount then due to Edward Hugh Bray under the two decrees of the 26th August 1905, which the Company agreed to do on having the repayment thereof with interest secured on the lands of the Roys therein mentioned, these lands were thereby mortgaged to the Company. The deed expressly stated these lands were subject to the encumbrance created by the two

decrees of 26th August 1905, alleged to be vested in Edward Hugh Bray, of 8, Clive Street, Calcutta.

To carry out this arrangement the parties had recourse to, probably having regard to their conflicting interests, the worst and most dangerous of all economies. The three parties, the Roys, Bray and the Company employed the same solicitors, Messrs Morgan & Company, by which imprudence each party had imputed to him or them all the information dealing with the transaction which the common solicitor had derived from both the other parties. The payment of the Rs. 50,000 was made in this way. The Company drew a cheque in favour of Morgan & Company for Rs. 50,000. Morgan & Company endorsed this cheque: "to Babus Shyama Charan Roy, Parbati Charan Roy and Sachindra Nath Roy, or order," and these three endorsees in their turn endorsed it to "E. H. Bray, Esq., or order." The cheque was paid to Bray and he, having thus been paid, the Roys ceased further to prosecute the appeal to His Majesty in Council. On the 16th April 1910 the appeal was by an order, made in the usual course in the office of the Privy Council, dismissed for want of prosecution.

On the 15th November 1910, Bray filed an application in the Court of the Subordinate Judge certifying that these two decrees had been fully paid and praying for an order that they were fully satisfied. The first four Respondents got notice of this application and did not object. On the 24th May 1911, the Subordinate Judge made an order to the following effect: that "the decree be noted as finally disposed of in full satisfaction."

Sir George Lowndes for the Appellants contended that no absolute order on the decrees for sale having been obtained, the equitable mortgage was, under the 88th and 89th sections of the Transfer of

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Property Act, 1882, still alive and did not merge in the decrees. He also assured the Board that at this period it was considered in Calcutta that the period of limitation under the Statute of Limitation, of 1877, ran when a decree was dismissed for want of prosecution, not from the date of the decision of the decree appeal against, but from that of the dismissal. Of course the Board accepts with the utmost confidence that assurance, but it is not the law. Two cases decided in the year 1914 establish this. The first is the case of *Abdul Majid v. Jawahir Lal* (1) and the second, *Batuk Nath v. Munni Dei* (2). In the first the judgment of the Board was delivered by Lord Moulton. It was decided that under the Statute of Limitation Act, 1877, Sch. II, Art. 179, the period of three years named therein ran in such a case from the date of the decree appealed against and not from the date of the order to dismiss the appeal for want of prosecution. The ground on which the decision was based was thus stated by Lord Moulton: "The order (*i.e.*, the formal order) dismissing the appeal for want of prosecution, did not deal judicially with the matter of the suit, and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the Appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all." The period of limitation ran from the date of the decree. The decision in the second of the last-mentioned cases is to the same effect.

The next question to be considered is

which of the two Limitation Acts, that of 1877 or that of 1908, applies to this case. That must, it appears to the Board, be determined by the condition in which the decrees stood when the latter Statute came into force on the 1st January 1909.

Sir George Lowndes contended that where a decree *nisi* for sale is made in a mortgage suit the period of limitation mentioned in the Act of 1877 is in effect three years plus six months the period given by the decree for redemption. Their Lordships cannot accept that view. The sale is merely something to be done under the decree. A certain time is fixed by the decree within which it is to be done, but the decree is operative from its date and it is the length of time during which it is operative that the Statute of Limitation looks to. The date of the decrees being the 26th August 1905, they became unenforceable by proceedings commenced after the 26th August 1908. Bray was paid the amount due upon the 2nd February 1910, one year and three months after the statutory period had elapsed, and over thirteen months after the 1st January 1909, when the latter Act had come into operation. There is no provision in this latter Statute so retrospective in its effect as to revive and make effective a judgment or decree which before that date had become unenforceable by lapse of time. The payment of these decrees by the Roys on the 2nd February 1910, was voluntary in the sense that they could not, by any legal proceedings founded upon the decrees in which these facts had been elicited and relied upon, have been compelled to make them.

The suit out of which this appeal has arisen was, on the 9th September 1912, instituted by the Roys in the Court of the Subordinate Judge, as above mention-

(1) I. L. R. 36 All. 350 : s. c. 18 C. W. N. 963 (P. C.) (1914).

(2) L. R. 41 I. A. 104 : s. c. I. L. R. 36 All. 284 ; 18 C. W. N. 740 (1914).

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ed, against the representatives of Dhanpat Singh and others, claiming to recover under the deed of indemnity of the 23rd April 1894 the amount paid by the Roys to Bray, with interest thereon till paid, and other sums amounting in all to Rs. 27,000. The plaint is long and involved. It states fully, however, the creation by Dhanpat Singh of the equitable mortgage by the deposit with the firm of the three mortgage deeds and the transfer of the two decrees of the 26th August 1905 to Bray on the 23rd June 1907, and then avers that Bray was about to execute those decrees, and that "considering it was more advisable to amicably pay off the decretal debt than bear the cost of execution," the Roys borrowed a sum of Rs. 50,000 from the Company on a mortgage and paid the same to Bray for the satisfaction of the debt due upon the decrees. In para. 11 of the plaint it is submitted that under the deed of indemnity the Roys were entitled to recover the whole of the debt due to the firm and the costs of the suits relating to it, which the Roys were obliged to pay.

Maharaj Bahadur Singh, one of the Defendants, filed in reply to this plaint a written statement, raising many quite untenable defences to which it is unnecessary to refer. In its third paragraph he, however, avers that the suit of the Plaintiffs is barred by limitation in respect of the different sums of money sought to be recovered, and in its fifteenth paragraph further avers that even if the Roys had paid to Bray the sum alleged, it was a mere voluntary payment, and that the Plaintiffs were therefore not entitled to recover it from the Defendants, the representatives of Dhanpat Singh, deceased. The Defendant No. 2 also filed a written statement raising the same defences.

The Subordinate Judge held (1) that the claim of the Roys under the indem-

nity deed was not barred by limitation, that under the 83rd section of the Limitation Act the right to sue ran from the time they, the Plaintiffs, were damnified, which was the 2nd February 1910, when they paid Bray the Rs. 50,000; and (2) that it was too late for the Defendants to raise the defence that the payment was a mere voluntary payment and that therefore the Plaintiffs were entitled to recover the sums claimed. On both these points the High Court came to a different conclusion. They held that as the decrees of the 26th August 1905 had not been kept alive by obtaining an absolute order for sale the remedies upon them were barred by limitation, that the decrees were not enforceable and that the Defendants were not precluded from raising this point. They therefore allowed the appeal.

Their Lordships concur with the High Court in the two conclusions above-mentioned, but they differ from them as to the consequences which the High Court apparently thought necessarily followed from these conclusions.

The words of the indemnity are very wide and far reaching. They provide that the Roys are to be indemnified from and against all losses, damages, actions and claims, and or for any act done by Dhanpat Singh with respect to the three mortgage deeds. It was perfectly open to the Plaintiffs to have replied to this plea that, though the decrees could not have been enforced against them by Bray, Dhanpat Singh had by his own act in depositing the deeds as a security with the firm, blistered, encumbered and lessened in value their equity of redemption in the property mortgaged by these deeds, and that they were under the words of this indemnity entitled to recover from his representatives what it had cost them, the Roys, to remedy the damage he had

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done to their property by paying off the encumbrance upon it which he had by his own acts created.

The difficulty, however, is not in discovering a principle of law entitling the Plaintiffs to recover, it is in finding evidence in the case to show that the principle is applicable. This is possibly due to the fact that the whole litigation was based on the two decrees and on those alone. If the task of those conducting the case for the Plaintiffs had been to elicit the irrelevant and leave the relevant hidden and obscure, they could not well have succeeded better. It seems incredible, but so it is, that there is not a particle of evidence written or parol as to what was done with the three mortgage deeds, by the deposit of which the encumbrance on which the two decrees of 20th August 1905, were based was created. It is not shown whether the firm delivered them to Bray when the decrees were assigned, to him, or whether Bray delivered them to the Roys when the decrees were paid, or whether they were delivered by Bray or by the Roys to the Company when the mortgage of the 1st February 1910 was executed and the Company's cheque endorsed over to the Roys. On these important points the Board is left to conjecture what would be the natural and probable course for prudent men in their own interest to take. But that is not all. Not a particle of evidence is elicited to prove the important statement in the plaint that Bray was about to execute the two decrees, and that the Roys thought it wiser to settle the decrees amicably than to incur the costs of a sale. If this were true the fact that the Roys had to borrow money from the Company to pay these decrees, even though they might have been mistaken as to their enforceability, would not alter the position. Their expenditure

would still have been incurred to cure the injury Dhanpat Singh had done to them by pledging the mortgage deeds. This point has been raised before their Lordships for the first time, and the difficulty which the Board have in dealing with it illustrates forcibly the wisdom of the rule which prohibits the raising of new points involving questions of fact after the trial is over, when evidence of fact could have been given touching those questions had they been then raised. It was suggested that this question was raised before the High Court. That is a mistake. The passage in the judgment of the High Court on which that suggestion was founded runs as follows :—

“ For the Defendants, Appellants, three arguments were addressed to us :—(1) That the payment by the Roys to Mr. Bray was voluntary, and so they could not recover it ; (2) that the contract of indemnity was in fraud of the sub-mortgagee, Raja Gokul Das, and that the Plaintiffs being parties with Rai Dhanpat Singh Bahadur to that fraud were not entitled to recover the amount from their joint wrong-doer ; and (3) that the payment was really a payment by the Eastern Mortgage and Agency Company and not by the Plaintiffs.

“ The third argument has not been seriously pressed. There can be no doubt whatever that the Plaintiffs got credit for the amount of the decree as part of the cheque, of Rs. 50,000, which undoubtedly passed through their accounts.”

The point here raised was that it was the Company who really paid Bray, and it was supposed to be answered by the fact that the Company's cheque was endorsed to the Roys.

To send the case back to the Court of the Subordinate Judge to ascertain what has been done with these mortgage deeds, what was the arrangement made in respect to them, and who has got possession of them, would involve considerable expense, and might afford an almost too

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tempting opportunity for the concoction of evidence. Their Lordships are driven, in order to deal with the case, to assume that matters were conducted in a business way, and that what would have occurred had they been so conducted did in fact occur. In the ordinary course of business the mortgage deeds would have been delivered by the firm to Bray when the decrees were assigned, they would have been delivered by Bray to the Roys or more probably to the Company to fortify their legal mortgages when Bray was paid off. Their Lordships will therefore assume that they were so delivered. It would be the natural consequence of the proved acts of the parties. As has been already pointed out, the fact that the Roys were obliged to borrow money on mortgage to get rid of the encumbrance placed upon their property by the act of Dhanpat Singh does not prejudice in any way their rights under the covenant to indemnify. The expenditure to get rid of the encumbrance was equally incurred at their expense, but the amount of that expenditure must be measured by the sum paid to Bray on the 2nd February 1907, with interest, as it apparently has been measured by the decree of the Subordinate Judge dated the 12th August 1914. Their Lordships are, for these reasons, of opinion that this appeal should be allowed, the judgment of the High Court reversed and the aforesaid decree of the 12th August 1914, affirmed, and they will humbly advise His Majesty accordingly. But as the grounds upon which they base their judgment were not put forward in the High Court at all and for the first time mentioned before this Board, the respective parties must each bear their own costs in the Courts in India and of the appeal to His Majesty in Council.

Solicitors : Messrs. Downer and Johnson for the Appellants.

Solicitor : Mr. G. C. Farr for the Respondents.

R. M. P.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 18 of 1921.

SANDERSON, C. J.

RICHARDSON, J.

1921,

30, November

SAILENDRA MOHAN

DUTT, Appellant,

v.

DHARANI MOHAN

Roy, Respondent.

High Court, Original Side, Taxation Rules, Chap. 36, r. 32, jurisdiction of Court or Judge to hear application and pass orders regarding payment of Counsel's fees as between Attorney and client, when no reference is made by the Taxing Officer under r. 9 - R. 6, applicability of, to fees to Counsel - Proviso to r. 32, if applies to and controls the jurisdiction and discretion of the Court or Judge - Proper time for making the application.

In a certain suit in the High Court, Original Side, the Judge allowed a change of Attorneys on behalf of the Defendant on condition that he should pay his former Attorney a specified sum, subject to re-adjustment after taxation. Upon taxation of the costs a question arose with regard to four fees of Counsel and the Taxing Officer said that he could not allow those fees without an order of Court as required by r. 32 of the taxation rules. Thereupon an application was made to the Judge by the said former Attorney for an order that in the taxing of his costs as between Attorney and client the Taxing Officer might do so irrespective of the taxation rules as regards payment of Counsel's fees. The learned Judge rejected the application on the ground that he had no jurisdiction to make the order asked for :

Held—That the fact that the matter was not raised by means of a reference by

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the Taxing Officer does not deprive the Judge of his jurisdiction under r. 32. The Judge had jurisdiction to deal with the application and to decide the matter on its merits. The proviso in r. 32 requiring client's written authority or ratification for payment of the fees applies to the jurisdiction and discretion of the Taxing Officer only and does not control the jurisdiction and discretion of the Court or a Judge. The proviso applies to a case when the Court or a Judge has not ordered or does not order otherwise. Even assuming that r. 6 must be taken to refer to Counsel's fees, although such fees are not specifically mentioned therein, the rule is a direction to the Taxing Officer only and does not limit or control the jurisdiction of the Court or a Judge given by r. 32.

It is open to the learned Judge to consider the question as to the proper time and procedure at and in which such an application should be made to him.

This was an appeal preferred on the 23rd of February 1921 against the order of Mr. Justice Greaves, dated the 2nd February 1921.

The facts of the case will appear from the judgment.

Mr. N. N. Sircar and Mr. B. K. Ghosh, Counsel, appeared for the Appellant.

Sir B. C. Mitter and Mr. A. K. Roy, Counsel, appeared for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by Sailendra Mohan Dutt against the judgment of my learned brother Mr. Justice Greaves. Sailendra Mohan Dutt was acting as the Attorney for one Dharani Mohan Roy who was the Defendant in the suit and by an order of the 7th of April 1920 there was a change of Attor-

neys; the material part of the order being, "It is ordered that upon the Defendant paying to the said Mr. S. M. Dutt the sum of rupees six thousand on account of costs due to him in this suit including the costs of this application to be taxed by the Taxing Officer of this Court as between Attorney and client and upon the said Mr. S. M. Dutt undertaking to refund any excess amount that may appear to have been paid to him after taxation of such costs as aforesaid and the Defendant by his said Attorneys Messrs. Kally Nath Mitter and Sarvadhicary undertaking to pay to the said Mr. S. M. Dutt any sum that may be found due to him upon taxation in excess of the said sum of rupees six thousand and the sum already advanced to him, the said Messrs. Kally Nath Mitter and Sarvadhicary be appointed the Attorneys for the Defendant." Upon taxation of the costs a question arose with regard to four fees of learned Counsel; those four fees are mentioned in para. 4 of the affidavit of Gangadhar Bose at p. 37 of the paper-book. What happened with regard to the question is stated as follows :—"The said Assistant Taxing Officer, Mr. S. M. Roy referred the matter informally to the Taxing Officer and on the 9th day of September 1920 the said Taxing Officer after hearing Messrs. Kally Nath Mitter and Sarvadhicary and Mr. S. M. Dutt expressed his opinion that in view of r. 32 of the Taxation Rules he could not allow those fees without an order of Court as required by the said Rule." Thereupon, an application was made to the learned Judge dated the 14th of December 1920 and notice was given to the effect that an application would be made on the part of Mr. Sailendra Mohan Dutt, the former Attorney of Dharani Mohan Roy, the Defendant in the suit for an order that in the taxing of his costs as between Attorney

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and client the Taxing Officer of this Hon'ble Court may do so irrespective of the Taxation Rules as regards payment of Counsel's fees.

The learned Judge did not enquire into the merits of the case but disposed of it on a preliminary objection raised by the Respondent that the learned Judge had no jurisdiction to make the order asked for.

The learned Judge held that Chap. XXXVI, r. 6, did not apply to fees to Counsel and decided the case upon his construction of r. 32 of Chap. XXXVI, holding that he had no jurisdiction to allow the fees in question and that they could only be allowed by the Taxing Officer upon the production of a letter signed by the client authorising or ratifying the same and that no such letter had been produced.

On behalf of the Appellant it was argued that Chap. XXXVI, r. 32, overrides all the other rules in Chap. XXXVI so far as fees to Counsel are concerned, that the general rule to be observed by the Taxing Officer is contained in r. 3, but that r. 32 is the "special provision" as to the taxation of Counsel's fees, and that the learned Judge had jurisdiction to hear and determine the application under r. 32 on its merits. On the other hand, in support of the judgment it was first argued that the application should have been made when the change of Attorneys was made on the 7th April 1920.

In my judgment this might be a matter which the Judge on hearing the application on the merits might take into consideration, but the fact that the application was not made on the 7th April 1920 cannot take away the learned Judge's jurisdiction to hear the application; it is open to the learned Judge to consider the question as to the proper time and procedure at and in which such a matter

should be brought before him. It was then urged that the learned Judge had no jurisdiction to hear the application under r. 32 unless a reference had been made by the Taxing Officer under r. 9.

In my judgment the fact that this matter was not raised by means of a reference by the Taxing Officer does not deprive the learned Judge of his jurisdiction under r. 32. It was then argued on behalf of the Respondent that under r. 32 the Judge's jurisdiction is limited: in other words that the learned Judge has power to increase the scale, and to direct that the maximum figure, specified in the scale in respect of the matter in question, should not apply; but that even if the scale were increased by the Judge's orders the proviso to r. 32 would apply.

For the purpose of illustration of the argument I will take a concrete instance, and I will refer to the first item in the table: according to the table the maximum fee for a leading Counsel on an appeal against an order is 15 gold mohurs. It was argued on behalf of the Respondent that if a fee of 20 gold mohurs had been marked on the brief of learned Counsel in respect of an appeal against an order, this could only be allowed by the Taxing Officer if (1) a letter signed by the client authorising or ratifying the payment of the fee were produced, and (2) if a Judge's order sanctioning an increase in the scale were produced to the Taxing Officer. In other words it was argued that the rule merely gives the Court or a Judge power to increase the scale and that even when the scale is increased by a Judge's order the above-mentioned letter signed by the client must be produced.

R. 32 was made in 1914, and it was stated by the learned Counsel for the Respondent that it was well-known that the rule was made because of complaints,

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which had arisen as to excessive fees of Counsel.

The rule was made before my time, but the terms of the rule lead me to think that there is little doubt but that the learned Counsel's statement was correct: the object of the rule, judging by its terms, seems to me to have been to limit the jurisdiction and discretion of the Taxing Officer as regards Counsel's fees, and to provide that under no circumstances can the Taxing Officer allow any fees to Counsel, higher than those set out in the table, unless an order of the Court or a Judge is obtained. No doubt the fees mentioned in the table were considered to be reasonable and sufficient in all ordinary cases and it was therefore hoped that the rule would result in Counsel's fees being kept within reasonable limits. It was therefore provided, so far as the Taxing Officer was concerned, that he could not go beyond those specified fees. At the same time a proviso was added that even with regard to the fees allowed by the table the Taxing Officer, even when dealing with a taxation as between Attorney and client, was not to allow the difference between the maximum fee allowed by the table and that actually allowed as between party and party if in his opinion such difference constituted an excessive fee unless a letter signed by the client authorising or ratifying the payment thereof was produced. It is however a reasonable construction of the rule, in my judgment that while it was intended thus to restrict and limit the jurisdiction and discretion of the Taxing Officer as regards fees to Counsel, it was at the same time intended to preserve the jurisdiction and discretion of the Court or a Judge in this respect unfettered in order that the Court or a Judge should have power to deal with exceptional cases as is shown by the insertion of the words "unless otherwise

ordered by the Court or a Judge" in the first part of the rule.

In my judgment the proviso in r. 32 applies to the jurisdiction and discretion of the Taxing Officer only and does not control the jurisdiction and discretion of the Court or a Judge. In other words the proviso applies to a case when the Court or a Judge has not ordered or does not order otherwise. It was further argued that r. 6 of Chap. 36 applies to this matter. It seems to me obvious having regard to its terms that r. 6 was based upon the provisions of the English rule [Or. 65, r. 27 (29)]: that rule includes the words "special fees to Counsel." Those words are omitted from Chap. 36, r. 6 and it was argued for the Appellant that the framers of these rules intended that as far as the Taxing Officer was concerned the matter of Counsel's fees should be controlled entirely by the provision of r. 32.

The words at the beginning of r. 32 "notwithstanding any other provision in the rules" would point to there being some other rule relating to Counsel's fees. A sufficient meaning may be given to these words by reference to r. 3, which provides "The Taxing Officer shall, in the absence of any special provision in these rules, regulate the taxation of charges for retaining and employing Counsel, as nearly as may be, by the practice of the Supreme Court in England, reference being had to any difference which may exist between the two countries in the relative value and use of money." But even assuming that r. 6 must be taken to refer to Counsel's fees, although such fees are not specifically mentioned therein, the rule is a direction to the Taxing Officer only and in my judgment does not limit or control the jurisdiction of the Court or a Judge, given by r. 32.

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In my judgment, therefore, the learned Judge had jurisdiction to deal with the application and to decide the matter on its merits. I desire to make it clear that anything I have said is not to be taken as an opinion on the merits of the question. No enquiry has as yet been made with respect thereto. My decision is merely that the learned Judge had jurisdiction to hear the application on the merits. I am therefore not pressed by the argument of the learned Counsel for the Respondent that the salutary rule laid down in r. 6 will be abrogated by our decision. The learned Judge, who hears the application on its merits will consider all the facts relating to the case and when deciding the matter will no doubt take into consideration the well-known principles applicable thereto.

It was further argued for the Respondent that the learned Judge would not go into the question of amount unless upon a reference or a review. In my judgment, there is no weight in that argument, for if the question of amount does become material on the application, the learned Judge will be able, if he thinks right so to do, to refer the question of amount to the Taxing Officer. In my judgment, therefore, this appeal should be allowed, the order of the learned Judge should be set aside, and both the learned Counsels agreeing that this is the proper course, the matter is to be remanded to a learned Judge on the Original Side for a decision on the merits.

The Appellant will have the costs of the appeal; the cost of the proceedings before my learned brother Greaves, J., will be in the discretion of the Judge who hears the matter on remand.

RICHARDSON, J.—I agree.

Mr. A. D. Banerjee, Solicitor for the Appellant.

Messrs. Kally Nath Mitter and Sarbadhicary, Solicitors for the Respondent.

J. N. R. Appeal allowed with costs.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2627 of 1919.

SWARNA KUMAR GHOSH,

Defendant No. 7,

Appellant,

v.

WOODROFFE, J.

B. B. GHOSH, J.

1922,

2, March.

PRAHLAD CHANDRA

SARKHEL, one of the

Plaintiffs and ors.,

Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 179—Covenant in a permanent lease that the lessee or his representatives should not transfer without the lessor's permission and reserving a right of pre-emption in favour of the lessors, validity of—Such covenant, if void as offending against the rule of perpetuity.

In a certain permanent lease there was a condition that if the lessee or any of his representatives intended to transfer the whole or any portion of the lease, the transfer would be made in favour of the lessors for proper price, that the lessee would not be able to transfer in favour of a third party without the lessors' permission, or wishes, that in the case of transfer to a co-sharer of the lessee, lessors' permission would not be necessary, and that in case of any act against the aforesaid conditions, the said act would be invalid:

Held—That the covenant was void as offending against the rule of perpetuity, and was not therefore binding on the lessee.

This was an appeal preferred on the 19th of December 1919 against the decree of Babu Nagendra Nath Ghosh, Subordinate Judge, 2nd Court of Zillah Bakarganj, dated the 4th of September 1919, affirming the decree of Babu Banku

SWARNA KUMAR GHOSH v. PRAHLAD CHANDRA SARKHEL.

Behari Chatterjee, Munsif, 1st Court at Perojpur, dated the 20th of January 1919.

One Iswar Chandra obtained a lease (*howla* settlement) of some homestead and agricultural lands under a *pottah* and a *kabuliyat*. The *pottah* and the *kabuliyat* contained a covenant to the effect that if the lessee or any of his representatives intended to transfer the whole or any portion of the lease, the transfer would be made in favour of the lessors for proper price, that the lessee would not be able to transfer in favour of a third party without the lessors' permission or wishes, that in the case of transfer to a co-sharer of the lessee, lessors' permission would not be necessary, and that in case of any act against the aforesaid conditions the said act would be invalid. Iswar Chandra's sons transferred the lands to a third party, one Swarna Kumar Ghosh under a *kobala*, though the heirs of the lessors offered to purchase the lands for proper price. As the transfer to Swarna Kumar was made in contravention of the covenant of the *pottah* and *kabuliyat*, the said heirs of the lessors instituted the suit (out of which the present appeal arose) for recovery of possession on declaration that the *kobala* was null and void and in the alternative prayed for specific performance of the contract to sell the lands to them according to the aforesaid clause in the *pottah* and *kabuliyat*. The Court of first instance held that the covenant, not being in absolute restraint of alienation, was valid and decreed the suit declaring the *kobala* as null and void and directing the vendors to execute a *kobala* in favour of the Plaintiffs, but disallowing the prayer for *khas* possession. The purchaser preferred an appeal from the said decree. The lower Appellate Court held that under sec. 10 of the Transfer of Property Act, the condition or limitation, being for the benefit of the lessor or those

claiming under him, the condition or limitation restraining alienation would not be void and sec. 179 of the Bengal Tenancy Act was also in Plaintiff's favour, and that the purchaser had notice of the restriction which was a covenant running with the land and accordingly dismissed the appeal. The purchaser thereupon preferred the present second appeal to the High Court.

Babu Abinash Chandra Guha for the Appellant.—The covenant in the lease relating to assignment consists of an affirmative clause, namely, that, if the leasehold interest is to be transferred, the lessee or his representatives shall be bound to transfer it to the lessor for consideration, coupled with a negative clause to the effect that the lessee or his representatives shall not transfer the same to any other person without the permission of the lessor. The Plaintiffs, who are the successors of the original lessor, sue for *khas* possession of the leasehold lands on the ground of breach of the negative covenant, or, failing that, for specific performance of the affirmative one. The Courts below have rightly held that, inasmuch as no right of re-entry was reserved in the lease in case of a breach of the negative covenant the Plaintiffs are not entitled to *khas* possession. Those Courts have, however, decreed the Plaintiffs' alternative prayer for specific performance. This, I submit, is erroneous. For, in the first place, the affirmative covenant is void as being obnoxious to the rule against perpetuities. Then, the covenant is not binding either on the Defendants Nos. 1 to 6, who are the sons and successors of the original lessee or on my client, the Defendant No. 7, who is the assignee of those Defendants. And the fact that my client purchased with notice of that covenant is immaterial. *Nobin Chandra*

SWARNA KUMAR GHOSH v. PRAHLAD CHANDRA SARKHEL.

Soot v. Nabab Ali Sarkar (1). Lastly, although a covenant not to assign without the lessor's licence may run with the land, a covenant to assign in favour of the lessor does not.

[B. GHOSE, J.—*Nobin Chandra Soot's* case (1) was not one between lessor and lessee?]

No, but the same principles would, I submit, apply as between lessor and lessee as well.

[B. GHOSE, J.—The latest English case on the subject between lessor and lessee is *Worthing Corporation v. Heather* (2).]

Their Lordships then stopped Babu Abinash Chandra Guha and called upon the Respondents to reply.

Babu Mahendra Nath Ray (with him *Babu Nilkanta Ghosh*) for the Respondents.—The covenant in question is perfectly valid and binding on the Defendants. Refers to sec. 10 of the Transfer of Property Act and sec. 179 of the Bengal Tenancy Act. Besides, the covenant merely reserves a right of pre-emption in favour of the lessor, and to such a covenant it has been held that the rule against perpetuities does not apply. *Karim Baksh v. Phula Bibi* (3).

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal arising out of a suit brought for a declaration that a certain *kobala* in favour of Defendant No. 7, who is the contesting Defendant, and executed by Defendants Nos. 1 to 6 in 1323 is invalid, and that the same should be set aside.

The first Court decreed the suit against Defendants Nos. 1 to 7 and on appeal it was held that the appeal failed. We should also mention that besides prayer

for a declaration, the plaintiff also asked for specific performance of a contract for sale.

Before us in appeal by Defendant No. 7, three points have been urged. First of all, that the covenant is bad which is referred to in the judgment of the Subordinate Judge, namely, that if the lessee or any of his representatives intend to transfer the whole or any portion of the lease, the transfer would be made in favour of the lessors for proper price, that the lessee would not be able to transfer in favour of a third party without lessors' permission or wishes, that in the case of transfer to a co-sharer of the lessee, lessors' permission would not be necessary, that in case of any act against the aforesaid conditions, the said act would be invalid.

It was contended that this covenant was bad as offending against the rule regarding perpetuity. Secondly, if the covenant were a good one, it is not a covenant running with the land, and thirdly, in any event, it could not be enforced against the Appellant as he was an assignee of the lessee who entered into the covenant. It is unnecessary to consider the second and the third of these grounds, for, we think the appeal succeeds upon the first ground. We have been invited to consider in this connection certain cases which have been decided by the Allahabad High Court upon the law of pre-emption. It is not clear whether the cases are relevant but in any event it is observed that these cases of pre-emption stand on their own peculiar law. In the present case we think it is clear that the covenant offends against the rule of perpetuity, and the appeal succeeds and the suit is dismissed with costs.

The Defendant No. 7 will be entitled to his costs from the Plaintiffs in the first Court and in the lower Appellate Court

(1) 5 C. W. N. 343 (1900).

(2) [1906] 2 Ch. 532

(3) I. L. R. 8 All. 102 (F. B.) (1886).

SWARNA KUMAR GHOSH v. PRAHLAD CHANDRA SARKHEL.

and he is entitled to his costs in this Court as against the Plaintiffs-Respondents.

J. N. R. *Appeal decreed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2258 of 1919.

CHATTERJEA, J.

PANTON, J.

1921,

Heard,

22, November.

Judgment,

25, November.

MD. WARISH JADAGAR,

Plaintiff, Appellant,

v.

RAHAMAN ALI MEAH

and anr., Defendants,

Respondents.

Civil Procedure Code (Act V of 1908), Or. 16, r. 4—Sale of immoveable property in execution of an order for payment of expenses of witness, legality of Sec. 36, scope and effect of.

In a certain suit the Plaintiff was ordered to pay a certain sum as expenses for one of his witnesses. The order was executed and certain immoveable property of the Plaintiff sold in execution. The present suit was instituted for a declaration that the sale of the immoveable property was without jurisdiction and illegal:

Held—That the sale of the immoveable property in execution of the order was illegal. Or. 16, r. 4 is not to be treated as a short and summary procedure for realisation of the expenses of a witness in addition to other modes of execution of orders under the provisions of sec. 36 of the Code. That section does not make any order capable of execution which was not so before. The section only means that the procedure prescribed for execution of decrees shall apply to execution of such orders as can be executed under the Code. There being a specific provision in that behalf in Or. 16, r. 4, the amount ordered to be paid ought to have been levied in that manner, and the immoveable property of the debtor could not have been put up to sale.

This was an appeal preferred on the 10th November 1919 against a decree of the Subordinate Judge of Chittagong (Babu Kumudini Kanta Roy), dated the 14th July 1919, affirming a decree of the Munsif at Patiya (Babu Jitendra Nath Sen), dated the 26th March 1918.

The facts of the case will appear from the judgment.

Babu Chandra Sekhar Sen for the Appellant.

Babus Mohendra Nath Roy, Paresh Ch. Sen and Probhat Ch. Dutt for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for a declaration that the sale held in execution of an order was without jurisdiction and illegal and for other reliefs.

It appears that the Plaintiff who is the Appellant before us, cited Rahaman Ali (the Respondent), as a witness in another suit, and the Court directed the Plaintiff to pay him Rs. 15 as his expenses. Rahaman Ali executed that order and in execution put up certain immoveable property of the Plaintiff to sale and the property was purchased by the Defendant No. 2.

The Courts below overruled the contention of the Plaintiff that the sale of the immoveable property was illegal and the Plaintiff has appealed to this Court.

It is contended that under Or. 16, r. 4, C. P. C., the Court, in default in payment, may order the expenses of a witness to be levied by attachment and sale of only the moveable property of the party obtaining the summons.

The learned Subordinate Judge was of opinion that Or. 16, r. 4 provides only a short and summary procedure for realisation of the expenses of a witness summoned to appear before a Court, leaving the other provisions of the Code unaffected.

MD. WARISH SADAGAR *v.* RAHAMAN ALI MEAH.

ed thereby. Reliance was placed by the learned Subordinate Judge as also by the learned Pleader for the Respondents before us upon the provisions of sec. 36 of the Code.

We do not think, however, that that section makes any order capable of execution which was not so before. All that it lays down is that the provisions of the Code relating to the execution of decrees shall so far as they are applicable, be deemed to apply to execution of orders, which, we think, means that the procedure prescribed for execution of decrees shall apply to execution of such orders as can be executed under the Code. There being a specific provision in that behalf contained in Or. 16, r. 4, the amount ordered to be paid by the Court, we think, ought to have been levied in that manner and that the immoveable property of the debtor could not have been put up to sale.

It is contended on behalf of the Respondents that there is nothing to show that the initial expenses were deposited under r. 2 by the Plaintiff-Appellant and that r. 4 therefore cannot apply as it applies only to cases where the sum paid into Court is not sufficient to cover the expenses of the remuneration of the witness.

But it was not suggested in either of the Courts below that the initial expenses were not deposited and neither of the Courts below was invited to go into the question; and we cannot presume that the initial expenses which r. 2 lays down shall be paid, were not, as a matter of fact, paid.

We are accordingly of opinion that the order of the Court below should be set aside and the suit decreed. There shall be a declaration in favour of the Plaintiff that the sale was illegal and did not affect the interest of the Plaintiff.

Each party to bear his own costs throughout.

J. N. R.

Appeal allowed.

(CRIMINAL REVISIONAL JURISDICTION.)

REV. NO. 321 OF 1922.

WALMSLEY, J.

MD. OZIULLAH,

SUHRAWARDY, J.

Accused, Petitioner,

1922,

v.

Heard, 21, June.

BENI MADHAB CHOW-

Judgment,

DHURY, Complainant,

23, June.

Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 196—Sanction of Local Government—Officer of Government over whose signature sanction should issue—Defective sanction and illegality of proceedings based thereon—Cognizance—Jurisdiction of Magistrate making report to Government for sanction to take cognizance.

The sanction of the Local Government required by sec. 196, Cr. P. C. must be conveyed in an order signed by the Chief Secretary. Any such order signed by the Deputy Secretary for the Chief Secretary is not in form and the proceedings based thereon are liable to be quashed.

A Magistrate making a report to the Local Government for obtaining the sanction is not incompetent to take cognizance of the case on the ground that he has taken a part in the initiation of the proceedings.

This was a rule granted on the 22nd April 1922 against the proceedings under sec. 294A of the I. P. C., pending against the Petitioners in the Court of the Additional Sub-Divisional Magistrate of Chittagong.

The facts of the case will appear from the judgment.

Babus Dasarathi Sanyal, Manmatha Nath Mukherjee, Tarakeswar Pal Chowdhury, Juan Chunder Roy and Lalit Mohan Sanyal for the Petitioner.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The Petitioner has been placed on his trial upon a charge under sec. 294A of the Indian Penal Code.

MD. OZIULLAH *v.* BENI MADHAB CHOWDHURY.

The Police reported the facts upon which the charge is based, and Mr. Burrows as Additional District Magistrate submitted a report to Government for the purpose of obtaining the sanction required by sec. 196, Cr. P. C., and the authority was conveyed in a letter issued from the Chief Secretary's Office, and signed by Mr. A. Cassells for Chief Secretary. A Police Officer then made a complaint to Mr. Burrows, and the Petitioner was summoned. On the day fixed for hearing Mr. Burrows transferred the case to another Magistrate.

On these facts two objections are based. The first is that Mr. Burrows was not competent to take cognizance of the case at all, because he had taken a part in initiating the proceedings. The second is that the authority is defective because the letter is signed by Mr. Cassells, and not by the Chief Secretary himself.

I cannot see any merit in the first objection, save to the extent that Mr. Burrows would have been well-advised to direct some other Magistrate to receive the complaint, instead of transferring the case for trial after issuing process.

The second objection is extremely technical, but I think that effect must be given to it.

Under sec. 196, Cr. P. C. the complaint must be made by order of or under authority from the Local Government. The Evidence Act lays down the conditions under which the Court may accept a mere letter as proof that the order has been issued or the authority conferred by the Local Government. Under sec. 79 it must draw certain presumptions, and if Mr. Stephenson had himself signed the letter, the order would have been proved. When it was argued in the case of *Apurba Krishna Bose v. Emperor* (1), that the head of the Local Government, then the

Lieutenant-Governor, ought to have signed the order, it was said that he "must necessarily, and ordinarily does communicate his orders through his accredited and gazetted Officers," but in that case the sanction had been signed by the Chief Secretary. That decision therefore has no bearing on the present case, for here the letter is signed by Mr. Cassells for the Chief Secretary. Mr. Cassells was at the time Deputy Secretary, according to the civil list, but he did not claim for himself any official position: he merely signed on behalf of the Chief Secretary. In these circumstances I think it must be held that there is no legal proof that the Local Government has ordered or authorized the prosecution. No presumption arises as to Mr. Cassells's capacity to sign the letter, and he could not certify the order on behalf of Mr. Stephenson, whose own capacity was that of a delegate.

The result is that the rule is made absolute, and the proceedings quashed; the Petitioner will be discharged from his bail.

SUHRWARDY, J.—I agree. The first objection is that on general principles the Additional District Magistrate should not have taken cognizance of the case, as he had himself taken part in the initiation of the proceedings. It is argued that if a Magistrate in the position of the Additional District Magistrate takes cognizance of a case, the provisions of secs. 202 and 203, Cr. P. C. which empower a Magistrate to dismiss a complaint or enquire into its truth become futile and meaningless. I do not think there is any substance in this argument. As has been observed by Carnduff, J., in the case of *Lakhai v. Emperor* (2), there is no bar prescribed by the Code of Criminal Procedure to a Magistrate in such a position receiving a complaint whereas sec. 556

(1) 1 L. R. 35 Cal. 141 (1907).

(2) 14 C. W. N. 589 (1910).

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may render him incompetent to try it. Moreover sec. 190 (c), C. P. C. gives express jurisdiction to a Magistrate to take cognizance of an offence even "upon his own knowledge" in which event, it is clear, secs. 202 and 203, Cr. P. C. are of as little avail as in the present case.

With reference to the second ground I agree in holding that the sanction required by sec. 196, Cr. P. C. has not been properly proved in this case. That section demands a sanction by the Local Government. The sanction in this case is contained in a letter which is headed "From H. L. Stephenson, Esq., C.S.I., C.I.E., Chief Secretary to the Government of Bengal" and signed "A. Cassells for Chief Secretary to the Government of Bengal." "This order of the Government sanctioning the present prosecution has to be proved according to the provisions of sec. 78 of the Evidence Act, which requires that an order of the Local Government may be proved by the record certified by the head of that department. The original letter is not on the record but there is a copy which is defective and does not appear to be a certified copy under sec. 76 of the Evidence Act. Besides, the letter does not purport to have been signed or certified by the head of the department to attract the presumption arising under sec. 79 of the Act. Had Mr. Cassells issued the letter in the official capacity he held, I doubt if it would not have then been in order as all orders of the Government are issued through its accredited Officers. We do not know and no evidence has been given to prove what authority Mr. Cassells had to sign for Mr. Stephenson. I am not sure if the prosecution cannot prove that proper sanction has been accorded by Government *dehors* the letter under consideration, but no such material being before us, we have no alternative but to quash the proceedings based on a docu-

ment which does not satisfy the requirements of law.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION]

REV. NO. 122 OF 1921.

JAGAT CHANDRA ROY,
Complainant,
Petitioner,

TEUNON, J.

GHOSE, J.

1921,
8, April.

KALIMUDDI SARDAR
and ors., Accused,
Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 494 (a)—Order upon Public Prosecutor's application for withdrawal—Court must give its reasons in the order.

The order upon an application for withdrawal made by the Public Prosecutor under sec. 494 (a), Cr. P. C. is passed by the Court in its judicial capacity and must contain its reasons so that the High Court may be in a position to say whether the Court's discretion has been properly exercised.

UMESH CHUNDER ROY v. SATISH CHUNDRA ROY (1) referred to.

This was a Rule against an order of the Sub-Divisional Magistrate of Sadar Dacca (Babu A. K. Banerjee), dated the 25th November 1920, discharging under sec. 494, Cr. P. C., the accused, Opposite Party, an application for revision of which order was rejected by the Sessions Judge of Dacca (Mr. C. Bartley), on 8th January 1921.

The facts of the case will appear from the judgment.

Babu Hemendra Kumar Das for the Petitioner.

Babu Atindra Nath Mukherjee (for Moulvi A. K. Fazlul Huq) for the Opposite Party.

JAGAT CHANDRA ROY v. KALIMUDDI SARDAR

The JUDGMENT OF THE COURT was as follows :—

This rule is directed against an order discharging 9 accused persons, Opposite Parties, in a case brought against them under the provisions of sec. 147, I. P. C. The order of discharge followed upon an application made by the Public Prosecutor for permission to withdraw from the prosecution of these accused persons and upon the consent of the Court given to that application. In the case of *Umesh Chunder Roy v. Satish Chundra Roy* (1), it has been held that in according or withholding sanction to an application for withdrawal made by the Public Prosecutor under the provisions of sec. 494 (a) the Court acts in a judicial capacity, and for such order so judicially made the Court must give and record its reasons so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised. In the present case for the order giving sanction to the Public Prosecutor's application for permission to withdraw no reasons have been given. But from the subsequent proceedings we are enabled to gather that the main reason or indeed the only reason for the withdrawal from this prosecution was that on a previous trial in connection with the riot in question six persons had already been convicted and punished, being sentenced to various terms of imprisonment. It appears that the riot was of a somewhat serious nature resulting in some 28 injuries upon seven persons; the riot, again, it being said, having arisen out of the opposition of certain persons to what were thought to be innovations in connection with certain religious ceremonies celebrated by the complainant. At the time of the trial of the persons previously convicted, it is stated that the present 9 accused were abscond-

ing. The conviction of the first six persons was had on the 7th August 1920, while the present accused, Opposite Parties, surrendered or were arrested on various dates extending from 7th July 1920 to the 15th October of that year. Whether these 9 accused were or were not absconding it is not for us to say, but it is obviously not advisable that a premium should be placed upon absconding and it cannot be held that the imprisonment of the first six is to be regarded as a vicarious atonement for the sins, if any, committed by the present accused, Opposite Parties.

We set aside the order of consent made by the trying Magistrate under the provisions of sec. 494 of the Code of Criminal Procedure and the discharge consequent thereupon, and we direct that the present accused, Opposite Parties, be replaced upon their trial and that the case be dealt with and disposed of in accordance with law.

S. C. C.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER
CENTRAL PROVINCES.]

LORD ATKINSON.

LORD PHILLIMORE.

SIR JOHN EDGE.

SIR ROBERT STOUT.

1921,

Heard, 14, June.

Judgment, 11, July.

RAMKISHORE and
ors., Appellants,

v.

JAINARAYAN and
ors., Respondents.

Hindu law, customary law at variance with, if enforceable—Dhusars of Gurgaon, emigrating to the Central Provinces—Adoption of orphan, if valid.

It is beyond question that, according to the law of the Mitakshara, as recognised by the School of Benares, an orphan cannot be adopted. It is also beyond doubt that in some parts of Northern India particularly in Districts now in the Punjab or adjacent to the Punjab, the strict rules of the Mitakshara, as recog-

(1) 22 C. W. N. 69 (1917).

RAMKISHORE v. JAINARAYAN.

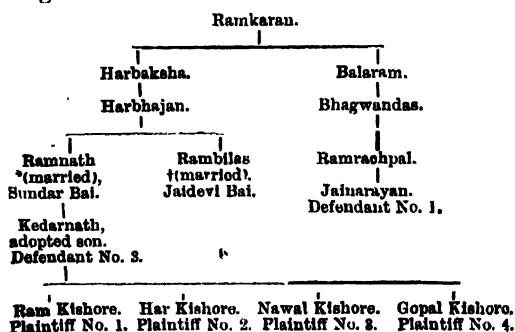
nised by the School of Benares, have not been followed by some castes, tribes and families of Hindus, and that customs which are at variance with that law have for long been consistently followed and acted upon and that when such customs are established, they, and not the strict rules of the Mitakshara with which they are at variance, are to be applied. They are found principally amongst the agricultural classes, but they are also to be found among classes which are not agricultural.

The Dhusars of Gurgaon are governed in matters of adoption not by the orthodox Hindu law but by customary law: and the adoption of orphans by Dhusars being consistent with that customary law is valid.

This was an appeal against a judgment and decree, dated the 2nd October 1917, of the Court of the Judicial Commissioner, Central Provinces, reversing a judgment and decree, dated the 7th August 1916, of the Court of the District Judge, Wardha.

The main question for determination in this appeal was, whether the adoption of the first Defendant-Respondent, Jainarayan, alleged to have been made in 1886-87, when he was admittedly an orphan, by Jaidevi Bai as the son of her deceased husband Rambilash was valid.

The following pedigree will show the relationship of the parties to this litigation:—



The facts of the case either admitted or concurrently found by both Courts in India were as follows:—

The parties were Hindus of the Dhusar caste and claimed to be Brahmmins. Their ancestors belonged to Kutubpur, tahsil Rewary, District Gurgaon, which formed part of the old Province of Agra and Oudh until the year 1858 when it was transferred to the Punjab Administration and became a part thereof.

In or about the year 1836 Harbhajan migrated from Kutubpur to the Central Provinces and settled down at Ashti in the Wardha District where he acquired considerable amount of property of which the property involved in the present litigation is a part. At the time of his migration Harbhajan was subject to the Mitakshara law as varied by special custom, and it was admitted that he carried his personal law with him and that this case is governed by it.

In 1858 as already stated Gurgaon District was transferred to the Punjab.

On Harbhajan's death in 1869 his sons Ramnath and Rambilas inherited the whole estate in equal shares. During the life-time of Ramnath he adopted Kedarnath, the third Defendant-Respondent.

Rambilas died in 1881 and on his death the name of his widow Jaidevi Bai was entered in the revenue records in place of that of her husband.

Ramnath died in 1883.

About the year 1886-87 Jaidevi Bai was alleged to have adopted the first Defendant-Respondent Jainarayan and shortly thereafter his name was substituted for hers in the revenue records. This factum of this adoption is not now disputed.

In 1898 there was a partition of the family estate between Kedarnath and Jainarayan in two equal parts and Jai-

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narayan got as his share the property now claimed by the Plaintiffs-Appellants. Jai-devi Bai died in 1897.

In 1907 the Plaintiffs-Appellants, who were the four sons of Kedarnath instituted Suit No. 28 of 1907 in the Court of the District Judge, Wardha, against Jainarayan (Defendant No. 1) and persons claiming under him. They had also impleaded their father as Defendant No. 3. The Plaintiffs alleged that the parties were governed by the Mitakshara law and claimed recovery of possession from Jainarayan of the property which he had obtained on partition on the ground, amongst others, that his adoption was not valid.

Jainarayan contested the suit on the ground, amongst others, that it was barred by limitation.

The District Court dismissed the suit holding that it was barred by limitation, and on appeal this decree was affirmed by the Court of the Judicial Commissioner, Central Provinces. But on further appeal by the Plaintiffs to His Majesty in Council those decrees were set aside, and by an Order in Council, dated the 24th, September 1913, "the suit was remanded to the District Court with a declaration that it would be competent for that Court in the event of Jainarayan failing in his other defences to make the whole or any part of the relief granted to the Plaintiffs conditional on their assenting to a partition so far as regards Kedarnath's interest in the estate so as to give effect to any right to which Jainarayan might be entitled claiming through Kedarnath."

After the remand the Plaintiffs filed an amended plaint, dated the 15th November and 1st December 1913, contending mainly that the property given by their father to Jainarayan was the joint ancestral property, belonging to them and their father, and that inasmuch as at the time

of his adoption Jainarayan was an orphan his adoption was invalid under the Mitakshara law by which the parties were governed, and consequently Jainarayan had no title to the property in his possession and that the Plaintiffs and their father were entitled to recover it as their joint property.

Jainarayan and the second Respondent filed a joint written statement contending that Dhusars like all other tribes in the Gurgaon District were governed by the Punjab tribal customs and not by Hindu law, and that one of such customs allowed the adoption of an orphan. It was further contended that in any case Jainarayan was entitled to Kedarnath's share which would go to him upon a partition between him and his sons, and that any decree which might be made by the Court in favour of the Plaintiffs should be conditional on a partition of Kedarnath's interest in the property and allotting the same to Jainarayan. They further contended that the Plaintiffs were not entitled to recover possession of certain tenancy lands.

Kedarnath, the third Respondent, filed a separate written statement generally supporting the Plaintiffs' claim and contending that Jainarayan was not entitled to special relief claimed against him (Kedarnath).

The Plaintiffs in their reply stated that Dhusars were a sect of Brahmins called Bhargavas and were governed by the Mitakshara law as interpreted by the Benares school which was the law applicable to Gurgaon District at the time when their ancestor migrated therefrom in 1836, that inasmuch as that District became part of the Punjab in 1858 the Punjab tribal customs were not applicable to them, and that in any case the Dhusars were not agriculturists of the Punjab

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and consequently not governed by the said tribal customs.

The issues material to this report were the following :—

6.—(a) Can the Plaintiffs sue for the whole property or only for their share in it? What are their shares?

(b) If the Plaintiffs otherwise succeed, can the Defendant claim to retain the disputed property as Kedarnath's share or a portion of that property?

10. By what law are the parties governed?

What is their personal law?

When did the family migrate to these parts and did they abandon their original personal law and are they governed by the Mitakshara law as prevailing in these provinces? *

11. Have the Plaintiffs any right to the tenancy lands held by Defendant No. 1?

On the 7th August 1916, the District Judge delivered judgment. He held that the parties were governed by the Mitakshara law and also in certain cases by custom, that the family migrated to the Central Provinces about twenty or twenty-five years before the first settlement in those provinces in about 1855, and brought 'their personal law along with them which they have not yet abandoned, that the Mitakshara law prevailing in the Central Provinces was the same as that by which the parties were governed, and that Jainarayan's adoption was not valid as he was an orphan at the time of his adoption. He also held that the Dhusars were not agriculturists and that the presumption was that in matters of adoption they were governed by their personal law which was the Mitakshara law, and that anybody asserting that they were governed by a custom prevailing in the Punjab had to prove the same. As regards Jainarayan's allegation that the adoption of

an orphan was permitted by custom the learned District Judge found that the oral evidence was wholly insufficient to establish a custom under which adoption of an orphan was permitted by the caste of the Dhusars, that the tribal custom of the Gurgaon District as evidenced by Revaj-iam prepared in 1879 did not expressly say anything about the adoption of an orphan, and that Jainarayan had failed to prove the existence of the custom under which the adoption of an orphan was valid. He finally held that the Plaintiffs were entitled to recover from Jainarayan their own shares and the latter was entitled to retain Kedarnath's share, which he erroneously calculated to be $\frac{2}{5}$ ths of the property in the possession of Jainarayan, and that the Plaintiffs' claim in respect of the tenancy lands must fail. In the result he ordered that the Plaintiffs should get a decree for possession of $\frac{3}{5}$ th share in the property in suit excluding tenancy lands, and that Jainarayan should pay the Plaintiffs one-half of their costs.

A formal decree, dated 7th August 1916, giving effect to the judgment was then drawn up.

Against the said decree of the District Judge Jainarayan appealed to the Court of the Judicial Commissioner, Central Provinces, and the Plaintiffs filed a memorandum of cross-objections.

On the 22nd October 1917, that Court delivered judgment allowing the appeal and dismissing the Plaintiffs' cross-objections and their suit with costs.

The learned Judicial Commissioners agreed with the Court below that the parties who were Dhusars were non-agriculturists, that the oral evidence alone did not prove the customs of adopting orphans and that the said Revaj-iam did not specially authorize the adoption of an orphan. But they held that the parties were not governed by the law

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applicable to Gurgaon in 1836, but by the present customary law of the Punjab tribes as evidenced by the Revaj-i-am prepared in 1879, according to which the Dhusars were governed in matters of adoption. They also held that the parties were not governed by the Mitakshara law, that they were governed by the Punjab customary law, and that under the latter adoption was merely a matter of appointing an heir to which no religious significance was attached and consequently there was no reason why an orphan should not be adopted.

They further held that though there was nothing in the Revaj-i-am specially authorizing the adoption of an orphan, yet inasmuch as the element of religion was eliminated the burden of proving that an orphan could not be adopted would lie upon the persons asserting it, and that in this case the Plaintiffs had failed to discharge that burden. In the result they held that Jainarayan's adoption was valid.

A formal decree, dated 22nd October 1917, was accordingly drawn up.

Against the said decree of the Court of the Judicial Commissioner the Plaintiffs appealed to His Majesty in Council.

Mr. J. M. Parikh (with *Mr. L. DeGruyther, K. C.*) for the Appellants.—Question raised is whether adoption of an orphan is valid. Parties are Hindus and claim to be Brahmins. They formerly belonged to Kutubpur in Gurgaon in the old Province of Agra and Oudh. In 1858 this province was transferred to the Punjab. In 1836 Harbhajan migrated to the Central Provinces. In 1869 Harbhajan died and his sons Ramnath and Rambilas inherited in equal shares. Ramnath adopted Kedarnath. Rambilas died in 1881 and Ramnath in 1883. In 1886-87 Jaidevi, Rambilas's widow, adopted Jainarayan. In 1898 there was parti-

tion between Kedarnath and Jainarayan. Law applicable is as it stood in 1836 before Harbhajan migrated when it was pure Mitakshara. Primary law is Mitakshara. Burden of proof of custom is on the other side. They say local law of the present day applies. In the Punjab, local customs are administered first and other law only as far as it has modified these.

Refers to *Balwant Rao v. Baji Rao* (1) as to law administered in such cases (at p. 222). Pleadings pp. 25, 26.

Reads judgment of the Judicial Committee in *Ramkishore Kedarnath v. Jainarayan Ramrachpal**.

Sec. 5, Act XIII of 1900, Punjab Alienation Act. *Sardul Sing v. Karam Sing* (2), *Chiman Lal v. Hari Chand* (3) and *Beg v. Allah Ditta* (4).

Report of the Revised Settlement of Gurgaon District, 1872 to 1883, pages 1, 3, 4 and 54.

Central Provinces Tenancy Act, sec. 42, sub-cl. (1). *Heyat Khan v. Button Khan* (5).

Mayne's Hindu Law, p. 56, Ed. 7th. *Abdul Hossain v. Bibi Sona Dero* (6).

Act XVII of 1887, sec. 31. Revised Settlement of Gurgaon District—portion dealing with "General Code of Tribal Custom." The Tribal Laws of the Punjab by Rattigan, pp. 15, 33, 35, 36.

Sec. 48, Indian Evidence Act, to be read with sec. 32, cl. (4).

Report of the Revised Settlement of

(1) L. R. 47 I. A. 213 at p. 222; s. c. I. L. R. 48 Cal. 30; 25 C. W. N. 243 (1920).

(2) 30 P. R. 1910.

(3) L. R. 40 I. A. 156; s. c. I. L. R. 40 Cal. 879; 17 C. W. N. 885 (1913).

(4) L. R. 44 I. A. 89 at p. 97; s. c. I. L. R. 44 Cal. 749; 21 C. W. N. 842 (1916).

(5) 5 Nag. L. R. 105 (1909).

(6) L. R. 45 I. A. 10; s. c. I. L. R. 45 Cal. 450; 22 C. W. N. 353 (1917).

* P. C. App. No. 43 of 1912, delivered 11th July 1913.

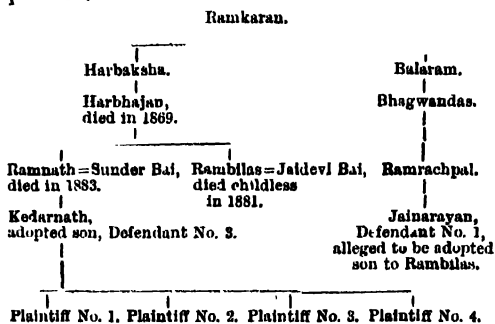
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(Gurgaon District, p. 28. *Allah Ditta v. Beg* (7), *Beg v. Allah Ditta* (4) and *Umar Khan v. Niazuddin Khan* (8).

Mr. E. B. Raikes for the Respondents.—Reads Jainarayan's evidence at p. 106. Refers to Art. 144, Indian Limitation Act.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by the Plaintiffs in the suit from a decree, dated the 22nd October 1917, of the Court of the Judicial Commissioner, Central Provinces, which reversed a decree, dated the 7th August 1916, of the District Judge of Wardha, and dismissed the suit. The suit is a suit on title for possession of the properties mentioned in the amended plaint. The Plaintiffs are the sons of Kedarnath, who is one of the Defendants. The principal Defendant is Jainarayan, and it is his title to the properties claimed by the Plaintiffs which is in question. Jainarayan's title depends on whether he was validly adopted as a son to Rambilas, who was a brother of Ramnath who had adopted Kedarnath. The following pedigree will show the position of the parties.



The parties to the suit are Hindus of the Dhusar caste. The members of the

Dhusar caste claim to be Brahmins, but that claim is not admitted, nor is it proved in this suit. Ramkaran and his two sons lived at Kutubpur in the District of Gurgaon, which was a District of the North-Western Provinces until after the mutiny of 1857, when, in 1858, it was transferred to the Punjab. Balaram and his descendants continued to live at Kutubpur until after the adoption of Jainarayan, the validity of which is in dispute in this suit. In or about the year 1836, Harbhajan migrated from Kutubpur to the Central Provinces and settled at Ashti in the District of Wardha; and acquired considerable property, which included the immovable property to which the suit relates. It is admitted that Harbhajan carried his personal law with him, and that this appeal has to be decided in accordance with that personal law. Harbhajan died in 1869, leaving his sons, Ramnath and Rambilas him surviving. Ramnath married Sunder Bai, and, being childless, he adopted Kedarnath as a son to him. Ramnath died in 1883. The four Plaintiffs are the sons of Kedarnath. Rambilas married Jaidevi Bai and died childless in 1881, leaving his wife Jaidevi him surviving.

In 1886 or 1887, the exact date is uncertain, Jaidevi Bai in fact adopted Jainarayan as a son to her deceased husband Rambilas. Whether that adoption was or was not valid is the question upon which this appeal depends. At the time of the adoption of Jainarayan he was an orphan, his father and his mother being then dead, and he was nine or ten years of age, and was under the guardianship of Sunder Bai, the widow of Ramnath. Of the fact of the adoption there cannot be a doubt, the factum of the adoption is not disputed. It took place at Kutubpur, in the presence of members of the Dhusar caste then assembled, and of others, includ-

(4) L. R. 44 I. A. 89 at pp. 93, 96; s. c. I. L. R. 44 Cal. 749; 21 C. W. N. 843 (1916).

(7) P. R. No. 48 of 1909 (1908).

(8) L. R. 39 I. A. 19 at p. 25 (1911).

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ing Brahmins, some of whom recited Mantras, and the ceremonies observed on the occasion were apparently similar to those which were usually observed when Dhusars of Gurgaon adopted sons. Jainarayan was, in the presence of those assembled at Kutubpur, given in adoption by Sunder Bai to Jaidevi Bai and was placed by Sunder Bai on the lap of Jaidevi Bai as an adopted son. No one at the time, or for many years afterwards, questioned the validity of the adoption. On the adoption Kedarnath, without any protest or dispute, admitted Jainarayan as an 8 annas sharer in the joint family estate, that being the position which Rambilas had held when he was alive. Ramkishore, who is the Plaintiff No. 1, is said to have been born on the 20th December 1886, but whether he was born before or after the adoption of Jainarayan has not, so far as their Lordships are aware, been proved. His brothers, the Plaintiffs No. 2, No. 3 and No. 4, were born after Jainarayan had been adopted. In 1897 Jaidevi Bai died, and in 1898, Kedarnath and Jainarayan partitioned the family estate between them in two equal parts; and Jainarayan got as his share the property which is now claimed by the Plaintiffs in this suit.

The Plaintiffs' case is that the law of the Mitakshara, as recognised by the School of Benares, applies to the family, and that no custom at variance with that law has been proved; and, consequently, that the adoption of an orphan, as Jainarayan was when he was adopted, is invalid. The case of Jainarayan is that the Dhusars of the District of Gurgaon are governed by a custom and not by the law of the Mitakshara, as recognised by the School of Benares, and that according to that custom the adoption of an orphan

is valid. It was for Jainarayan to establish that custom.

It is beyond question that, according to the law of the Mitakshara, as recognised by the School of Benares, an orphan cannot be adopted. It is also beyond doubt that in some parts of Northern India, particularly in Districts now in the Punjab or adjacent to the Punjab, the strict rules of the Mitakshara, as recognised by the School of Benares, have not been followed by some castes, tribes and families of Hindus, and that customs which are at variance with the law of the Mitakshara, as recognised by the School of Benares, have been for long consistently followed and acted upon, and that when such customs are established they, and not the strict rules of the Mitakshara with which they are at variance, are to be applied. Such customs relate to a variety of subjects, as for instances, to widows, adoptions, and the descent of lands and interests in lands; they are to be found principally amongst the agricultural classes, but they are also to be found amongst classes which are not agricultural. It has been found by each of the Courts below that the Dhusars are not an agricultural class, although many of them are owners of land.

The Trial Judge, in a very carefully considered judgment, came to the conclusion that "Jainarayan's adoption was not valid, as he was an orphan at the time of his adoption." There was evidence before him upon which he might have found that there was a custom amongst the Dhusars according to which an orphan might be validly adopted, but he did not consider it strong or satisfactory. Three cases in which it was alleged that orphans had been previously adopted were mentioned by witnesses; in one of those cases, that of Ramchandra, the evidence that an orphan had been

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publicly adopted was, their Lordships consider, convincing. In the other two cases, those of Harnarayan, otherwise Narayan Das, and Jwalaprashad, there was evidence that an orphan had been adopted, although the Trial Judge did not consider it satisfactory, in one case—because it appeared to be evidence of repute, and in the other case—because it did not appear that the witness had been present at the adoption. The evidence to which the Trial Judge referred had been taken on commission and not before him. It appears from his judgment that the Trial Judge in considering the evidence of witnesses as to adoption of orphans by Dhusars did not overlook the fact that such adoptions must have been few and of rare occurrence. In coming to the conclusion that Jainarayan's adoption was invalid, the Trial Judge was obviously much influenced by the fact that the "Code of Tribal Custom of the Gurgaon District" did not expressly say anything about the adoption of an orphan. The "Code of Tribal Custom of the Gurgaon District," to which the Trial Judge referred, was a record of the customs of the Gurgaon District, which was prepared at various dates in 1878 and 1879 by Mr. Wilson, who was the Assistant Settlement Officer in the revision of the settlement of the District of Gurgaon; it was prepared from the answers of the village headmen of each of the principal land-owning tribes of the District to a series of questions put to them with the approval of the Punjab Government. Some of those answers show that the Dhusars had by their customs materially departed from the rules of the Mitakshara, as recognised by the School of Benares, but no question was expressly directed to the adoption of an orphan.

That the adoption of Jainarayan was considered to have been a valid adoption

at the time, and for years afterwards, by everyone concerned, the Trial Judge found. In his judgment he said: "Under the same impression (*i.e.*, that the family was governed by special customs), the right of Jaidevi Bai to adopt a son for her husband was not disputed, and the status of Jainarayan as an adopted son of Rambilas, and as being capable of owning the share and interest of his adoptive father in the family estate, was as a matter of course recognised. None thought otherwise. There was no occasion for dispute—all concerned thought that what was done was perfectly valid. None had any idea that they were governed by the ordinary Hindu law, and that under the law by which they were governed, Jainarayan's adoption by Jaidevi Bai was invalid and had no legal existence. Several circumstances must have supported them in this their impression, which he, however, considered as mistaken. There was not that strictness in the observance of the conditions of an adoption, recognised by Hindu law, in their caste. The customs of the Punjab were being observed by them, and the landed property owned by them in that province was being dealt with accordingly, so everybody accepted the right of Jaidevi Bai to adopt, and the status of Jainarayan as her adopted son."

As the Trial Judge had come to the conclusion that the adoption was invalid he made a decree in favour of the Plaintiffs for possession of the lands claimed, except some tenancy lands, to which he held that the Plaintiffs had no title. From that decree Jainarayan appealed to the Court of the Judicial Commissioner, and the Plaintiffs filed cross-objections as to the tenancy lands.

The learned Judges of the Judicial Commissioner's Court, who heard the appeal, considered that if the Trial Judge

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had been of opinion that the Revaj-i-am applied to Dhusars, who are not an agricultural class, he would have held that the adoption of Jainarayan was valid, and they pointed out that some of the special customs relating to adoption set out in the Revaj-i-am are specifically stated to apply to Dhusars, and establish the proposition that Dhusars are governed in matters of adoption not by the orthodox Hindu law but by customary law. They came to the conclusion that under the Punjab customary law there is no religious significance attached to the appointment of an heir, and that there is nothing in the customary law applicable to Dhusars which precludes the adoption of an orphan, and as to the oral evidence as to orphans having been adopted by Dhusars, they said: "We agree with the District Judge's remarks in paragraph 23 of his judgment, to this extent, that if the oral evidence were the only evidence to prove a custom of adopting orphans, it would not be sufficient to prove such a custom if the parties were orthodox Hindus. The instances given of adoption of orphans do, however, support the view that the adoption of an orphan is not considered contrary to proper usage, and the adoption of at least one orphan besides Jainarayan, namely, Ramchandra, is satisfactorily proved. It is hardly possible to suppose that even one instance would be possible if the Dhusars consider themselves governed by the Mitakshara law as to adoption."

The learned Judges of the Judicial Commissioner's Court found that the adoption of Jainarayan was valid, and by their decree allowed the appeal and dismissed the suit. From that decree this appeal has been brought.

Their Lordships are satisfied that the parties to this suit are governed, not by the Mitakshara as recognised by the

School of Benares, but are governed by the customary law of the Dhusars of the District of Gurgaon. They have further come to the conclusion that it is consistent with that customary law that the adoption of orphans by Dhusars is valid. They have come to that conclusion for the following reasons. Adoptions which would be invalid if not permitted by that customary law are by that customary law permitted, as for example, a brother can be adopted, a daughter's son can be adopted, there is no limit as to the age of the person who may be adopted, a married man who has had children may be adopted, and a guardian may give a boy in adoption. Besides the case of Jainarayan there is clear evidence of one who had been present at the adoption, that another orphan, Ramchandra, had been adopted, and there is evidence that Harnarayan and Jwalaprashad, who were orphans, had been adopted. Jainarayan's adoption took place openly in the presence of Dhusars at Kutubpur, and of many others who had been assembled there for the purpose of Jainarayan being adopted. There was no concealment. Everyone knew that he was an orphan. For years after that adoption everyone treated Jainarayan as a lawfully adopted son, and no one suggested that he had not been validly adopted. Kedarnath, who was the person who was most interested to dispute the adoption, acknowledged that the adoption was valid, and admitted Jainarayan, as a validly adopted son to Rambilas, to the share in the family property which a naturally born son of Rambilas, if there had been one, would have enjoyed. Their Lordships can come to no other conclusion than that Jainarayan was validly adopted.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

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Solicitor : Mr. Edward Dalgado for the Appellants.

Solicitors : Messrs. T. L. Wilson & Co. for the Respondents.

R. M. P.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2450 OF 1919.

CHATTERJEE, J. JOGENDRA NATH
PEARSON, J. MUKHERJEE, Plaintiff,
1922, Appellant,
Heard, 11 and v.
12, January. | RAJENDRA NATH BHAT-
Judgment, TACHERJEE, Defendant,
17, January. Respondent.

Adverse possession—Question of mixed fact and law—Acts necessary to constitute adverse possession of one co-owner against another—Ouster, proof of—Principle, if applies to co-owners, not members of a family.

The question of adverse possession is a mixed question of fact and law. The facts found by the Judge must be accepted but the conclusion drawn from them, namely, whether the possession was adverse or not, is a question of law.

LACHAMESWAR SINGH v. MANOWAR HOSSEIN (1), RAM GOPAL v. SHAMSKHATON (2), CHINTAMONI PRAMANIK v. HRIDAY NATH RAMILA (3) and BALARAM GURIA v. SYAMA CHABAN MANDAL (4) approved.

To prove dispossession of one co-sharer by another, it must be shown that there was exclusion or ouster to the knowledge of the former and this principle is applicable to all cases of co-owners and is not confined to cases where the co-owners were persons who at one time had formed members of a family.

(1) L. R. 19 I. A. 48 : s. c. I. L. R. 19 Cal. 253 (1891).

(2) L. R. 19 I. A. 228 : s. c. I. L. R. 20 Cal. 93 (1892).

(3) 29 C. L. J. 241 (1913).

(4) 24 C. W. N. 1057 : s. c. 33 C. L. J. 344 (1920).

The possession of one co-owner is the possession of all for the purpose of limitation.

There can be no dispossession by one joint tenant in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy and if no notice is given to the co-sharer of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co-owner sought to be ousted and of laches if he fails to discover and assert his rights.

JAGANNATH MARWARI v. CHANDNI BIBI (13) and JOY NARAIN SEN v. SRIKANTA RAY (14) approved.

This was an appeal preferred on the 16th November 1919 against a decree of Babu Bejoy Gopal Chatterjee, Subordinate Judge of Howrah, dated the 19th September 1919, reversing a decree of Babu Nripendra Nath Guha, Munsif of Howrah, dated the 30th April 1918.

The facts of the case will appear from the judgment.

Babus Rupendra K. Mitra and Mritunjoy Chatterjee for the Appellant.

Dr. D. N. Mitter and Babu Haradhan Chatterjee for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for partition of a house described as the *sadarbari* which originally belonged to one Haradhan and his co-sharer.

The Plaintiff purchased the 4 annas share which belonged to Haradhan on the 26th April 1916, the Defendant having purchased the remaining shares so far back as 19th November 1901 from the

(13) 26 C. W. N. 85 (1921).

(14) 26 C. W. N. 206 (1921).

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other co-sharers. After his purchase, the Defendant blocked up the *sadar* door of the *sadarbari*.

The Plaintiff brought the suit for partition in 1917, and the Defendant pleaded that the claim was barred by limitation by reason of adverse possession on his part for 12 years.

The Court of first instance was of opinion that the possession of the Defendant was not adverse to Haridhan and that the claim of the Plaintiff therefore was not barred by limitation.

On appeal, the learned Subordinate Judge held that the possession was adverse and that his claim was barred by limitation.

The Plaintiff has appealed to this Court.

It is contended that the facts found do not amount to an ouster by a co-sharer.

On behalf of the Respondent, it is contended that the question of adverse possession is a question of fact and that the finding of the Lower Appellate Court on the point cannot be considered by this Court in second appeal.

The question of adverse possession, however, is a mixed question of fact and law. The facts found by the Judge must of course be accepted, but the conclusion drawn from them, namely, whether the possession was adverse or not, is a question of law and can be considered by this Court [see the cases of *Lachameswar Singh v. Manowar Hossein* (1), *Ram Gopal v. Shamskhaton* (2), *Chintamani Pramanik v. Hriday Nath Ramila* (3) and *Balaram Guria v. Syama Charan Mandal* (4)].

(1) L. R. 19 I. A. 48 : s. c. I. L. R. 19 Cal. 253 (262) (1891).

(2) L. R. 19 I. A. 228 : s. c. I. L. R. 20 Cal. 93 (99) (1892).

(3) 29 C. L. J. 241 (245) (1913).

(4) 24 C. W. N. 1057 : s. c. 33 C. L. J. 344 (348) (1920).

With regard to the question of limitation, the learned Subordinate Judge, as stated above, found that the Defendant was in adverse possession since he blocked the entrance to the *sadarbari*. There is no doubt that Haridhan was a co-sharer and in order to prove dispossession of one co-sharer by another, it must be shown that there was exclusion or ouster to the knowledge of the former.

It is contended by the learned Pleader for the Respondent that the principle cannot apply to a stranger who is not a member of the family and we are referred to the case of *Ram Lakhi v. Durga Charan Sen* (5).

The question there was whether a person who had purchased a property from a member of a joint Hindu family* was entitled to the benefit of Art. 127 of the Limitation Act, and it was answered in the negative. One of the Judges, Garth, C. J., held that Art. 136 would apply to the case, while the other Judge, Ghose, J., held that Art. 141 was the article applicable.

The question of adverse possession as between co-sharers however does not appear to have been considered in that case.

We have also been referred to the case of *Varada Pillai v. Jeerathnammal* (6), where the Judicial Committee, referring to the rule that the possession of one of several joint tenants or tenants in common is not adverse to the others so as to prevent the statutes of limitation from affecting them, observed : "Whether the rule is applicable to sharers in an unpartitioned agricultural village in India not holding their shares as members of a joint family, it is unnecessary for the purpose of the present case to decide." There is no expression of opinion by their Lordships

(5) I. L. R. 11 Cal. 680 (1885).

(6) L. R. 46 I. A. 285 : s. c. I. L. R. 43 Mad. 244 : 24 C. W. N. 346 (1919).

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that the principle was not applicable and when their Lordships expressly stated that it was unnecessary for the purpose of that case to decide the question, it cannot be contended that the principle is inapplicable.

It is true that in the case of *Corca v. Appuhamy* (7) and in some other cases, the question arose as between persons who had at one time formed members of a family. But the principle is not confined to such cases only. The principle does not depend upon whether the parties are members of a joint family but rest upon the ground that they are co-owners, and is applicable to all cases of co-owners. In the case of *Balaram Guria v. Syama Charan Mandal* (4), both the Plaintiff and the Defendants were strangers who purchased from the members of a joint family and the Plaintiff's vendor was not in possession for 50 years. The principle is that the possession of one co-owner is the possession of all for the purpose of limitation. No doubt the sole possession of one co-owner for a very long period may, having regard to other circumstances, show exclusion or ouster. The Judicial Committee in the case of *Varada Pillai v. Jeevarathnammal* (6) observed.—The limits of the rule were defined in *Culby v. Taylerson* (8) as follows:—"Generally speaking, one tenant in common cannot maintain an ejectment against another tenant because the possession of one tenant in common is the possession of the other, and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining; but where the claimant, tenant in

common, has not been in the participation of rents and profits for a considerable length of time and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster."

The question was also considered in *Fisher and Taylor v. Prosser* (9), *Banda-charya v. Srinivasacharya* (10) and *Gangadhar v. Parashram* (11) and in our Court, the circumstances which should be taken into consideration were pointed out in the case of *Ayeneemussa Bibi v. Sheikh Isuf* (12). See also *Jagannath Murwari v. Chandni Bibi* (13).

It is contended on behalf of the Respondent that, having regard to the length of time which has elapsed since the Defendant blocked up the entrance to the *sadar-bari* and to the notoriety attending on the closing of the door to the entrance, the Court below was justified in coming to the conclusion that the possession of the Defendant was adverse. But the learned Subordinate Judge has not considered the question whether Haridhan had direct knowledge of the blocking of the *sadar dgor* or that there were circumstances, from which one could impute knowledge to him.

There can be no dispossession by one joint tenant in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy: and if no notice is given to the co-sharer of the denial of his right the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co-owner sought

(4) 24 C. W. N. 1057: s. c. 33 C. L. J. 344 (1920).

(6) L. R. 43 I. A. 285, 292-293: s. c. I. L. R. 43 Mad. 244: 24 C. W. N. 846 (1919).

(7) [1912] App. Cns. 230.

(8) 11 A. & E. 1008 (1840).

(9) [1774] 1 Cowper 217 (219-220).

(10) 5 Bom. L. R. 743 (1903).

(11) 1 L. R. 29 Bom. 300 (1905).

(12) 16 C. W. N. 849 at p. 852 (1912).

(13) 26 C. W. N. 65 (1921).

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to be ousted and of laches if he fails to discover and assert his rights : See *Jagan-nath Marwari v. Chandni Bibi* (13) and *Joy Narain Sen v. Srikanta Ray* (14), where the question is fully discussed.

The learned Pleader for the Respondent lays much stress upon the fact that the Defendant blocked the entrance in 1901 and that the suit was not brought until 1917. But Haridhan was a minor for a greater part of this period and did not attain majority until 1911. It is also found that he did not go to Andul where the property is situated ever since the Defendant purchased the property.

We think that the Court must consider whether, having regard to all the circumstances, knowledge of Haridhan of the exclusion can be inferred.

The case must accordingly go back to the lower Appellate Court in order that the question may be considered and the case disposed of according to law. It will be in the discretion of that Court to take further evidence on the question of knowledge.

Cost to abide the result.

H. D. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 24 OF 1918.

CHATTERJEE, J. SURENDRA NATH CHAT-
CUMING, J. TERJI and anr.,
1920, Defendants, Appellants,
Heard, v.

13, August. SAROJBANDHU BHUTTA-
Judgment, CHARJI and ors.,
18, August.) Plaintiffs, Respondents.

Construction of Will—One part of the Will purporting to give an absolute estate and another part imposing restrictions on the powers of alienation and mode of enjoyment, whether passes an absolute or a limited estate—Succession Act (X of 1865),

(13), 26 C. W. N. 65 (1921).

(14) 26 C. W. N. 206 (1921).

sec. 125, applicability of—Central idea and isolated expressions in a Will, which to prevail.

In a Will the testator provided that after his death his daughter would be malik vested with the power to transfer by sale and gift the entire properties and would enjoy and hold possession of the same down to her son, son's son and so on. The Will next provided that the daughter should live in the testator's ancestral bhita, and perform the pujas inaugurated by him, otherwise she would not be entitled to hold possession or transfer any portion of the property. The Will also provided that she would be entitled to transfer the property only if it was unavoidably necessary for the education of her son or if they fell into great calamity. In a suit for possession by the sons of the daughter, the Court of first instance held that the Will conferred an absolute estate on the Plaintiffs' mother, who having left a maiden daughter still living, the Plaintiffs had no title to the property. On appeal the Lower Appellate Court held that the questions raised should be decided after taking evidence and remanded the case for trial upon the merits :

Held—That the words in the earlier part of the Will, without anything to qualify them, would no doubt create an absolute estate and there was power of alienation expressly given. There is no doubt that if an estate conferred by Will is held to be absolute, the conditions as to the mode of its enjoyment are void. But considering all the terms of the Will it is clear that the provisions made in the earlier part of the Will are qualified by the provisions made in the other parts of it. Three things appear to have been uppermost in the mind of the testator : that his daughter and her sons, etc., should reside in his bhita, that power of alienation should be given only for meeting the education expenses of her son or in case of

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great calamity, and that she should hold the properties subject to performance of the pujas. Taking into consideration the central ideas of the Will, instead of isolated expressions, it is clear that the Will did not give an absolute estate to Plaintiffs' mother.

LALA RAM JEWAN RAM v. DAL KOER (1), AMARENDRA NATH v., SURADHANI (2), JUTENDRA KUMAR v. NRITTYA GOPAL (3), TRIPURARI PAL v. JAGATTARINI (4) and other cases discussed and distinguished.

SHIB LAKHAN v. SRIMATI TARANGINI (5), KANDARPA NATH v. JOGENDRA NATH (6), HARA KUMARI v. MOHINI (7) and RADHA PRASAD MULLIK v. RANEEMANI DASSI (8) discussed and followed.

This was an appeal preferred on the 4th January, 1918 against an order of the Subordinate Judge of Zillah Burdwan (Babu Nagendra Nath Ghosh), dated the 10th October 1917, reversing an order of the Munsif of Katwa (Babu Lal Behary Chatterji), dated the 9th September 1916.

The facts will fully appear from the judgment.

Babus Pyari Mohan Chatterjee and Krishna Lal Banerjee for the Appellants.

Babu Bijan Kumar Mukerjee for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit to recover possession of the property in dispute. The Plaintiffs alleged that certain persons (who may be described as the

Mandals) mortgaged the property in suit to their maternal grand-father Surjyakanta Bhattacharji, that Surjyakanta executed a Will in favour of his daughter Gopendrabala (the mother of the Plaintiffs), that after the death of Surjyakanta the Mandals executed a mortgage *kistbandi* in favour of Gopendrabala, and that on her death, the Plaintiffs having succeeded to the estate of their maternal grand-father as heirs, brought a suit upon the mortgage and in execution of the decree obtained upon it, purchased the property and obtained symbolical possession, but that the Defendants were withholding possession from the Plaintiffs. Some of the Defendants are the mortgagees or their heirs, and the others are purchasers of portions of the property. The main points in dispute in the suit were first whether the Plaintiffs' mother Gopendrabala obtained an absolute or a limited estate under the Will, for if she got an absolute estate the Plaintiffs would not be heirs, as she left a maiden daughter who is still living; and secondly whether the decree and proceedings held thereunder are valid.

The Court of first instance did not take any evidence in the case, but held that the Will conferred an absolute estate upon the Plaintiffs' mother, that she left a maiden daughter who is still living, and that the Plaintiffs therefore had no title to the property, and accordingly dismissed the suit. On appeal the learned Subordinate Judge held that the questions raised in the case should be decided after taking evidence and remanded the case for trial upon the merits. The Defendants have appealed to this Court.

It is contended that the question whether the Plaintiffs' mother got an absolute, or a limited estate should be determined upon a construction of the Will only and that under the Will, she took an absolute

(1) 1 L. R. 24 Cal. 406 (1897).

(2) 14 C. W. N. 458 (1908).

(3) 18 C. W. N. 140 (1912).

(4) L. R. 40 I. A. 37; s. c. 1 L. R. 40 Cal. 274; 17 C. W. N. 145 (1912).

(5) 8 C. L. J. 20 (1908).

(6) 12 C. L. J. 391 (1910).

(7) 12 C. W. N. 412 (1908).

(8) 1 L. R. 85 Cal. 896; s. c. 12 C. W. N. 729 (P. C.) (1908).

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estate; secondly, that in any case the Lower Appellate Court ought not to have remanded the case for trial, but should have proceeded under Or. 41, r. 25 of the Civil Procedure Code.

The first point for consideration therefore is what was the nature of the estate conferred upon the Plaintiffs' mother by the Will.

The Will states that the testator had become old and was suffering from diabetes, and for that reason rules should be framed regarding his properties. Then it states "I therefore make these provisions by this Will that you are my only daughter, there is no other nearer heir of mine than you. After my death, being *malik*, vested with the power to transfer, by sale and gift, the entire properties moveable and immoveable specified in Schs. I and II below, you will enjoy and hold possession of the same in great felicity down to your son, son's son and so on in succession and act in the following manner." Three provisions are made in several paragraphs which run as follows:—

"Living and residing in my homestead dwelling house (ancestral dwelling-house) in the village of Mowgachi, you will inherit (become *uttaradhikari*) the rent-paying and rent-free properties, moveable and immoveable, described in Schedules 1 and 2 which I at present possess and which will be acquired up to the time before my death, and the monies that are invested in money-lending business, and the cash money and the ornaments in stock, and the paddy and the metallic utensils, etc., all the properties left by me, down to your heirs in succession; you will, living and residing on my ancestral *bhita* in the village Mowgachi and by lighting lamp on the *bhita*, you will live and reside on my *bhita* down to your son, son's son and heirs in succession and hold posses-

sion of all the properties left by me. If there be any male child born of your womb, and if your husband (my son-in-law) Srijukta Haripada Bhattacharjee or you be totally incapable of bearing the expenses of his education, then you will be competent to sell the entire or a portion of my properties and meet the expenses of his education, and also if you fall into great calamity you will be competent to sell these properties. On any other grounds except this or if you do not live and reside in my ancestral dwelling-house, you will not be competent to transfer by sale or gift in any way any of my properties mentioned in this Will; if you do so, the same will not be valid.

It is my sole and principal object and my utmost desire that the autumnal Durga, Shyama and Jagadhatti Pujas inaugurated by me, shall be continued for ever, in the same manner, from generation to generation. For this reason I enjoin by this Will that after my death being entitled to all the properties left by me, you will continue to perform the said Durga, Shyama and Jagadhatti Pujas uninterruptedly, continually and uniformly down to your heirs and representatives in succession at an expense of Rs. 75 per annum. If for any special reason the same becomes impossible, then the three *pujas* must be performed uninterruptedly for at least 20 years after my death. If you fail to do the same, you will not be competent to hold possession of any of my properties, moveable and immoveable, left by me and if by living and residing in my ancestral dwelling-house, you do not perform the *pujas*, etc., both you and your husband Srijut Haripada Bhattacharjee would be sinners and thrown into hell for not obeying the orders of superior (father). If you do not perform the *pujas*, the principal gentlemen of the village such as Ram Nrisingha Ghose,

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Upendra Narain Ghose, Jadab Chandra Pattack, Kedar Nath Gangopadhyay, Sasi Bhusan Pal, Gopal Chandra Khan, Surja Kanta Dey, Kali Bhanjan Shaha, Prosonna Kumar Raha and others shall have power to urge you in the act." In the 3rd and 4th paragraphs, the testator provides that certain persons are to be maintained as members of the family, and in case of disagreement they are to be accommodated each separately in a room, and a fixed amount of maintenance provided for them. The other provisions of the Will are not material for this case.

A large number of cases have been cited before us bearing upon the question whether the words *malik* and "*putra poutradi krame*" confer an absolute estate. It is unnecessary to deal with them, because the meaning of these expressions is now well-settled.

The Will before us states that not only is the daughter to be "*malik*" but "will be vested with power to transfer by sale and gift" and will "enjoy and hold possession in great felicity down to son and son's son and so on in succession." These words without anything to qualify them would no doubt create an estate of inheritance, and there is power of alienation expressly given. It is accordingly contended that the provisions in the subsequent part of the Will merely lay down the mode of enjoyment of the property, that those conditions may be disregarded having regard to the provisions of sec. 125 of the Succession Act, and that they do not qualify the absolute estate conferred in the earlier parts of the Will.

There is no doubt that if once an estate conferred by Will is held to be absolute, the conditions as to the mode of its enjoyment are void. But we have to look to all the terms of the Will and find whether an absolute or a limited estate was conferred. We have therefore to see whe-

ther the provisions made in the first part of the Will are qualified by the provisions made in the other parts of it. Now, three things appear to have been uppermost in the mind of the testator—the first is that his daughter and "her son, son's son and so on in succession" shall reside in the ancestral *bhita* in village Mowgachi and by "lighting lamp on the *bhita*" (an idea entertained by orthodox Hindus) hold possession of all the properties, and it is expressly stated that if the daughter does not reside in the ancestral dwelling-house, she will not be competent to transfer by sale or gift or in any other way any of the properties mentioned in the Will. The intention of the testator therefore was that the daughter and her heirs should reside in the ancestral dwelling-house and "light lamp on the *bhita*." If however an absolute estate was intended to be conferred she might *sell away* the properties and go to reside in her husband's house, which would defeat the intention of the testator. There appears to be special reason for the testator's making such a provision. Ordinarily the daughter would reside with her husband in the latter's house, and it was probably because the testator apprehended that she might go to live at her husband's house that he made the provision that she would not be competent to transfer by sale or gift or in any other way, any of the properties, and that if she did, it would not be valid.

The second is the education of the sons who might be born to her. In the same paragraph the testator says that if she or her husband be totally unable to bear the expenses of education of any sons who may be born to her, in that case or in case of great calamity she would be competent to sell the whole or a portion of the properties and meet the expenses of their education, and concludes by saying "on any other ground except this and if you do not

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live and reside in my ancestral dwelling-house you will not be competent to transfer by sale or gift or in any other way any of my properties mentioned in the Will. If you do so the sale will not be valid." The power of alienation therefore is given to her only in certain events, *viz.*, for meeting the education expenses of her sons, or in case of "great calamity," and she would have no power of alienation at all if she did not reside in the *bhita*.

The third is the performance of the *pujas*.

In the second paragraph, it is stated that the testator's "sole and principal object" and his "utmost desire was that the autumnal Durga, Shyama and Jagadhatti Pujas inaugurated by him should be continued for ever in the same manner from generation to generation," and he enjoined that after his death the daughter being entitled to all the properties left by him will continue to perform the said *pujas* "uninterruptedly, continually and uniformly" down to her heirs and representatives in succession at an expense of Rs. 75 per annum, and if for any special reasons the same become impossible, then the *pujas* must be performed uninterruptedly for at least 20 years after his death. These *pujas* had been inaugurated by the testator himself, and it was of paramount importance to him that the *pujas* should be celebrated by the daughter and her heirs in succession for ever, at any rate for a period of 20 years. Now if she was to get an absolute estate, she might sell away the properties and go to reside in her husband's house. In that case, what would become of these *pujas* which the testator says were to be celebrated by her and her heirs in succession for ever, at any rate for 20 years? The intention of the testator is very clearly expressed, "it is my sole and principal object and my utmost desire"

that the *pujas* should be performed, and if she failed to do the same, she "will not be competent to hold possession of any of my properties, moveable and immoveable." We think that the intention is clear and clearly expressed in the Will. It is not a mere moral injunction, though such an injunction is given in the lines which follow:—"If living and residing in my ancestral dwelling-house you do not perform the *pujas*, etc., both you and your husband Srijut Haripada Bhattacharjee would be sinners and thrown into hell for not obeying the orders of superior (father). If you do not perform the *pujas*, the principal gentlemen of the village (naming them) shall have power to urge you in the act."

It may be said that the *pujas* could not be performed for ever or even for 20 years, if the entire properties were sold away to meet the education expenses of the sons who might be born to her. But the provision with respect to the same was that she would be competent to sell a portion or the whole of the properties in case she and her husband were to become wholly unable to meet the education expenses. No grandson had been born up to that time. The testator evidently thought that the son-in-law would be able to meet the education expenses, as the words "if Haripada be totally incapable" would indicate, and although he gave power to the daughter to alienate in the latter case, the testator probably thought it was a very remote contingency for which he was providing. The provision for celebrating the *pujas* for ever shows that the testator did not contemplate the alienation of his entire property as a probable contingency, at any rate within 20 years.

Later on, it is stated in the Will "God forbid, if after my death you die without leaving any issue and your husband in-

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herits the properties mentioned in this Will, he shall have to perform year after year the three *pujas* mentioned in my Will and enjoy the profits and hold possession of the said properties. If he does not perform the *pujas*, etc., in the manner stated in this Will, he will not be entitled to get anything out of the properties left by me." It is contended that the son-in-law could inherit the properties only if the daughter got an absolute estate, and that this provision shows that the testator intended to confer an absolute estate. But the Will apparently was not drawn by a lawyer, and the testator might have thought that in the absence of any issue of the daughter the property would devolve by right of inheritance upon her husband. It is no doubt difficult to reconcile all the provisions of this badly drawn Will, but the testator, an old man of 62 years of age, did say all that he could, to express his intention that the daughter and her heirs in succession should reside in the ancestral house, educate the sons who might be born to her, and perform the *pujas*, and she was not to get any property if she failed to comply with the first and third provisions though she was given a restricted power (and full power in certain events) of alienation for meeting the education expenses of her sons or in case of calamity. It may be contended that if that is the proper construction of the Will, the daughter would not get the estate at all in the event of her failing to perform the acts enjoined by the testator, as it has been found by the Court below (on remand) that the daughter did not reside in the house of the testator after his death nor perform the *pujas* after his death as directed by the Will. But the estate vested in the daughter on the death of the testator before any acts enjoined by the testator could be performed. Then there was no gift over on her failure to perform

the acts, and, she was the heir-at-law. We have relied upon those provisions only for ascertaining whether the intention was to confer an absolute estate upon her or only a limited estate.

We do not think we should hold that she was given an absolute estate with absolute power of alienation merely upon what is stated in the earlier part of the Will entirely ignoring the other provisions of the Will, on the ground that she was given an absolute estate and the other provisions being repugnant to the nature of the estate must be rejected. The Will as stated above is badly drawn, but in construing it we must give effect to all its provisions. Taking into consideration all the provisions of the Will we think that the Will does not give an absolute estate to the Plaintiffs' mother.

As stated above it is unnecessary to discuss the cases which deal with the effect of the words "*malik*" or "*putra poutradi krame*" or similar expressions. In the present case both those expressions have been used in the Will, as also the power of alienation is expressly given in one part of the Will, while the other parts of the Will show that she was to have power of alienation only in certain events or indicate that she was not to have an absolute estate. We will only refer to the cases where the Will purports to confer an absolute estate in one portion of it, while other clauses indicate a contrary intention.

In *Lala Ram Jewan Ram v. Dal Koer* (1), it was held that the prohibition to alienate did not cut down the absolute gift conferred in that case and reference was made to the provisions of sec. 125 of the Succession Act. In *Amarendra Nath v. Suradhani* (2), where the testator provided that his widow would be *malik* like

(1) I. L. R. 24 Cal. 406 (1897).

(2) 14 C. W. N. 458 (1908).

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himself having right to give away, sell, etc., and after her death, the property would come into the control of his son if he was reformed, it was held that the intention of the testator was to confer an absolute estate, as otherwise the intention of the testator might have been completely defeated, for whatever portion of the estate might be left undisposed of by his widow would have passed by inheritance to the son, to meet which contingency it was provided that if any portion of the estate was left intact by the widow at the time of her death it was not to go to his son except on the event of a complete reformation of his habits in the interval. In *Jitendra Kumar v. Nrittya Gopal* (3), where the Will gave some properties to her wife with power of alienation and there was no gift over it was held to be an absolute gift. In *Tripurari Pal v. Jagat-tarini* (4) the Judicial Committee held that there was an absolute gift, as there was no provision for cutting down the absolute gift in what followed.

On the other hand in *Shib Lakhan v. Srimati Tarangini* (5), where the Will provided that the testator's widow was to be *malik*, with power to sell or make gift according to her wish if for any reason it became necessary to do so, it was held that she did not get an absolute estate. There was a clause in the Will which directed the widow to carry on out of the income of the properties the daily and periodical worship of the ancestral family idols, and there were other provisions in the Will which strengthened the view that the estate conferred was not absolute, one of them being a clause which authorized the widow to have recourse to a sale or gift in case of necessity which

would be superfluous if the widow was already vested with absolute power of disposition.

In *Kandarpa Nath v. Jogendra Nath* (6) the learned Judges with reference to the words of the preamble of the Will that the widow was to "hold possession like the testator" which were taken to indicate that an absolute interest was intended to be created in her favour observed: "As pointed out however in the case of *Shib Lakhan v. Tarangini* (5) importance ought not to be attached to isolated expressions, but the Court must look to all the clauses of the Will and give effect to all the clauses ignoring none as redundant or contradictory." In that case it was pointed out that the central ideas of the testator were obviously two-fold, first that whatever properties might be left upon the death of his mother and his wife were to be applied for the establishment of a pious institution of a permanent character for commemoration of his name, and secondly that in no event was the estate to be alienated in favour of the reversionary heirs; and that they were inconsistent with the theory that the donees took an absolute and alienable interest in the estate. It was held upon those considerations and upon the other clauses of the Will that the donees did not take an absolute estate. In *Hara Kumari v. Mohini* (7), the Will gave to the widow power of alienation by gift or sale of all "the aforesaid moveable and immoveable properties" and directed her to purchase a house and establish a *Mahadev* on it and perform its *sheba* and service, and that on her death his daughter would be entitled to whatever properties would remain after her death. It was held that giving effect to all the words of the Will

(3) 18 C. W. N. 140 (1912).

(4) L. R. 40 I. A. 37; a. c. I. L. R. 40 Cal. 274; 17 C. W. N. 145 (1912).

(5) 8 C. L. J. 20 (1908).

(6) 12 C. L. J. 391 (1910).

(5) 8 C. L. J. 20 (1908).

(7) 12 C. W. N. 412 (1908).

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the widow took an estate for life with a power of alienation, and to the extent to which such power was exercised, the daughter similarly took the property.

In the case of *Radha Prasad Mullik v. Raneemani Dassi* (8), the Judicial Committee in holding that according to the true construction of the Will the intention of the testator was to create in favour of his daughter an estate for life with a remainder over to their sons, relied upon the observations made in the case of *Mahomed Shamsul Huda v. Shewakram* (9) that "in construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family; and it may be assumed that as a general rule at all events women do not take absolute estates of inheritance which they are enabled to alienate."

We have been referred to an unreported decision of Mookerjee and Panton, JJ., dated the 10th June 1919 in (*Sulochana v. Jagat Tarini**). There the Will (in the 6th clause) provided that the widow was to be full owner (*sampurna malik*), and the question was whether the full proprietary right had been cut down by the other clauses of the Will. The learned Judges held that the other clauses did not in any way qualify the effect of the 6th clause and referred to the observations of Lord Watson in *Scale v. Rawlens* (10), "we are not at liberty to speculate upon what the testator

may have intended to do or may have thought that he had actually done: we cannot give effect to any intention which is not expressed or plainly implied in the language of the testator."

In the present case the paragraphs 1 and 2 of the Will clearly express the intention of the testator. Nothing can be clearer than the words "my sole and principal object and my utmost desire" used with reference to the provision for the *pujas*, and the provision as to residence in the house is also clear, and we do not think that the provisions of the said paragraphs merely lay down the mode of enjoyment of the property so that it can be held that the preamble to the Will gives an absolute estate, and the provisions in the 1st and 2nd paragraphs are void as being repugnant to the nature of the estate granted. The provisions of the 1st and 2nd paragraphs qualify and govern the provisions made in the earlier part, and in fact explain them, and as stated above, taking all the provisions together we think that the Plaintiffs' mother took only a limited estate. The Plaintiffs therefore on their mother's death inherited the property.

There are other questions in the case which have not been tried by the Courts below. The case should therefore go back to the Court of first instance for trial of the remaining issues and disposal of the case according to law.

Cost will abide the result.

J. N. R.

*Appeal dismissed,
Case remanded.*

(8) 1. L. R. 35 Cal. 896 : s. c. 12 C. W. N. 729 (P. C. 1908).

(9) L. R. 2 I. A. 7 (1874).

(10) [1892] 2 App. Cas. 342 (344).

* Reg. App. No. 108 of 1917. Since reported: 30 C. L. J. 51 (1919).

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM APPELLATE DECREE****No. 1982 OF 1919.****| GURU PROSANNA BHAT-****TACHERJEE, Plaintiff,****Appellant,****v.****MADHUSUDAN CHAU-****DHURY, Defendant,****Respondent.****MOOKERJEE, J.****PANTON, J.****1921,****4, August.***Landlord and tenant—Renewal, covenant of—
Dossara bundbust, meaning of.*

Where a kabuliyat stated that after the expiry of the term of the tenancy the tenant would take a দোসরা বন্দোবস্ত (dossara bundbust), and on his failure to take the same the landlord would be competent to grant settlement thereof to any other tenant:

Held—That the covenant was one for renewal on the same terms as the previous tenancy.

LANI MIA v. MOHAMMED EASIN MIA (6) and SECRETARY OF STATE FOR INDIA v. FORBES (7) referred to.

This was an appeal against the decree of Babu Jatindra Chandra Lahiri, officiating Subordinate Judge of Zillah Rungpur, dated the 29th of July 1919, affirming the decree of Babu Ram Chandra Banerjee, Munsif, 1st Court at Kurigram, dated the 23rd of April 1918.

The facts material to this report are as follows:—

Plaintiff brought this suit against the Defendant for *khas* possession of $3\frac{1}{2}$ cottas of land by ejectment and demolition of the structures standing thereon. The Defendant, on the 11th May 1908, executed a registered *kabuliyat* in favour of the Plaintiff in respect of *Chukani bashabati* land measuring $3\frac{1}{2}$ cottas, at a *jama* of Rs. 3-8 per annum for a term of 9 years to expire on the 13th April 1917. The

said *kabuliyat*, *inter alia*, stated “after the expiry of the term I shall take a fresh settlement (বাদ বেবাদ দোসরা বন্দোবস্ত আমলে আনিব) of the same. If I fail to take the same then you (the landlord) shall be competent to grant settlement thereof to any other tenant by bringing the same under your *khas* possession.”

The Plaintiff brought this suit for ejectment on the 15th June 1917. The defence *inter alia* was that the *kabuliyat* contained a renewal clause for 9 years, that he offered to take a fresh settlement but the Plaintiff had wrongfully refused and that the Defendant was consequently entitled to remain on the land for a further term of 9 years and he was not liable to ejectment. The Court of first instance dismissed the suit. On appeal by the Plaintiff the learned Subordinate Judge upheld the decision of the Court of first instance and dismissed the appeal.

The following portion of the judgment of the learned Subordinate Judge will be found material to this report:—

“The covenant in question runs in the following terms:—‘On the expiration of the term, I shall take a fresh settlement (বাদ বেবাদ দোসরা বন্দোবস্ত আমলে আনিব).’ By accepting the *kabuliyat* the Plaintiff must be deemed to have agreed to grant such a fresh settlement. The document, however, does not state anything whatever as to what would be the term of the fresh lease or the rent payable thereunder. In the case reported in *Surendra Nath Sen v. Dinabandhu Naik* (8), it was no doubt said that in the absence of such particulars, the contract for the renewal of the lease would be too vague and uncertain for a specific performance but that ruling appears to have been dissented from in the case of *Lani Mia v. Mohammed Easin Mia* (6) in which all the rulings on the point were reviewed. . . . Thus I find

(6) 20 C. W. N. 948 (1915).

(7) 16 C. L. J. 217 (1912).

(6) 20 C. W. N. 948 (1915).

(8) 13 C. W. N. 595 (1908).

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that the case of *Lani Mia v. Mohammed Easin Mia* (6) is fully applicable to the facts of the present suit and the Defendant must be deemed to have acquired a right to obtain a fresh settlement for a period of 9 years as stated above. Admittedly he lost no time in praying for a renewal which the Plaintiff was not justified to refuse. Thus I find that the Plaintiff was not entitled to evict the Defendant before the expiration of the term of the renewal."

Plaintiff then preferred this second appeal.

Babu Atul Chandra Gupta for the Appellant.—The expression দে'সর বন্দোবস্ত really means a second settlement which need not be on the same terms as the previous one. The expression is ambiguous and therefore evidence is admissible to shew what is the true meaning [see *Watcham v. The Attorney-General of African Protectorate* (1)], the intention of the parties may be gathered from the *kabuliyat* executed by the vendor of the Defendant in favour of the Plaintiff on the 19th April 1903 and another executed by a previous tenant in favour of the Plaintiff on the 5th January 1901. All that therefore the parties intended was that the second settlement was not to be on the same terms.

Babu Surendra Chandra Sen (with him *Babu Hemendra Chandra Sen*) for the Respondent.—The expression দো'সর বন্দোবস্ত means "another settlement on the same terms," or "a second settlement on the same terms," or in other words "a renewal of the lease upon the same terms;" otherwise, the expression in the deed is meaningless, for, if the Plaintiff, i.e., the grantor of the lease be entitled to dictate his own terms it was not necessary to make a provision for

the second settlement. The meaning of the word is free from ambiguity and the case comes within the principle enunciated in *Lani Mia v. Mohammed Easin Mia* (6) and *Secretary of State for India v. Forbes* (7). There is a clause of "renewal of lease" and if the contention of the Appellant is correct, he can then destroy the effect of the clause by demanding new terms.

Babu Atul Chandra Gupta in reply.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff in an action in ejectment. The Defendant executed a *kabuliyat* in favour of the Plaintiff on the 11th May 1908 for a term of 9 years to expire on the 13th April 1917. As the Defendant did not give up the land on the termination of the tenancy the Plaintiff instituted the present suit on the 15th June 1917 after service of notice to quit. The Defendant pleaded that the *kabuliyat* contained what was in essence a renewal clause for 9 years, that he had offered to accept a new tenancy but the Plaintiff had wrongfully refused and that consequently he was entitled to remain in occupation for a further term of 9 years as if a new tenancy had been created in his favour. He also urged that the notice served was inadequate. It is plain that no question of notice arises, as the suit has been brought on the termination of the tenancy; if in law the tenancy has terminated, the Plaintiff is entitled to eject the Defendant without service of notice to quit. Consequently the only question for consideration is whether the provision in the lease operated as a renewal clause and entitled the Defendant to continue in occupation for a second term of 9 years. This ques-

(1) [1910] A. C. 533.

(6) 20 C. W. N. 948 (1915).

(6) 20 C. W. N. 948 (1915).

(7) 16 C. L. J. 217 (1912).

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tion has been answered against the Plaintiff by both the Courts below. On the present appeal it has been argued that the *kabuliyat* has been mis-interpreted by the Courts below and that in substance there was no renewal clause of the scope alleged by the Defendant.

The *kabuliyat* states that after the termination of the tenancy the Defendant would make a *দোসরা বন্দোবস্ত*. The Courts below have taken this to mean a fresh settlement on the same terms as the first settlement. Mr. Gupta has contended that the expression *দোসরা বন্দোবস্ত* is really ambiguous, that it means in essence a second settlement and that such settlement need not be on the same terms as the previous settlement but may be a different settlement. In support of this argument he has invited our attention to two *kabuliyats*, one executed by the vendor of the Defendant in favour of the Plaintiff on the 19th April 1903 and another executed by a previous tenant of the disputed land in favour of the Plaintiff on the 5th January 1901. Mr. Gupta has contended that as the term *দোসরা* is really ambiguous, evidence is admissible to show its true meaning as used in the contract under consideration, and in support of this contention, he has relied upon a decision of the Judicial Committee in *Watcham v. The Attorney-General of African Protectorate* (1). Lord Atkinson stated in that case the principle that when the instrument contains ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language and their intention in executing the instrument, whether the ambiguity be patent or latent. We need not discuss whether one deed should be construed with reference to another unless the two form part of the same transaction. [*Bhagwat Buxh v. Sheo Per-*

shad (2), *Kamaleswari v. Ramhari* (3), *Patiram Banerjee v. Kankinarah Co., Ltd.* (4) and *Smith v. Chadwick* (5)]; but, let us assume that evidence is admissible to explain the meaning of the term *দোসরা* and that the two *kabuliyats* mentioned are for this purpose relevant evidence. In each of these documents, the term *দোসরা* occurs twice. In one place it is stated that after the expiry of the term, the tenant would take *দোসরা বন্দোবস্ত* from the landlord. In another place, it is stated that if the tenant failed to take a *দোসরা বন্দোবস্ত* then the landlord would be competent to re-enter on the land and realise rent by granting settlement to *দোসরা-প্রাপ্ত*. It has been contended that when the term *দোসরা* is applied to a tenant, it means a new tenant who need not necessarily hold on the same terms as the previous tenant. This may be conceded and this may show that the term *দোসরা* is used in more than one sense according to the context. The question for consideration before us is, what is the implication of the term *দোসরা* when used in relation to a second settlement. Mr. Sen has contended on behalf of the Respondent that in answering this question, we cannot overlook that if the argument of the Appellant prevails the result will be to nullify the clause which was inserted in the contract plainly for the benefit of the tenant. If *দোসরা বন্দোবস্ত* might be a second settlement on such terms as might be dictated by the landlord, the latter might destroy the protection afforded to the tenant by imposing terms so onerous and exacting that the tenant could not possibly accept them. We are of opinion that this aspect of the

(2) 18 C. W. N. 297; s. c. 18 C. L. J. 277 (1913).

(3) 17 C. W. N. 1159; s. c. 19 C. L. J. 248 (1913).

(4) I. L. R. 42 Cal. 1050; s. c. 19 C. W. N. 623 (1915).

(5) L. R. 20 Ch. D. 27.

(1) [1919] A. C. 532.

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matter must be borne in mind when the contract before us is construed, and we agree with the Courts below that the intention of the parties was that the second settlement should be made on the same terms as the previous tenancy. Consequently the rule enunciated in *Lani Mia v. Mohammed Easin Mia* (6) on the authority of the decision in *Secretary of State for India v. Forbes* (7) becomes applicable, namely, that where there is a covenant for renewal, if the option does not state the terms of the renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself. We hold accordingly that the covenant in this case was a true covenant for renewal on the same terms as before.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

H. C. S. *Appeal dismissed with costs.*

(CRIMINAL REVISIONAL JURISDICTION.)

REV. NO. 491 OF 1922.

<p>WALMSLEY, J. SUHRAWARDY, J. 1922, '30, June.</p>	}	<p>Haji MD. ISMAIL, 1st party, Petitioner, v. MUNSHI BARKAT ALI and ors., 2nd party, Opposite Party.</p>
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Criminal Procedure Code (Act V of 1898), sec. 144, if empowers a Magistrate to stop prayers in a mosque to avoid a breach of the peace—Magistrate's jurisdiction to interfere with a mutwali's administration of wakf property—Proper course for Magistrate, when there is likelihood of breach of peace.

A certain mutwali of a mosque appointed as pesh iman, or the leader of prayers, a certain person, with whom the congregation got dissatisfied. The people therefore refused to read their prayers with him and

(6) 20 C. W. N. 948 (1915).

(7) 16 C. L. J. 217 (1912).

the matter went so far as to necessitate police interference. Ultimately proceedings under sec. 144, Cr. P. C., were drawn up and the Magistrate passed orders forbidding people of either party to read prayers in the said mosque:

Held—That the order was a misconceived one. Unless the mutwali was displaced in due course of law, no one had a right to interfere with the management of the trust property. If the effect of the order of the Magistrate was that no Mahomedan would be allowed to say his prayer in the mosque, the order was not justified under sec. 144, Cr. P. C. Such an order is not proper and justified by the law. The proper course for the Magistrate is to find out which party is wrong, and if he finds one party interfering unnecessarily with the exercise of the legal powers of the other party, he ought to bind down that party restraining them from committing any act which may lead to a breach of the peace.

This was a rule granted on the 14th June 1922 against an order of the Deputy Magistrate of Asansol (Mr. J. Dutt), dated the 2nd May 1922, directing under sec. 144, Cr. P. C., that no man of either party will be allowed to read the prayer in the mosque, an application for revision of which order was rejected by the District Magistrate of Burdwan (S. G. Hart, Esq.), on the 26th May 1922.

The facts will fully appear from the judgment.

Mr. A. K. Fuzul Huq and Babu Radhica Ranjan Guha for the Petitioner.

Mr. Nag, Counsel, M. Amiruddin Ahmed and Babu Profulla Chunder Ghose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

SUHRAWARDY, J.—This rule was issued against an order passed under sec. 144,

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Cr. P. C., by the Sub-Divisional Magistrate of Asansol on the 2nd of May 1922. The grounds upon which the rule was issued are grounds Nos. 1, 3, 5 and 6 of the petition of motion, namely, that the order of the Magistrate was without jurisdiction and that sec. 144, Cr. P. C., was not intended to authorize a Magistrate to stop prayers in a mosque in the manner done in this case. It appears that the Petitioner is the *mutwali* of a mosque in Raneegunge Kasaipara, by virtue of a *wakfnama* executed by his grand-father. The Petitioner appointed Hafez Abdus Sobhan as the *pesh iman* or the leader of the prayers in the mosque sometime ago. The men of the locality followed his leadership for a number of years; but having, as alleged, subsequently discovered that he used to lend money on interest, they refused to read their prayer with him. The matter went so far as to necessitate the interference of the police. Ultimately, proceedings had to be drawn up against both parties under sec. 144, Cr. P. C. No evidence was taken in the case but attempts were made from time to time to bring about a settlement of the dispute between the parties. The learned Sub-Divisional Officer appointed some persons who intervened and brought about a settlement; but it did not last very long for shortly after, the Petitioner again applied for proceedings under sec. 144, Cr. P. C., saying that the second party were about to commit a breach of the peace. On this, the Magistrate passed the following order: "The only course left for me to be taken is to pass orders under sec. 144, Cr. P. C., to the effect that no man of either party will be allowed to read the prayer in the above mosque." Against this order, the Petitioner moved the District Magistrate of Burdwan who tried to bring about a settlement again by asking the Maho-

medan Marriage Registrar of Raneegunge 'to report on the subject of dispute and to arrange for the parties to come to terms.' The Marriage Registrar reported that the Petitioner was the *mutwali* of the mosque and that he was unable to bring about a settlement of the dispute. The learned District Magistrate thereupon declined to interfere with the order of the Sub-Divisional Officer passed under sec. 144, Cr. P. C.

It seems to me that the order is a misconceived one. The Petitioner is the *mutwali* of the mosque and, unless he is displaced from his position as such, no one has any right to interfere with the management of the trust property. As the Superintendent or the *mutwali*, apparently, he has the right to appoint a servant of the mosque and, if the congregation is not satisfied with the appointment made by him, the only course open to them would be to go to the proper Court to have the *mutwali* removed or to make him adopt the proper and legal mode of managing the *wakf* property. But I doubt not that they have no right to interfere with his management and to threaten to commit a breach of the peace if a certain person appointed as the *pesh iman* is not removed from office. Apart from the question whether the public will follow the lead of Sobhan, the conduct of the Opposite Party seems to me to be far from justifiable as it has resulted in the mosque being practically deserted. If the effect of the order of the learned Magistrate is that no Mahomedan would be allowed to say his prayer in the mosque, I do not think that such an order is justified under sec. 144, Cr. P. C. I do not like to comment on the effect of this order upon the religious sentiments of the people of the locality but I only wish to suggest that such an order is not proper and justified by the law. I may add that

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the learned Counsel who appears for the Opposite Party admits, in my opinion rightly admits, that the order complained against is indefensible. But he asks us to direct the Petitioner to remove the objectionable *iman* from office which we are unable to do.

It seems to me that the proper course that the Magistrate ought to follow is to find out which party is wrong and, if he finds on the evidence that the second party is in the wrong and is interfering unnecessarily with the exercise of the legal powers of the first party, he ought to bind down the second party restraining them from committing any act which may lead to a breach of the peace. With these observations, I make the rule absolute and set aside the order of the Sub-Divisional Magistrate of Asansol, dated the 2nd May 1922 passed under sec. 144 of the Code of Criminal Procedure.

WALMSLEY, J.—I agree.

J. N. R. Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD ATKINSON.	RAI BAIJNATH
LORD PHILLIMORE.	GOENKA, since deceased
SIR JOHN EDGE.	(now represented
MR. AMEER ALI.	by Kedarnath
1922,	Goenka), Appellant,
Heard, 20, January.	v.
Judgment,	MAHARAJA SIR RAVA-
9, February.	NESHWAR PRASAD
	SINGH, Respondent.

Civil Procedure Code (Act V of 1908), sec 47—Suit to recover possession of undivided share, decreed—Partition pending suit—Execution of decree—Decree-holder, if may obtain possession of the allotted share in execution—Decree, if must be amended for the purpose—Separate suit, if necessary.

Pending a suit to set aside a sale for arrears of revenue of an undivided share in a Mahal and for joint possession

thereof, the Collector effected a partition of the estate under the Estates Partition Act and gave the purchaser separate possession of specific lands. The Court decreed the suit without being informed of the completion of the partition by the Collector. This decree being reversed by the High Court was ultimately restored with certain modifications by the Privy Council. The decree-holder having applied for execution of the decree and for possession of the lands which had been substituted by the partition for the undivided share decreed by the Court:

Held—That the decree could be executed by giving the decree-holders possession of the substituted lands, the question as to what were the substituted lands being a matter which arose within the meaning of sec. 47 of the Civil Procedure Code between the parties relating to the execution and satisfaction of the decree; neither an application to the Judicial Committee to vary their decree nor a separate suit for establishment of title was necessary.

These are two consolidated appeals from one judgment and two decrees, both dated the 24th April 1917, of the High Court of Judicature at Patna, which reversed a judgment and two decrees made by the Subordinate Judge of Monghyr on the 22nd February 1916.

The facts which are fully set out in the judgment of the Board were briefly as follows :—

The Respondents were part proprietors in Mahal Bisthazari.

Some of the proprietors obtained a separation of accounts under Act XI of 1859 and the Respondents were entitled to share in the *ijmali*.

In September 1901 the *ijmali* was sold for arrears of revenue and was purchased by Baijnath Goenka. Fifteen sharers in

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the *ijmali* then filed a suit to have the sale set aside.

Meanwhile partition proceedings had been taking place for some years and were completed prior to 30th June 1904, the date on which the Subordinate Judge gave judgment in the above suit and set aside the sale.

From this decision Baijnath Goenka appealed successfully to the High Court, but on the 3rd February 1915 the decree of the Subordinate Judge was restored by an Order in Council.

The *ijmali* sharers then applied for execution of the decree of 30th June 1904. Their application was dismissed by the Subordinate Judge but his decision was reversed by the High Court at Patna, (Chamier, C. J., and Roe, J.) and the present consolidated appeals were now brought by Baijnath Goenka.

Messrs. L. DeGruyther, K. C., and B. Dubé for the Appellant.—Referred to *Ravaneshwar Prasad Singh v. Baijnath Ram Goenka* (1) and contended that the decree-holders could not be awarded possession of lands which under the partition proceedings had been substituted for those previously held by them, inasmuch as the latter alone were specified in the decree of 30th June 1904.

Sir George Lowndes, K. C., and Mr Wallach for the Respondents.—Sec. 47 (2) of the Civil Procedure Code 1908 provides for matters of this kind being dealt with in execution but in any case a decision on this point is not essential because the decree actually refers to "the parties in dispute."

Mr. DeGruyther replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are three con-

(1) L. R. 42 I. A. 79; s. c. I. L. R. 42 Cal. 897; 19 C. W. N. 481 (1915).

solidated appeals. It will be convenient to dispose at once of the appeal in which Musammat Bibi Nabi Zohra is the Appellant. That appeal is not supported, and will be dismissed with costs.

In the other two appeals which will now be considered, Rai Baijnath Goenka was the Appellant; he is now dead, and is represented by his minor son through his mother and guardian, his next friend. These two consolidated appeals are from two decrees, dated the 24th April 1917, of the High Court at Patna, which reversed the decrees, dated the 22nd February 1916, of the Subordinate Judge of Monghyr, by which the Subordinate Judge dismissed applications by the Respondents here or those whom they represent for the execution of a decree of the Subordinate Judge of Monghyr of the 30th June 1904, which on the advice of the Judicial Committee of the Privy Council had, by an order of His Majesty in Council of the 3rd February 1915, been restored, except as to villages Matasi and Mirzagunj.

In order that the questions in dispute in these appeals may be understood, it is necessary to refer briefly to some facts and to the history of the litigation in which these appeals have arisen.

Mahal Bisthazari, in the District of Monghyr, which included 360 villages was jointly owned by a number of persons, including the Respondents or those whom they represent. The owners of the specified but undivided shares had applied for and obtained from the Collector a separation of accounts under Act XI of 1859. There was left a large area of the Mahal called the *ijmali*, or joint share, the owners of which remained jointly liable for the revenues due, or to become due, in respect of that area. The Respondents or those whom they represent owned in the *ijmali* share 14 annas, 1 dam (pucca) out of 16 annas (pucca) of village Lohara, and shares

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in village Padmaot and other villages. The revenue due in respect of the *ijmali* share was in arrear in 1901, and the *ijmali* share was sold by the Collector by auction on the 9th September 1901, and was purchased by Baijnath Goenka, who was placed in possession as the purchaser. Applications to the Collector for the partition of Mahal Bisthazari had been made in 1876, and the proceedings to partition were continued under the Bengal Estates Partition Act, 1897. The partition had not been completed on the 9th September 1901, but it had been completed before the decree of the Subordinate Judge of the 30th June 1904 was made in suit No. 596 of 1902.

In 1902 the Respondents or those whom they represent and other share owners brought suit No. 596 of 1902 against Baijnath Goenka to have the sale of the 9th September 1901 set aside, and to obtain possession, and the Subordinate Judge, by his decree of the 30th June 1904, set aside the sale and decreed possession and mesne profits in favour of the Respondents, the mesne profits to be ascertained in execution. The Subordinate Judge, when he made that decree, apparently had not been informed that the Collector had completed the partition, or indeed that proceedings for partition had been commenced. He made his decree in favour of each Plaintiff or set of Plaintiffs in the suit for possession of his respective share as if no partition had taken place. The shares specified in his decree are the shares to which the Plaintiffs would have been entitled respectively if no partition had taken place, and sec. 26 of the Estates Partition Act, 1897, was not in the decree complied with. Baijnath Goenka appealed from that decree to the High Court at Calcutta, and that High Court, holding that the sale was valid by its decree of the 1st May 1907, set aside the decree of the 30th

June 1904 of the Subordinate Judge. From that decree of the High Court at Calcutta, the Respondents appealed to His Majesty in Council. That appeal to His Majesty in Council came before the Board in 1915, and the Board taking the same view of the irregularity and invalidity of the sale of the 9th September 1901, upon which the Subordinate Judge had made the decree of the 30th June 1904, advised His Majesty that the decree of the High Court at Calcutta should be set aside and that the decree of the Subordinate Judge should be restored, except as to the villages Matasi and Mirzagunj, as mentioned in the order of His Majesty in Council of the 3rd February 1915. The Board in so advising His Majesty was unaware of the proceedings for partition, and was not informed by the parties or by any one of those proceedings.

After the order of His Majesty in Council of the 3rd February 1915 had been made, the Respondents applied to the Subordinate Judge of Monghyr for execution of the decree of the 30th June 1904, and for possession of the lands which had been substituted by the partition for the shares which they had been entitled to before the partition. Baijnath Goenka objected, and the Subordinate Judge, being of opinion that he could not, in execution of the decree of the 30th June 1904, grant possession of the substituted shares, as they were not the shares mentioned in the decree of the 30th June 1904, and that the decree-holders could not get possession of the substituted shares without bringing a regular suit to establish their title to them, by his decree of the 22nd February 1916, dismissed the applications for execution. From that decree of dismissal the Respondents appealed to the High Court at Patna. The appeals were heard together, and it was contended on behalf of Baijnath Goenka that the

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decree of the 30th June 1904 could not be executed, and that it would be necessary for the Respondents here either to get that decree varied by an application to the Judicial Committee, or to establish their titles by a suit. The learned Judges of the High Court at Patna held that the decree of the 30th June 1904 could be executed by giving possession of the substituted shares, and that an application to the Judicial Committee was not necessary, nor was a separate suit necessary, and by their decree of the 24th April 1917 they allowed the appeals and directed the Subordinate Judge to restore the applications for execution to his pending file and to hold the enquiries necessary for ascertaining which were the shares which by the partition had been substituted for the original shares. From these decrees of the 24th April 1917, Baijnath Goenka brought these two consolidated appeals.

Their Lordships agree with the High Court at Patna that the decree of the 30th June 1904 could be executed by giving these Respondents respectively possession of the substituted shares, and that no application to the Judicial Committee was necessary. The questions as to what were such substituted shares were questions which arose within the meaning of sec. 47 of the Code of Civil Procedure, 1908, between the parties and related to the execution and satisfaction of the decree of the 30th June 1904.

At the conclusion of the arguments in these two consolidated appeals their Lordships were informed by counsel that no stay of execution having been granted, the decree of the 30th June 1904 has been executed pursuant to the directions given in the decree of the High Court at Patna of the 24th April 1917.

Their Lordships will humbly advise His Majesty that these two consolidated appeals should be dismissed with costs.

Solicitors: *Messrs. Watkins and Hunter* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 890 OF 1917.

PROMATHA NATH

GREAVES, J.

MULLICK

1922,

v.

1, June

PRADYUMNA KUMAR

MULLICK and anr.

Rights of a shebait of an idol to impose restrictions on the powers of subsequent shebait—Acceptance of benefits conferred by a gift by the shebait—Effect of such acceptance on the restrictions imposed by the gift.

A Hindu governed by the Dayabhaga School established certain family deities, but imposed no condition as to their location. His son acquired a piece of land and erected thereon a separate Thakurbari for one of the deities. By a declaration of trust he declared that he, his heirs, executors, representatives and administrators should for ever hold the land to and for the use of the deity, that the Thakur should be located and worshipped in the premises and that the Thakur should not on any account be removed therefrom unless and until a similar or better Thakurbari was built. The grandsons of the founder separated and the palas of worship were divided. One of the said grandsons, not having got any part of the family house, removed elsewhere and built himself a separate residence, where he wanted to remove and worship the Thakur during his turn of worship, but was prevented by his co-sharers on the strength of the above declaration:

Held—That the founder of the idols having imposed no condition as to their location, it was not open to any subsequent shebait to impose restrictions which would

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fetter those who subsequently as heirs of the founder became shebaita. The said grandson is therefore entitled to remove the Thakur from the Thakurbari to his own house during his turn of worship.

GOSSAMI SRI GRIDHARIJI v. ROMANLALJI GOSSAMI (1) *distinguished.*

Quære:—Whether it is open to the shebaita to take for the Thakur the benefit of the Thakurbari without conforming to the restrictions imposed by the deed of trust.

The facts will fully appear from the judgment.

Mr. S. R. Das and Mr. S. K. Chakravarti, Counsel, appeared for the Plaintiff.

Mr. B. Chuckerbutty and Mr. H. D. Bose, Counsel, represented the Defendant Pradyumna Kumar Mullick.

Mr. N. N. Sircar and Mr. R. N. Banerjee, Counsel, represented the Defendant Monmotha Nath Mullick.

THE JUDGMENT OF THE COURT was as follows:—

The Plaintiff in this suit seeks a declaration that he is entitled to remove certain deities named respectively Thakur Sree Sree Radha Shamsunderjee, Thakurani Sree Sree Radharanee and a Saligrahsila known as Sree Sree Raj Rajeswar from the Thakurbari, where they are ordinarily located, to his residence during his turn of worship.

The deities above-named were established by one Mati Lal Mullick, the grandfather of the Plaintiff and of the second Defendant and the great grandfather of the first Defendant. During Mati Lal's life-time the deities were located in his family dwelling-house in Pathuriaghata Street. Mati Lal died in 1846 leaving a widow Sreemutty Rangomoni Dassi and an adopted son, Jadulal Mullick aged two

years. Mati Lal left a Will, dated the 3rd September 1846 and thereby appointed his wife, so long as Jadulal did not attain the age of 20, *malik* or proprietor and attorney for the protection and care of the whole of his estate. And he left certain funds out of which his wife was to defray the expense of the daily *sheba* and of the festivals of the Thakur and Thakurani so long as his adopted son had not attained the age of 20 upon the happening of which event he directed his wife to make over the whole of the property to him fully. Jadulal, who attained his majority, pulled down the family dwelling-house and rebuilt it partly on No. 67, Pathuriaghata Street, and partly on No. 7, Prasanno Kumar Tagore Street. Jadulal who on Mati Lal's death became *shebait* of the deities acquired a piece of land, No. 1, Prasanno Kumar Tagore Street, and erected thereon a Thakurbari for the Thakur Radha Shamsunderjee and located and worshipped this deity there. By a declaration of trust, dated the 26th April 1888 Jadulal declared that he, his heirs, executors, administrators and representatives should for ever hold this land to and for the use of the Thakur Radha Shamsunderjee to the extent that the Thakur might be located and worshipped in the premises. A power was reserved by the instrument to the settlor, his heirs, executors, administrators or representatives to revoke the trusts upon providing and dedicating for the location and worship of the Thakur another suitable Thakurbari of the same or greater value and the settlor provided that unless and until this was done the Thakur should not on any account be removed from the said premises. The settlor further provided that he should be the sole *shebait* of the idol during his life-time and that his male heirs should alone be the *shebaita* after his death and that in case

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of disagreement between any future *shebais* the worship should be conducted by yearly turns. Jadulal died on the 5th February 1894 leaving him surviving his widow Sreemutty Saraswati and three sons Anathnath, who has since died leaving the first Defendant his heir, the Plaintiff and the second Defendant and four daughters. He left a Will but I understand that the provisions are not material for the purposes of this suit. In a subsequent appointment of new trustees of the Will the Thakurbari appears as secular property of the estate. An amicable partition took place between Jadulal's three sons and the Commissioner of partition, the late Mr. W. C. Bonnerjee, made his award as Commissioner of partition on the 30th June 1899. By the said award the properties which formed the family dwelling-house of Jadulal were allotted to Anathnath Mullick and the Plaintiff got no part therein and ultimately built himself a residence in Cornwallis Street where he now resides. Disputes arose between the parties to this suit with regard to the provisions of the Will of Sreemutty Rangomoni Dassi, the mother of Jadulal who had devised certain property for the worship of the Thakur Radha Shamsunderjee and in Suit No. 799 of 1904 Mr. Bhupendra Nath Basu was appointed to frame a scheme of worship of the deity and to partition the residue of Rangomoni's estate. Mr. Basu directed that the worship of the deity should be performed by the parties and their heirs by turns of one year each, the 1st turn commencing from the 1st Baisack 1317 and going to the 1st Defendant in the present suit, the 2nd turn going to the present Plaintiff and commencing on the 1st Baisack 1318 and the 3rd turn going to the 2nd Defendant and commencing on the 1st Baisack 1319.

The dispute in this suit arose in this

way. It appears that the Plaintiff during his turns of worship in 1911 and 1914 removed the deities to his house in Cornwallis Street and worshipped them in the Puja Dalan which he had made there but when his turn of worship came round in 1917 the 1st Defendant, who was then of age, and the 2nd Defendant refused to allow the deities to be removed relying upon the provisions of the deed poll executed by Jadulal on the 26th April 1888.

The dispute which I have got to decide is whether the Defendants were right in their refusal or whether the Plaintiff is entitled at his recurring turns of worship each 3rd year to move the deities to Cornwallis Street and worship them there.

The Plaintiff says, amongst other things, that the accommodation is not adequate at the Thakurbari and that there is no sleeping accommodation for him there and no conveniences and that he cannot properly carry out the worship there. The plan of the Thakurbari is Ex. I and the other plan, which is before me, shows the position of the Thakurbari with regard to the premises allotted to the 2nd Defendant and to the 1st Defendant's father.

The issues framed were as follows:—

(1) Was the deed of the 26th April 1888 a pretended document? Was it executed with a view to getting exemption from Municipal rates and taxes as alleged in para. 8 of the plaint?

(2) What is the effect of this deed upon the true construction thereof?

(3) Did the taking of the Thakurs to the Thakur Dalan constitute a removal thereof within the meaning and intention of the said deed?

(4) Was the Thakurbari ever treated as the secular property of Jadulal, if so what is the legal effect thereof?

(5) Was there any understanding as alleged in para. 14 of the plaint?

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(6) Was there any consensus by all the members of the family as alleged in para. 23 of the plaint? What is the effect thereof? Did the consensus, if any, extend beyond the temporary taking of the Thakur from the Thakurbari to the Thakur Dalan?

(7) Could the Thakur Radha Shamsunderjee be severed from his consort the Thakurani and from the other ancillary deities?

(8) Were the Thakurs established by Mati Lal Mullick, Radha Shamsunderjee, Radharanee and Saligram?

(9) Is the Plaintiff entitled to remove the Thakurs to his residence No. 129, Cornwallis Street during his turn of worship?

(10) Is the Plaintiff estopped by his conduct from questioning the validity of the deed of dedication?

(11) Has the Defendant No. 2 replaced the silver articles referred to in para. 33 of the plaint? Which of these articles came into the hands of Defendant No. 2?

(12) Is the Plaintiff entitled to any and what damages?

So far as issues Nos. 1 and 4 are concerned the only evidence is that of the Plaintiff who stated that the Thakurbari was really secular property and that the deed of 1888 was prepared to avoid payment of rates and that his father on principle (what principle is not clear) applied for remission of rates thereon and not because it was dedicated property. He also stated that the Thakurbari was treated by himself and the other trustees as secular property and that his father told him in 1892 that he had made the deed of 1888 to exempt the building from taxation and that to effect this he had to state that the Thakurs would be permanently located there and that he did not mean to keep the Thakurs there himself. I am not prepared to accept this evidence as

correct and as sufficient to displace the express provisions of the deed poll of 1888. I answer issues Nos. 1 and 4 in the negative.

The 3rd issue deals with the removal of the Thakurs and it will be convenient to state here the evidence with regard to this. The Plaintiff stated that when No. 67 was demolished the Thakurs remained in one room which was not demolished and that they were removed from room to room as convenience required during the rebuilding; that subsequently they were moved from No. 1 to No. 7 and to No. 67 passing through the public street even in his father's life-time. The Defendant Pradyumna denied that when they were moved to No. 7 and to No. 67 they were taken through the public street and stated that since he attained his majority they had not been moved from the Thakurbari. He stated that when they were moved they were kept in the Puja Dalan and taken back to the Thakurbari as soon as the ceremonies were over.

Upon the evidence it would appear that since the Thakurbari was built the Thakurs were not removed therefrom (apart from the removals by the Plaintiff of 1911 and 1914) except for the purposes of festivals when they were taken back to the Thakurbari at the conclusion of the festivals and it would appear that this has been discontinued.

I am not prepared to say that the removal for festivals constituted a removal within the meaning of the deed or that it affects the question which I have to decide.

With regard to the 5th and 6th issues the evidence does not support the understanding alleged in para. 14 of the plaint or the consensus alleged in para. 23.

With regard to the 10th issue no question of estoppel arises. The answer to the 1st point of issue No. 11 is in the

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affirmative and the 2nd point of this issue does not arise.

The real questions that arise for decision are contained in issue Nos. 2 and 9.

There is no dispute that the Thakurs were established by Mati Lal and that he imposed no condition as to their location and consequently I do not think that it was open to any subsequent *shebait* to impose restrictions which would fetter those who subsequently as heirs of the founder become *shebait*s.

But it is said that it is not open to those who are *shebait*s to take for the Thakurs the benefit of the Thakurbari founded and built by Jadulal without conforming to the restrictions which he imposed by the deed with regard to the removal of the Thakur Sree Sree Radha Shamsunderjee and reliance is placed on the case *Gossami Sri Gridhariji v. Romanlalji Gossami* (1).

But in the present case no question arises as arose in *Gossami Sri Gridhariji v. Romanlalji Gossami* (1), where the claim was to the *shebaitship* and to the temple. The only question that arises for my decision is whether Jadulal who was not the founder of the Thakur could impose a condition as to the location of the Thakur which would bind *shebait*s who came after him. I think he could not and I answer issues Nos. 2 and 9 accordingly. It may be that some day the question may arise for decision whether the Thakur can change his location every 3rd year and still keep his Thakurbari and he may be put to his election with regard to this but as already stated this question does not arise in the present suit as no claim is being made to the Thakurbari adversely to the Thakur. In the view I take issues Nos. 7 and 8 do not arise. With regard to the 12th issue this

(1) L. R. 16 I. A. 137: s. c. I. L. R. 17 Cal. 3 (1889).

has not been argued and the only damages that I can see the Plaintiff has suffered are the loss of such spiritual benefit as may ensue from worshipping the Thakurs, and this cannot be measured in money. I accordingly declare that the Plaintiff is entitled to move the Thakurs from the Thakurbari during his turn of worship and the Defendants must pay the costs to be taxed on Scale No. 2.

Mr. S. K. Ghose (of *Messrs. B. N. Basu & Co.*), Solicitor for the Plaintiff.

Mr. H. N. Dutt, Solicitor for the Defendant Pradyumna Kumar Mullick.

Mr. M. N. Sen, Solicitor for the Defendant Monmatha Nath Mullick.

J. N. R. *Suit decreed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 71 of 1920.

NAZIR AHAMAD CHOU-
DHURY and anr.,

Plaintiffs, Appellants,
v.

THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL and ors., De-
fendants, Respondents.

CHATTERJEA, J.
PEARSON, J.

1922,
24, March.

*Noabad lands, settlement of—Right of Govern-
ment in respect of such lands.*

Semle:—Government stands in the same position as an ordinary zemindar in respect of Noabad lands which it has a right to settle with whomsoever it likes.

This was an appeal against the decree of Babu Kumud Nath Roy, Officiating Subordinate Judge, 1st Court of Zillah Chittagong, dated the 28th of February 1920.

The facts of the case will appear from the judgment.

Babus Jogesh Ch. Roy and *D. L. Kastgir* and *M. Md. Nurul Huq Choudhury* for the Appellants.

NAZIR AHAMAD CHOUDHURY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Babus D. N. Chakravarty, Surendra Nath Guha and Chandra Sekhar Sen for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for possession of certain plots of land, on the allegation that some of the plots were reformations on their own land, that the remaining plots were accretions to the lands reformed, and that the Defendant No. 1, the Secretary of State, settled the lands with Defendants Nos. 2 to 5 disallowing Plaintiffs' petition for settlement.

The Court below gave a decree to the Plaintiffs for possession of the portion of the land found to be reformation of Plaintiffs' land and dismissed the suit in respect of the portion which was claimed as an accretion. The portion which was found to be reformation of Plaintiffs' land consisted of *dags* Nos. 6889 and 6890 and portion of 6888, and the claim of the Plaintiffs was decreed in respect of such plots. The appeal, therefore, relates to the land situate to the north of *dag* No. 6891, and to the west of the northern part of *dag* No. 6888 and the land to the west of the *dag* No. 6890.

Cross-objections have been preferred by the Respondents Nos. 2 to 5 with whom the lands were settled by the Defendant No. 1 (the Secretary of State) and relate to *dag* No. 6889, the northern portion of *dag* No. 6880, and the northern portion of 1762. There is no cross-objection with regard to *dag* No. 6890.

As the cross-objection raises the question of the correctness of the finding of the Court below in favour of the Appellant we would dispose of the cross-objection first.

It is contended on behalf of the Respondents that the *kabuliyat*, dated the

19th March 1916 (Ex. 5) under which the Defendants obtained a lease from some of the Duttas who had 12 annas share of the lands, refer to the entire *dag* No. 1762 which comprises these plots and *dag* No. 203 (which is not covered by the suit).

It is urged that the description in the document is absolutely clear, that there being no ambiguity, the Court ought not to have ordered a local investigation; and that the entire *dag* No. 1762, according to the description, falls within the *kabuliyat*. The *kabuliyat*, no doubt, refers to *dag* No. 1762, but it is contended on behalf of the Appellant that the word "entire" refers only to *dag* No. 203 which does not relate to any land in suit. However that may be, the *kabuliyat* purports to demise lands "appertaining to Taraf Azam Fateh" which the lessors obtained under the *pottah*, dated 8th Joist 1210 Maghi (20th May 1848). The lease therefore was in respect of lands of Taraf Azam Fateh only; it had nothing to do with Taraf Joy Narain Ghoshal.

It is also to be observed that the *pottah*, dated 20th May 1848 [Ex. 1 (1)] refers only to *dag* No. 6888 (the southern portion) which corresponds only to part of *dag* No. 1762. Neither 6889 nor 6890 ever belonged to Mahal Azam Fateh, but belonged to Taluk Joy Narain Ghoshal. The *kabuliyat*, dated 19th March 1916 does not mention Joy Narain Ghoshal at all.

It is contended on behalf of the Respondents that the area mentioned in the *kabuliyat* would cover the entire land. That is not clear. But even if it is so, the boundaries also should be taken into consideration. The western boundary of 6891 would not cover the entire western boundary of 1762; it would cover only a portion of the western boundary. Having regard to the facts mentioned

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above, and taking the document as a whole, we think that the Court below is right in holding that the Defendants' lease did not cover the *dags* decreed to the Plaintiff, and that the cross-objections must fail.

Turning now to the appeal itself, the first question to be considered is whether the land in respect of which the Plaintiffs' claim has been disallowed, was an accretion to the plots of land which have been decreed to the Plaintiffs and whether the Court below is wrong in holding that it was not an accretion.

It is contended on behalf of the Appellants that there was no defence by the Government that the accretion was not gradual and imperceptible, nor was there any evidence in support of such a case and we were referred to the evidence of some of the witnesses to show that the accretion was gradual and imperceptible.

It appears, however, that all the lands now in dispute were in existence in 1839. They were submerged shortly after, and re-appeared shortly before, the Cadastral Survey. They can be and have been identified by the Commissioner who in his report (which has not been challenged by either party) states that they are reformations in situ of Mouza Kattali. In a suit brought by the Duttas in 1914 in respect of *dags* Nos. 6882 and 6888 they stated that the western portion thereof had been washed away by the sea long ago, and reformed in situ since a few years before the Cadastral Survey. If the lands are reformations in situ, the question whether the accretion was slow and imperceptible or not does not arise. The Court below has held that they are reformations in situ of lands belonging to the Government and has also found that there was no gradual and imperceptible accretion.

The Plaintiff No. 2 Gouri Charan ad-

mils in his deposition that the "western portion of the disputed lands which have filled up is Government Noabad property." He adds, "I tried to have a settlement of it as an accretion to the *kaimi mahal* on the east but got none, I am ready to pay fair and equitable rent for that portion" and in another place he admitted, "the said accreted land is Noabad land but I cannot say if it is Shabek Noabad."

We accordingly agree with the finding of the Court below on this point.

It is contended, however, that even if the land is not an accretion to the Plaintiffs' land, they were entitled to the settlement of the land on the ground of contiguity and possession. It has been strongly urged before us that the Defendants Nos. 2 to 5 obtained settlement from the Secretary of State (Defendant No. 1) on the representation that the entire *dag* No. 1762 belongs to the Plaintiffs and that therefore the ground upon which the lands were settled with Defendants Nos. 2 to 5 fails.

There is no doubt, as would appear from the application for settlement made by the Defendants, dated the 8th November 1916, that they prayed for settlement on the ground of their having obtained *pottah* of the lands from the Duttas, and having been in possession of the "said land along with the *dag* No. 1762 as appertaining to the said *raiya*ti." In the order-sheet of the *khas tehsildar*, dated 23rd April 1917, it is stated that "Faizali and others claim it on the ground of possession as contiguous to the lands of their *jote* comprising C. S. Plot No. 1762," and again "Faizali is possessing not only the decretal land but the whole of C. S. Plot No. 1762 and the present Plot No. 18."

The *khas tehsildar* evidently was under the impression that the lease obtained by

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Faizali and others from the Duttas comprised the whole of Plot No. 1762. He says "Durga Charn Dutta relies more upon the boundary than upon the plot number given in schedule of the *jote* lease granted to Faizali and others. But from the *jote* lease itself it is quite clear that the whole of Plot No. 1762 and a portion of *khas* Plot No. 692 were settled with Faizali and others." The *khas tehsildar* took a *kabuliyat* from the Defendants on that very day (23-4-1917). The Collector approved of his order on the 14th May 1917. The *khas tehsildar* received rent on the 8th June 1917 from the Defendants, though a *pottah* was granted later, on the 26th July 1917. The Commissioner upheld the order of the Collector on the 17th August 1917. The *khas tehsildar* who has been examined in the present case says that he "did not make any inquiry as to any accretion as it was not an accretion" and that "other lands in the *char* were also let out not on the ground of accretion but on the ground of contiguity and possession."

The Secretary of State in his written statement stated: "The said land being situated contiguous west of C. S. Plot No. 1762 which is covered fully by the lease of Defendants Nos. 2 and 3 of date 6th Chaitra 1277 granted by Defendants Nos. 7, 8 and 11 was settled with Defendants Nos. 2 to 5 on the 23rd April 1917."

There is no doubt, therefore, that the lands were settled with the Defendants on the ground of contiguity and possession.

It is contended on behalf of the Respondents that the land might have been settled on the ground of its being contiguous to Plot No. 6891 which belonged to Razak Ali—one of the persons who obtained settlement of the land from Government. But the order-sheet of the *tehsildar* shows that the land was settled

on the ground that it was contiguous to *dag* No. 1762.

Then it is contended on behalf of the Respondents that the Plaintiffs were not in possession of these lands. The Respondents do not say that they were in possession of these lands before they obtained settlement. What they say is that the lands were sandy *char* and not capable of cultivation, and that at that time no cultivation was possible without raising an embankment, and, so, after obtaining settlement, they constructed *bunds* and brought the land under cultivation.

Reference is made also to an application submitted by the Duttas in Settlement Case No. 200 of 1916-17, dated the 17th February 1917 in which it was stated that the land on the western part does not yield any paddy even now. "It remains under deep water in the rainy season. I possess by catching fish, etc."

Reference is also made to certain *ek sona* (এক সোনা) *kabuliyats* produced on behalf of the Plaintiffs and certain other documents to show that the western boundary of the land dealt with by them was described as *dhum char* or sandy *char* . It is accordingly contended that the lands were not cultivated and that they were not in possession of the Plaintiffs.

In the 10th column of Ex. 25 (dispute in settlement operation) however, it is stated that the *khas mahal dag* No. 18 (which comprises the whole of the disputed land) was formerly possessed by Ram Chandra Dutta and that then it was possessed by Faizali and others since it was leased to them. It also appears from the report in the Settlement Case of 1909-1910 that certain persons the Duttas among them had trespassed on the lands of *dags* Nos. 644 and 692 without the permission of Government and had sowed paddy therein. *Dag* No. 692 comprises the disputed lands and it is stated in the

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report with reference to *dag* No. 692 that "there will be about 500 *aris* of paddy." This report was on the 4th November 1911.

The learned Pleader for the Respondents Nos. 2 to 5 contended that the report referred to Plots Nos. 6889 and 6890; but it refers to *dag* No. 692 which comprises all the plots. The *khas tehsildar* in his deposition says that he learnt on inquiry that paddy was being grown on the land for the previous two or three years. This inquiry he made just before the settlement with the Defendants.

Now, the Defendants, as already stated, do not claim to have been in possession prior to their obtaining settlement from Government and if any one exercised possession over the lands, it must have been the Plaintiffs who were in possession of the lands to the east. The evidence shows that, at any rate, the land was under cultivation for two or three years before 1917, even if we agree with the Court below in holding that the oral evidence as to possession adduced by both parties is not satisfactory. The learned Subordinate Judge however in considering the question of limitation says:—

"On the evidence and probabilities, therefore, I find this issue partly for the Plaintiffs."

It is contended on behalf of the Respondents that the Court below merely meant to hold that the suit was not barred with respect to the plots for which the Plaintiffs got a decree in that Court. But that is not so, as appears from other passages in the judgment, namely, "I have disbelieved the Defendants' possession, even *bonâ fide* possession, in any portion of the disputed land," and again "The mere fact of possession cannot give Plaintiffs any right as they have not admittedly acquired any right by adverse

possession against the Defendant No. 1 who represents the Government."

We are accordingly of opinion that the Plaintiffs were in possession of the lands. The lands were contiguous to the lands of the Plaintiffs which were in their possession. The Court below however has disallowed the claim for these plots as they are Noabad lands.

The question, therefore, for consideration is whether in respect of Noabad lands, Government has a right to settle lands with whomsoever it likes.

That the settlement was made on the ground of contiguity and possession, is clear from the proceedings, and reference is made even to sec. 13 of Reg. VII of 1882 in the order of the *khas mahal tehsildar*. But it has been contended before us by the learned senior Government Pleader that if Government had an absolute right to settle the land with anybody it liked, it was immaterial what procedure was adopted by the *khas mahal* officer; and that if any erroneous procedure was adopted by the officers of the Government, it would not create any estoppel or confer any right upon the Plaintiffs to claim settlement.

The determination of the precise nature of the right of Government in Noabad lands is not free from difficulty. The nature and incidents of Noabad lands have not been discussed by the Court below. The Plaintiffs do not appear to have raised the question as their case was that the land was an accretion and that they had a right to settlement. They did not pray in their plaint for settlement of the land on the ground of contiguity and possession though the facts were stated. Subsequently they applied for amendment of the plaint but the application was disallowed.

The learned Pleader for the Appellants referred to sec. 5, Chap. II of the Bengal

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Survey and Settlement Manual, 1917 (p. 2) where it is laid down that "the assessment of revenue in temporarily settled private estates will always be made under Reg. VII of 1822. In such estates where there are proprietors but no tenants, the whole settlement will be carried out under that Regulation;" and contended that if the lands are to be settled under Reg. VII of 1822, then the Appellants have a right to settlement because under sec. 13 of the Regulation, possession is not to be disturbed. But sec. 5 of the Settlement Manual deals with the assessment of revenue, and the question before us is whether in Noabad lands the Government stands in the same position as an ordinary Zamindar.

The cases of *Mahomed Israile v. Wise* (1) and *Watson & Co. v. Rani Brojo Soon-duree* (2) referred to on behalf of the Appellant have no bearing upon the present case. The first deals with a *lakherajdar's* right to settlement, and the latter with the right to permanent settlement of *char* lands under Reg. XI of 1825. The case of *Mohini Mohan v. Juggobundhu* (3) also relates to a case of accretion under Reg. XI of 1825. On behalf of the Respondents we were referred to certain passages from "selections from the Records of the Board of Revenue L. P. correspondence on the settlement of the Noabad land in the District of Chittagong." The question of whether Noabad taluk in Chittagong should be treated as "estates" is discussed in Mr. Carlyle's letter to the Commissioner of Chittagong dated the 6th July 1891 (See Vol. V, p. 143). We have not however been referred to any definite and clear decision regarding Noabad lands. It ap-

pears from the letter of the Government of Bengal to the Board of Revenue dated the 3rd November 1891 (Vol. V, pp. 158-159) that the Noabad Talukdars will not have three incidents of the proprietary right, *viz.*, the right to partition, to a separate account and to *malikana*. All these refer to Noabad Taluks. The cases of *Prasanna Kumar Roy v. The Secretary of State* (4) (known as the Ramoo case); and *Haider Ali v. Secretary of State* (5) and *Gangadas Sil v. The Secretary of State* (6) also relate to Noabad Taluks. The learned Government Pleader referred to Sarada Charan Mitra's *Land Tenure in Bengal*, 2nd Ed., p. 42 where it is stated that "Reg. III of 1828 declared the absolute right of Government to those Noabad lands." Reg. III of 1828 does not however appear to refer to Noabad lands in Chittagong; sec. 13 of the Regulation refers to lands in the Sunderbans. He also referred to Rampini's *Bengal Tenancy Act*, 4th Edition, p. 17 where a reference is made to letter No. 1729-173 dated the 24th July 1893 from the Government of India to the Government of Bengal in which it was stated that Noabad Taluks in Chittagong were to be treated as "tenures" and not as "estates." That indicates that Government is a proprietor in respect of Noabad lands. In the case of *Dharma Charan v. Ramesh Chandra* (7) the learned Judges observed that Noabad land is land which forms part of a Government estate. If Noabad is a Government estate, it would be similar to a Government *khas mahal*. In *Aminaddi v. Tarini Charan* (8) it was observed that as proprietor of the *khas*

(1) 13 B. L. R. 118 (F. R.); 21 W. R. 327 (1874).

(2) 17 W. R. 376 (1872).

(3) 9 W. R. 312 (1866).

(4) I. L. R. 26 Cal. 792; s. c. 3 C. W. N. 695 (1899).

(5) 13 C. W. N. 235 (1908).

(6) 20 C. W. N. 636 (1916).

(7) 24 Ind. Cas. 820 (1914).

(8) 24 C. W. N. 211 at p. 214 (1919).

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mahal, Government stands in the same position as a private Zamindar.

As stated above, the real contest in the lower Court did not turn upon the nature and incidents of Noabad lands; and although the matter has been argued before us on appeal, and the question is one affecting a large number of interests in Chittagong, it cannot be said that the evidence in the lower Court was directed to the point upon any comprehensive or exhaustive scale. We can only give our decision upon such materials as have been placed before us in the present case.

Having regard to the letter of the Government referred to in Rampini's Bengal Tenancy Act mentioned above, and the observation in the case of *Dharma Charan v. Ramesh Chandra* (7), it should be taken that the Government stands in the same position as an ordinary Zamindar in respect of Noabad lands. And if that is the position of the Government, it may settle lands like any ordinary Zamindar. In the case of *Sheikh Hazari v. Khanoo Mirda* (9) it was held that a Collector is not bound to grant a *pottah* of Government lands to the party in possession. We must accordingly hold that the Defendant No. 1 was not bound to settle the lands with the Plaintiffs.

Settlements made by the Government however appear to be made according to certain rules, and in the present case appear to have been made with reference to Reg. VII of 1882. The lands were settled with the Defendants Nos. 2 to 5 on the ground of contiguity and possession. So far as Plots Nos. 6888, 6889 and 6890 are concerned the settlement with the Defendants must fall through, having regard to the finding of the Court below with which we agree. The plots of land which are the subject-matter of the appeal

were also undoubtedly settled with them on the ground of contiguity and possession. It is so expressly stated in the proceedings. It is accordingly urged on behalf of the Appellants that when it is found that the settlements with the Defendants were granted under an erroneous impression, we should declare that the Plaintiffs are entitled to settlement if contiguity and possession are to be considered in settling lands. The Court however can declare the title of the Plaintiffs to settlement only if they have got a *legal right*. As it is, we are unable to make any declaration in favour of the Plaintiff. It is for the Government to consider whether it should rectify its previous erroneous assumption by settling the land with the Plaintiffs.

The Plaintiffs are entitled to get mesne profits in respect of the portion of the properties decreed in their favour from August 1917 up to the date of delivery of possession, or until the expiry of three years from the date of this decree, whichever event first occurs with interest thereon at 6 per cent. per annum. There will be no decree against the Defendant No. 1 as the Defendants Nos. 2 to 5 agree to pay the entire amount of mesne profits payable to the Plaintiffs. The mesne profits are to be ascertained by the Court below and final decree will be passed by that Court for the amount so ascertained in favour of the Plaintiffs. The case will be sent down to the lower Court for that purpose.

The result is that, subject to the order for mesne profits mentioned above, both the appeal and the cross-objection are dismissed.

The Appellant must pay 5 gold mohurs as costs of the Secretary of State for India and the Respondents Nos. 2 to 4 must pay one gold mohur to the Appellant.

(7) 24 Ind. Cas. 820 (1914).

(9) 4 W. R. 52 (1885).

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No order as to costs in the cross-objection.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)
APPEALS FROM APPELLATE DECREES
Nos. 1416, 1514 AND 1515 OF 1920.

WOODROFFE, J.
 CUMING, J.
 1922,
 4, July.

GOURI KUMARI DAS,
 Plaintiff, Appellant,
 v.
 INDRA KUMAR MUKHO-
 PADHYA and anr., De-
 fendants, Respondents.

Hindu law—Debutter property—Order of succession of shebait as laid down in deed of endowment, if may be altered by donor.

It is clear law that the donor of a debutter property can make no change in the order of succession of shebait as laid down in the deed of endowment in the absence of a reservation to that effect in the deed.

These were appeals against the decrees of Babu Parada Kinker Mukherjee, District Judge of Zillah Burdwan, dated the 31st March 1920, reversing the decrees of Babu Hem Chandra Mitra, Munsif, 1st Court of that place, dated the 29th of January 1919.

The facts of the case material to this report will sufficiently appear from the judgment.

Dr. Dwarka Nath Mitter and Babu Bankim Chandra Mookerjee for the Appellant.

Babus Mohendra Nath Roy, Gopendra Nath Das and Pramatha Nath Bando-padhyia for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—These are three appeals Nos. 1416, 1514 and 1515 of 1920 which are analogous though a question arises in the second and the third appeal

as to whether an appeal lies, a question which does not arise in the first appeal.

The first appeal arises out of a suit brought by the second wife of one Uma-charan Dey for recovery of rent. An objection was taken by the Defendants in that suit that the Plaintiff-Appellant had no title to sue as the *shebait* and that the title of *shebait* was in the elder widow of Uma Charan Dey. Uma Charan Dey executed a deed of gift in respect of his movable and immovable properties, constituting the same *debutter* in the year 1915 and making himself the first *shebait*. That document provided for the devolution of the office of *shebaitship* as follows : “ After my demise my eldest wife Srimati Raman Kumari Dasi shall be the *shebait* of the deities and after her my youngest wife Srimati Gouri Kumari Dasi shall be the *shebait*. After the death of my both wives if there be any son born from the womb of my said wives then that son will be the *shebait* and for want of that if I take any son as *dattak* the said *dattak* son shall be *shebait*. If through misfortune there be no son born of me and in case I could not take a son as *dattak*, then the *shebait* or *shebait*s selected by me, by a Will or any other document, of my properties, he or they shall be *shebait*s. The *debutter* properties will be managed by the *shebait*s after me.” Now it is clear law that Uma Charan Dey could not make any change in the order of succession of *shebait*s unless he had made a reservation to that effect in the deed and the question before us in this appeal is whether upon a true construction of this document there had or had not been such a reservation as entitled him to appoint, as he subsequently did, his second wife as *shebait*. In my opinion he had no authority to appoint his second wife as *shebait* as he did in the year 1917. Upon the construction of this document I think that after the death of

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Uma Charan Dey his eldest wife was to be the *shebait* and after her his younger wife and after the death of both of them either the natural son or the adopted son of the creator of the trust and it is only after the two wives had taken in the order mentioned in the document and in the absence of any natural or adopted son that provision was made in the deed for selection of a *shebait*. In my view therefore Uma Charan Dey was not competent to pass over the eldest wife who was the *shebait* under the deed of 1915 and to make an appointment in favour of the younger wife by the deed of 1917.

But then it is said that for 19 months of the period for which rent is claimed the rent accrued due during the life-time of Uma Charan Dey. It is then argued that even if Uma Charan Dey could not validly appoint his second wife to succeed him after his death he might have appointed his second wife to act during his life-time. Assuming that he could have done this and assuming that the Plaintiff-Appellant could have during the life-time of Uma Charan sued to recover on behalf of the deity the rent accruing due during the life-time of Uma Charan Dey we have it as a fact that no such suit was brought. Now there is an arrear of rent for the period as mentioned. The question arises who is entitled to sue for recovery of such arrears which involves the discussion of the question with which I have already dealt and the answer to which is that only the senior widow can sue to recover such rent on behalf of the deity.

Therefore in my opinion this appeal fails and must be dismissed with costs.

As regards the two other appeals a further objection is taken on the ground that no second appeal lies and I am disposed to think that there are some grounds for this contention. But it is not necessary

to decide this question because on the merits the two appeals must fail for the reasons which I have given in dealing with the construction of the deed of dedication in the first appeal. The second and third appeals are also dismissed with costs.

The connected Rules are discharged. No order is made as regards the costs of the Rules.

CUMING, J.—I agree.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS

Nos. 13 AND 14 OF 1921.

JITENDRA NATH BHAT-	
CHATTERJEA, J.	TACHARJEE, Creditor
CHOTZNER, J.	No. 1, Appellant,
1921,	v. '
29, July.	FATEH SINGH NAHOR
	and ors., Respondents.

Provincial Insolvency Act (V of 1920), sec. 4, sub-sec (1)—Decision of question of title, how far discretionary with Court—Sub-sec. (3), Court if bound to take evidence or give reasons for refusing to decide questions of title or for holding that the insolvent has a saleable interest in any property and ordering its sale—Nature of materials upon which Court may come to such decision.

A. was adjudicated an insolvent, and a Receiver was appointed. After various intermediate proceedings the insolvent's brother B. appeared in Court and laid claim to certain properties. The Judge put to him certain questions and elicited certain answers. The Receiver also submitted a report and a petition on the same date. The Judge after considering the report and the petitions submitted and after hearing pleaders refused to go into the question of title and decided that the insolvent had a saleable interest in the properties. He thereupon directed the Receiver to sell the insolvent's right, title and interest in the properties under the provisions of sub-sec. (3) of sec. 4 of the Provincial Insolvency Act.

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Held—That though the Court had power under sub-sec. (1) of sec. 4 to decide a question of title, it had full discretion to follow the course laid down in sub-sec. (3), i.e., to refuse to decide questions of title and to direct sale of insolvent's right, title and interest, whatever that might be. Where the Court has reason to believe that the debtor has a saleable interest in any property, it may without further enquiry sell such interest. The matters stated in the report of the Receiver and the answers given by the claimant when questioned by the Judge, were sufficient materials for his coming to the conclusion that the debtor had a saleable interest in the property.

These were appeals preferred, one against the order of J. McNair, Esq., District Judge of Zillah 24-Parganahs, dated the 25th of September 1920, and the other against the order of H. M. Veitch, Esq., 1st Additional District Judge of Zillah 24-Parganahs, dated the 22nd of December 1920.

The facts of the case are briefly as follows:—One Girindra Bhattacharjee was adjudicated an insolvent by the District Judge of 24-Parganahs on the 29th November 1919 and a Receiver was appointed. After various intermediate proceedings the insolvent's brother Jitendra Bhattacharjee appeared in Court on the 25th September 1920, and laid claim to certain properties. Both he and the creditors then apparently asked for an enquiry into the title to the disputed properties under sec. 4 (1) of the Provincial Insolvency Act (V of 1920). The Judge put certain questions to Jitendra and recorded the purport of the answers in the order. The Receiver too submitted a report and a petition on that date. The Judge after perusing all the petitions, and the Receiver's report, and presumably considering also the answers mentioned

above, decided on the said 25th September that in view of his heavy file, he would not go into the question of title and under the provisions of sec. 4 (3) directed the Receiver to sell the insolvent's right, title and interest in the properties for what they would fetch. Thereafter, Jitendra applied to the Additional District Judge, in whose file the case then was, for stay of sale and the said Additional Judge passed an order to the effect: 'Let the sale be stopped pending inquiry about insolvent's interest in the properties.' On the 22nd December 1920 when the matter came up before his successor, he held that his predecessor did not seem to have seen the District Judge's previous order (dated the 25th September) and his order was passed *ex parte*, and that in any case it could not be regarded as a definite order setting aside the District Judge's order, and he accordingly dismissed the application for further enquiry under sec. 4 (1). The claimant Jitendra thereupon preferred the present two appeals to the High Court against the orders, dated the 25th September 1920 and 22nd December 1920 respectively.

Dr. Sarat Ch. Basak (with him *Babu Sarat Ch. Mookerjee*) for the Appellant.

Babus Banku Behari Mullick Chowdhuri, Jitendra Nath Roy, Peary Mohan Chatterjee and Krishna Lal Banerjee for the Respondents.

Dr. Sarat Chandra Basak (with him *Babu Sarat Chandra Mookerjee*) for the Appellant.—Everything was done in my absence. The Receiver's report was *ex parte* and I had no opportunity to meet the facts stated in the Receiver's petition submitted on the 25th September 1920. The Court also says that I appeared for the first time on the 25th September. I had not even a copy of the Receiver's report or the petition. Everything up to

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that time had been done behind my back and on that day orders were passed for selling the properties.

[*Babu Jitendra Nath Roy* for one of the Respondents.—The Appellant was served with notice in the beginning of September 1919 as the order-sheet will show (*vide* orders Nos. 3, 5 and 7, pp. 1 and 2 of the Paper Book). But he appeared in Court more than a year after that, *i.e.*, on 25th September 1920. If everything was done in his absence he could thank himself alone for it.]

Sec. 4, sub-sec. (3) says: "But has reason to believe that the debtor has a saleable interest." But the condition is "where the Court does not deem it expedient or necessary to decide any question of title, etc." This condition must be satisfied. Sufficient reasons should be given for holding that it is not necessary or expedient to decide questions of title and evidence should be taken for coming to the conclusion that the debtor has a saleable interest in the properties. But this has not been done nor have sufficient reasons been given for adopting the course laid down in sub-sec. (3). The Judge said that he had no time to go into the question of title. But that is not sufficient reason or ground for deeming it inexpedient or unnecessary to go into questions of title. The Judge formulates as reason for rejecting the prayer for enquiry into title "other urgent work on the file." That is not at all a sufficient ground for proceeding under sub-sec. (3). Cites *Re : Umbika Nandan Biswas* (1).

The Court was wrong in saying that the Appellant in reply to its question had said that he was joint with his brother Harendra. He had said that he maintained his younger brother Harendra as the latter did not earn anything.

It is very necessary that the question

(1) I. L. R. 3 Cal. 434 (1878).

of title should be gone into to do complete justice between the parties. And the Receiver too wants enquiry into title.

Cites *Joy Chandra v. Mahomed Amir* (2) and *Nilmoni v. Durga Charan* (3). The order passed by Mr. McNair as District Judge was superseded by the subsequent order of the Additional District Judge.

If without enquiry into the insolvent's title, his right, title and interest, whatever they might be, are sold, the jewellery shop is bound to suffer. It was a flourishing business. Its credit has already suffered heavily on account of this affair and it will further suffer.

Babu Banku Behari Mullick Chowdhuri for the Respondent No. 1.—Some of the creditors are willing to purchase the right, title and interest of the insolvent whatever they may be. One who knows what an unusually large number of insolvency applications are made at Alipur, will realise that that alone is a sufficient ground for refusing to decide questions of title in these cases. If the Judge has to do that, he will be wholly occupied with this work alone all the year round.

Babu Jitendra Nath Roy for the Respondent No. 2f.—The Appellant was duly served with notice before 8th September 1919 and he chose to stand by for more than a year. When he appeared for the first time on the 25th September 1920, he said that he did not appear so long to avoid spending money for nothing and being harassed. He did not plead want of knowledge or that no notice was served on him (*vide* order-sheet, p. 23 of the Paper Book).

Heaviness of the file was not the only reason—there were other reasons given. There were sufficient materials before the Judge for proceeding under sub-sec. (3).

(2) 23 C. W. N. 702 (1917).

(3) 22 C. W. N. 704 (1918).

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The Receiver's report was accompanied by a petition verified by him and the facts stated in that verified petition could be acted upon by the Judge. The Judge was also guided by probabilities of the case, because the jewellery shop belonged to the insolvent's father and it was in the *benami* of the Appellant because the said father was a Government servant. The answers given by the Appellant to the questions put to him by the Judge could be taken as good evidence. It is discretionary with the Court to sell the undetermined right, title and interest of the debtor when he does not deem it expedient to enter into questions of title. He has given some reasons and the Receiver's verified petition, the answers given by the Appellant, and the petitions of the other creditors and the verbal submissions by the Receiver and the pleaders were sufficient materials for the Court's decision to proceed under sub-sec. (3). No separate evidence or further enquiry was necessary. Besides, the heavy nature of the file in this particular district is a very good reason for leaving questions of title alone for the time being.

The Appellant says that the lower Court wrongly recorded the answer given by him with regard to his brother Harendra. It is wholly an after-thought. The Appellant did not challenge it or take any exception in that respect in the long petition of objections which he submitted thereafter.

It was not at all necessary to decide questions of title. That would have been making a complicated matter still more complicated, and would have unnecessarily caused waste of a large amount of money. The ruling cited was a decision under the old law. The jewellery shop cannot suffer. It is not under attachment nor is it in the Receiver's possession. Its credit cannot

have suffered. No notice has been hung up outside the shop to show its connection with any insolvent. Some of the creditors are prepared to purchase the undetermined right of the insolvent instead of spending good money over the determination of his right. If that only is sold, we believe we will all be paid in full. The lower Court was right in refusing to decide questions of title and in ordering sale of the insolvent's undetermined right, whatever that might be.

Babu Peary Mohon Chatterjee (with him *Babu Krishna Lal Banerjee*) for the Respondent No. 18.—The Judge has given very cogent reasons for refusing to decide the question of title in p. 23 (b), Reads. He said it would involve a very long and cumbrous process, and would be attended with hardships and difficulties and costs. Therefore he deemed it inexpedient to do so. That was a sufficient reason for proceeding under sub-sec. (3).

THE JUDGMENT OF THE COURT was as follows :—

The Court, no doubt, under sub-sec. (1) of sec. 4 of Act V of 1920, has full power to decide a question of title, but the Judge has in the present case followed the course laid down in sub-sec. (3).

It is contended that no sufficient reasons are given for adopting this course, and that evidence ought to have been given before doing so. But the Court, where it does not deem it expedient or necessary to decide any question of the nature referred to in sub-sec. (1) but has reason to believe that the debtor has a saleable interest in any property, may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit.

It appears that notice was served upon Jitendra Nath Bhattacharjee who is the Appellant before us, on the 8th Septem-

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ber 1919. He did not appear in Court until the 25th September 1920. The learned Judge put to him certain questions and the purport of the answers is mentioned in his order. Upon a consideration of the matters stated in the report of the Receiver and of the answers given by the Appellant when questioned by the learned District Judge, he came to the conclusion that the debtor had saleable interest in the property.

At one stage of the case, it is true, the creditors wanted to have a decision on the question whether the properties were joint family properties or not; but we understand that the creditors are now willing to purchase whatever interest the insolvent had in the property.

In these circumstances, we do not think that we should interfere with the order of the Court below.

The appeals are accordingly dismissed with costs, two gold mohurs, to be divided among the persons who have appeared.

J. N. R. *Appeal dismissed with costs.*

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM APPELLATE DECREE
No. 196 OF 1920.

HAR KISHORE SEAL
and ors., Plaintiffs,
Appellants,
v.

WOODROFFE, J.
B. B. GHOSE, J.

1922,
9, March.

THAKUR DEAN BAISHNUB
and anr., Defendants,
Respondents.

*Hindu Widow Re-marriage Act (XV of 1856)—
Son dying after mother's re-marriage—Right of
mother to inherit—Hindu law.*

*Apart from any provisions of the Widow
Re-Marriage Act, a Hindu mother may in-
herit from her son by a former marriage,
the son having died after her re-marriage.*

AKORAH SOOTH *v.* BOREANEE (1) *referred to.*

(1) 2 B. L. R. 199, 11 W. R. 82 (1868).

This was an appeal against the decree of Babu Kali Prasanna Sen, Subordinate Judge, 1st Court of Zilla Sylhet, dated the 26th August 1919, affirming the decree of Babu Bhuban Mohon Sinha, Munsif, 3rd Court at Habiganj, dated the 24th February 1919.

The facts of the case will appear from the judgment.

Babus Broja Lal Chakravarty and Preonath Dutt for the Appellants.

Babus Jogesh Chandra Roy and Birendra Kumar Dey for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for recovery of possession of and declaration of title to lands and we deal with only one point in this case. The question which arises is this. It is admitted that the property which is the subject-matter of the suit belonged to a man of the name of Madan. The Plaintiffs-Appellants are the purchasers from the daughter's sons of the grandfather of Madan. The Defendants claim under purchase from the mother of Madan. Madan, the son died admittedly after the re-marriage of his mother. Now the question arises which of the parties has acquired title by their purchase; and this depends upon the question whether the daughter's sons of the grandfather of Madan were the heirs of Madan or whether Madan's mother was his heir. Both Courts have found in favour of the latter alternatively and accordingly dismissed the suit and the appeal. The question therefore which we have to decide is whether or not Madan's mother who is *prima facie* his heir under the Hindu law was incapable of inheriting by reason of the second marriage. The learned Judges of the two lower Courts have decided the case after having referred to two decisions,

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one of this Court, namely, the case of *Akorah Sooth v. Boreanee* (1), and the other a Full Bench decision of the Bombay High Court, namely, the case of *Basappa v. Rayava* (2). The learned Vakil for the Appellants has sought to distinguish these decisions on the ground that they deal with cases governed by the Widow Re-marriage Act (XV of 1856) and his contention is this that the Act was passed for the purpose of removing a bar or disqualification; that if there is no bar to a re-marriage then the Act does not apply and that such is the case here according to the evidence which has been accepted, that widow re-marriage was permissible amongst the caste to which Madan belonged.

On the other hand it is contended for the Respondents that the Act is of universal application and authority is relied upon in support of the respective contentions of both sides. In our opinion it is not necessary to decide the point. Whatever view we accept as regards the argument addressed to us on the point this appeal must fail.

It is conceded that if the Act applies then the decision of this Court to which we have referred is conclusive on the point which is now before us. We are of opinion that that decision is also an authority in favour of the Respondents and against the Appellants even on the assumption of the Appellants' argument that the case is not one under the provisions of that Act, because, in our opinion, it must be taken that apart from any special provisions of that Act it was decided in that case that a mother may inherit from her son after re-marriage. It has been held that under the general Hindu law the widow is entitled to succeed to the estate of her son. That case was

followed by a Full Bench of the Bombay High Court and we agree in the decision of the learned Chief Justice in that case when he stated that whatever might have been his view had the matter been uncovered by authority it would (in his opinion) be wrong to disregard a rule affecting rights of property established as far back as 1868 by the decision of a Full Bench of the Calcutta High Court in the case of *Akorah v. Boreanee* (1).

In our opinion therefore the appeal fails and it is dismissed with costs.

S. C. C.

[CRIMINAL APPELLATE JURISDICTION.]

GOVERNMENT APP. NO. 2 OF 1922.

SUPERINTENDENT AND
REMEMBRANCER OF

SANDERSON, C. J.

PANTON, J.

1922,

7, June.

LEGAL AFFAIRS,
BENGAL, Appellant,

TRAILAKHYA NATH
CHATTERJEE,
Respondent.

Bengal Municipal Act (III of 1884, B. C.), secs. 261 and 273 (2)—“Using a place as a kiln for making bricks,” meaning and effect of—“Kiln,” what it actually signifies—Country panjas or clamps, if come within the definition of “kiln.”

A certain person was prosecuted for burning bricks in panjas in contravention of sec. 273 (2) of the Bengal Municipal Act, which prohibits using any place, within the Municipal limits, “as a kiln for making bricks without a license.”

Held—That the definition of a “kiln” points to a structure, which is of a permanent nature. The process used for making bricks (e.g., by panjas or clamps) did not amount to using the place as a kiln and hence no offence was committed.

If, however, there is a doubt about the

(1) 2 B. L. R. 199; 11 W. R. 82 (1868).

(2) I. L. R. 29 Bom. 91 (F. B.) (1904).

(1) 2 B. L. R. 199; 11 W. R. 82 (1868).

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interpretation of the word "kiln," the words of the section ought not to be strained unduly against the Defendant. In a case of this kind, it is not the function of the Court to strain the meaning of the particular section of the Act, because if the particular process in question is in the opinion of the authorities such a process as ought to be brought within the purview of the section, it is open to them to amend the Act.

This was an appeal preferred on the 3rd April 1922 against an order of acquittal made by the Sub-Deputy Magistrate of Ghatal (Babu Nirmal Kumar Sen), on the 3rd January 1922.

The facts are briefly as follows :—

Under the sanction of the Chairman of the Ghatal Municipality, one Trailakhya Nath Chatterjee was prosecuted under sec. 273 (2) of the Bengal Municipal Act in the Court of the Sub-Deputy Magistrate of Ghatal for having, without a license as required by sec. 261 of the Act, burned bricks in a kiln in a place called Konnagore within the said Municipality.

The accused was acquitted by the Sub-Deputy Magistrate and the present appeal was preferred by the Local Government against the said order of acquittal.

Mr. Orr for the Crown (Appellant).

Babus Manmatha Nath Mookerjee and Satindra Nath Mookerjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Superintendent and Remembrancer of Legal Affairs, Bengal, against a decision of a Sub-Deputy Magistrate, 3rd class, of Ghatal, and the matter arises out of a prosecution, in which one Trailakhya Nath Chatterjee was the Defendant, under sec. 273 (2) of the Bengal Municipal Act, which provides that, "who-

ever, in a Municipality, without a license, uses any place for any of the purposes specified in sec. 261, or sec. 263, or uses any place as a kiln in contravention of the provisions of sec. 262A and so on, shall be liable, for every such offence, to a fine." And the material part of the sec. 261 which is applicable to this case is as follows :—"Within such local limits as may be fixed by the Commissioners at a meeting, no place shall be used without a license from the Commissioners, which shall be renewable annually, for any of the following purposes, namely, as a tannery, slaughter-house, or kiln for making bricks, pottery, tiles or lime."

The allegation in this case was that the Defendant had, without a license, used a place as a kiln for making bricks. The brick-field was said to be about 50,000 square feet and the method of manufacturing bricks was, what is called in this country, in "*panjas*," or as it has been said by one of the witnesses "*clamps*." The description of a "*panja*" or "*clamp*" is given by the witness, Joy Kumar Sarkar, who was called for the Defendant. He says "there is a difference between a kiln and a clamp. In a "*clamp*" or "*panja*" the fuel and bricks are placed in alternate layers. In a kiln, which means a room or masonry enclosure with or without roof, the bricks are stacked without any fuel and burn from places or fuels arranged below the stack, in which the fires are lighted and kept up with fresh supplies of wood or coal till the bricks are burnt." Then he says, "we never say Bull's clamp but Bull's kiln and we say 'country clamp' which does not mean a kiln." Then in describing the process adopted by the Defendant, he said, "I would not say that the bricks were burnt there in kilns, but they were burnt in "*clamps*" or country "*panjas*."

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On the other hand, it has been contended that this process of burning bricks by placing the fuel and the bricks in alternate layers so that they reach up to a considerable height and cover a considerable area really in effect amounts to the creation of a kiln. The Magistrate decided in favour of the Defendant holding that this process was not a kiln and the Legal Remembrancer has appealed. The definition of a kiln in the Oxford Dictionary is as follows:—"A furnace or oven for burning, baking or drying of which various kinds are used in different industrial processes." Then it gives an instance, "An oven or furnace for baking bricks, tiles or clay vessels, or for melting the vitreous glaze on such vessels."

That definition in my opinion points to a structure, which is of a permanent nature. Further I was struck with the account which the learned Vakil read from the Encyclopædia Britannica in volume 4 at page 520. It runs as follows:—"It is evident that the best method of firing bricks is to place them in permanent kilns, but although such kilns were used by the Romans some 2,000 years ago, the older method of firing in "clamps" is still employed in the smaller brick fields, in every country, where bricks are made. These clamps are formed by arranging the unfired bricks in a series of rows or walls, placed fairly closely together so as to form a rectangular stack. A certain number of channels or fire-mouths are formed in the bottom of the clamp and fine coal is spread in horizontal layers between the bricks during the building up of the stack. Fires are kindled in the fire-mouths and the clamp is allowed to go on burning until the fuel is consumed throughout. The clamp is then allowed to cool, after which it is taken down and the bricks sorted." In that description there is

clearly a distinction drawn between that which is a "clamp" and that which is a "kiln," and the process of making bricks by means of "clamps" seems to be older than the kilns which were used by the Romans about 2,000 years ago. Giving to the word "kiln" its ordinary meaning, I am inclined to the opinion that the Magistrate was right in his construction. If, however, there is a doubt about it, the words of the section ought not to be strained unduly against the Defendant. In my judgment there is force in the argument which the learned Vakil presented, upon the construction of this part of the section. The words are, "using a place as a kiln for making bricks." His argument was that if it had been intended to prohibit the manufacture of bricks not only by means of a kiln but also by means of the older system of "clamps," it would have been sufficient for the Legislature to provide that no place shall be used without a license from the Commissioners for the purpose of making bricks; consequently, we must take it that the words "no place shall be used as a kiln for making bricks," were advisedly used by the Legislature having regard to the ordinary meaning of the word "kiln" as distinguished from "clamps." In a case of this kind, in my judgment, it is not the function of the Court to strain the meaning of the particular section of the Act, because, if the process which is aimed at in this prosecution is really a nuisance and if it is in the opinion of the authorities such a process as ought to be brought within the purview of the section, it is open to them to amend the Act.

For these reasons, in my judgment, the appeal must be dismissed.

PANTON, J.—I agree.

J. N. R.,

Appeal dismissed.

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by them in the manner pointed out by him. The next item which the Subordinate Judge took up for examination was the sum of Rs. 19,725, with which he deals in the same exhaustive manner and shows how that sum was divided and how it was applied by the persons among whom the division was made. He shows that out of that sum Rs. 7,400 were set apart to Ramalinga, Rs. 7,400 to Lakshmivaraha and that Rs. 4,925 were given to Defendant No. 2. After an examination of the documents connected with this division he came to the conclusion that Lakshmivaraha received his share and applied the same to his uses, and that, therefore, he is not entitled to any share in the sums allotted to the Defendants Nos. 1 and 2. With regard to this item the High Court take a different view. They hold, upon a letter which Krishna Annavi No. 2, the first Defendant's father, wrote to the manager of the mortgagor on the 26th March 1909, saying that, "We consent to receive for the total debt due by the Zemindar a certain rate of interest," that there was no such division as the first Court had found. With regard to Ex. C., on which practically the decision of the High Court in respect of this particular item rests, it seems sufficient to say, as the Subordinate Judge properly observes, that a mere statement of Krishna Annavi No. 2 cannot outweigh the other facts.

With regard to the item of Rs. 6,550, the Subordinate Judge has applied the same method of examination and the High Court have affirmed his view. Regarding another item consisting of Rs. 1,795, due from a Mutt on a mortgage, the Subordinate Judge held that it had been divided among the parties in accordance with the allotments shown in the list. The learned Judges of the High Court have set aside his finding upon what

appears to their Lordships a certain misapprehension of the facts. These facts are fully set out in the judgment of the first Court, and do not require repetition.

Regarding item (No. 2) in the first list, which amounted to Rs. 7,594, due to the Annavi family from a Zemindar, it appears that Rs. 2,847 were set apart to Ramalinga and the same amount to Lakshmivaraha and the balance of Rs. 1,898 was given to the second Defendant. Respecting this item the Subordinate Judge deals with it equally, exhaustively and holds—

"In this item, Rs. 2,847-15-9 was set apart to Ramalinga Annavi and the same amount to Lakshmivaraha Annavi. The balance, Rs. 1,898-10-6, was set apart to the 2nd Defendant. Exhibit XI is a pro-note for Rs. 3,185-2-1 executed to 1st Defendant's father, Krishna Annavi, by Sivan Sethuroyar on 13th August 1897. This amount is described as his father's share in the amount due under a pro-note executed to Ramalinga Annavi and on account of a chit conducted by Sivan Sethuroyar. This pro-note was attested by Lakshmivaraha Annavi and Ramakrishna Annavi. Ex. XI (a) is a pro-note for Rs. 3,846-13-8 executed by Sivan Sethuroyar on 5th August 1900, for the amount due under Ex. XI. Sivan Sethuroyar's son, Sundaramsubramania Sethuroyar executed to Krishna Annavi, the 1st Defendant's father, the pro-note, Ex. XI (a), on 28th July, 1903, for Rs. 4,671-7-0 being the Principal and interest due under Ex. XI (a). Defendants' 7th witness, Mana Rama Aiyar has attested Exs. XI and XI (b). Defendants' 5th witness, Jagannadha Aiyar who was Kariyasthan under Sivan Sethuroyar, swears that he wrote Exbt. XI and that first Plaintiff's father and second Defendant attested it. This witness also wrote the pro-note, Ex. XII, which was executed to second Defendant by Sivan Sethuroyar on the same date as Ex. XI, namely 13th August 1897, for Rs. 2,122-6-8. The amount is described in that document as his share. This pro-note was renewed in second Defendant's name on 5th August 1900, by Ex. XII (a) for Rs. 2,564-8-11 and a pro-note

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similar to Ex. XI (b) was executed to second Defendant for Rs. 3,114-4-0 on 28th July 1903. The pro-note executed to first Plaintiff's father on the dates of Exs. XI and XII has not been produced. But it is mentioned in the pro-note, Ex. XIII, for Rs. 3,844-13-8, which was executed to first Plaintiff's father on 5th August 1900, at the same time as Exs. XI (a) and XII (a). Ex. XIII (a) was executed to first Plaintiff's father in renewal of Ex. XIII by Sivañ Sethuroyar's son for Rs. 4,671-7-0 on the same date as Exs. XI (a) and XII (b). These documents are proved by Defendants' fifth witness, Jagannadha Aiyar. Defendants' 6th witness, Ganapathi Aiyar, wrote Exs. XI (a), XII (a) and XII.

"On the first of December 1903, Sivañ Sethuroyar's son, Sundaramsubramania Sethuroyar, executed the sale-deed, Ex. XIV, for Rs. 15,350 in respect of certain lands in the village of Vellanguli, that is, the properties described in Sch. VIII, and a land in Uppubiyanputtur in the Oorkadu Zemin, that is, item No. 1 in Sch. XII (b). The sale deed was executed jointly to first Plaintiff's father, first Defendant's father and second Defendant. The recital in the sale-deed is that out of the sale price, Rs. 7,000 was paid in cash and that the balance, Rs. 8,350, was credited towards a portion of the amount due to the vendees."

In respect of this item the High Court took a different view. They state their reasons thus :—

"There is nothing in the document to show that this amount was not the common joint property of all the three persons. The balance of Rs. 8,350-0-0 was credited towards a portion of the amount due to the vendees under various promissory notes and a razi-namah decree. There is nothing in the document to show the debts that were due to each individual co-parcener. There is no doubt, therefore, that the property purchased under Ex. XIV was treated as common property. The purchase in the names of all the co-parceners jointly is inconsistent with the case set up by the Defendants so far as this property is concerned. The Subordinate Judge says that the three persons purchased the property with the intention of dividing it along with the other lands of the family which were left undivided. If this is so,

there is nothing to suggest that this property was not intended to be treated as the other immoveable properties in which they were equally interested. There is nothing to support the inference of the Subordinate Judge that this property should be divided in the proportion in which the debts were divided. We therefore hold that the Plaintiffs are entitled to a half share in the property purchased under Ex. XIV."

In their Lordships' opinion the view expressed by the Subordinate Judge appears to be fully warranted by the evidence.

The theory that in 1895 there was only a partial division of the outstandings which only related to three items, whilst the rest were left joint, is not consistent with the evidence, nor indeed logical. The Defendant No. 2, in his written statement, gives the reason why the joint money-lending business was wound up. He says that in that year or about that time Lakshmivaraha desired to make some gifts of money to his daughter: the other members objected to those monies being paid out of the joint funds; it was then decided that the business should be wound up, and the shares of the different parties ascertained and divided; that Lakshmivaraha thus obtained his share, and out of that share made the gifts which are now impugned by the Plaintiffs. This statement is supported by Defendant No. 2 in his evidence. The reason for the division is clear and straightforward, and explains the subsequent conduct of the parties to the transaction. The deliberate preparation of the lists with their precise details and systematic apportionment of shares, the setting apart of a sum for worship, and the allotment of a sum to Muthuswami disproportionate to the share to which he was legally entitled, for reasons which do not seem at all illegitimate, betoken a design to wind up altogether the family

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money-lending business and divide the outstandings. That those outstandings were, in fact, divided and were taken by Ramalinga, Lakshmivaraha, and the second Defendant in certain specific shares which roughly came to three-eighths to the first two and two-eighths to Rama Krishna is proved beyond doubt. When subsequently the three combined in fresh purchases or mortgages they contributed towards such acquisitions in proportion to the shares they acquired on the division of the outstandings.

In connection with these purchases, the Subordinate Judge pertinently observes :—

“ In all these documents there is reference to *Thamgal bhagam* (your share). If there was no division, this recital would not have been made. The object of taking the signatures of the other two co-parceners in the documents executed to each of them was to prevent them from afterwards contending that the documents were taken without their knowledge.”

And the oral evidence shows that the rents and issues of the properties so acquired were taken by the parties in those shares. The High Court does not seem to have attached much importance to this circumstance. But the enjoyment of the subsequent acquisitions is strong evidence of the fact, the Subordinate Judge has found, that they bought them in those shares and enjoyed them in those shares.

It has been strongly contended, on behalf of the Plaintiffs, that Narayana was of age in 1895 and was not a party to the partition, and is, therefore, not bound by it. But it is conclusively proved that Narayana acquiesced in and adopted the acts of his father not only in his life-time, but also since his death. He cannot now turn round and repudiate the division made in 1895. On the whole, their Lordships are of opinion that the view taken by the High Court of what

took place in that year cannot be sustained.

There remain now the two questions, one relating to the validity of the two gifts made by Lakshmivaraha to the fourth Defendant, Ponnu Annal. The first is an assignment of Rs. 5,000 out of the money which fell to the share of Lakshmivaraha due from the Thiruvavuduthurai Mutt. This was done at the instance of Lakshmivaraha. The other is an assignment of a usufructuary mortgage held by him. In the aggregate the two sums amount to Rs. 8,000. The father has undoubtedly the power under the Hindu law of making, within reasonable limits, gifts of moveable property to a daughter. In one case the Board upheld the gift of a small share of immoveable property on the ground that it was not shown to be unreasonable. In the present case, the gifts relate to sums of money. The only question is whether they were reasonable. Both the Courts in India have answered the question in the affirmative and their Lordships have no materials or ground to hold otherwise.

Regarding the prayer for the allotment upon partition of Rs. 2,000 for the marriages of Plaintiffs Nos. 2 and 3, the High Court disallowed the claim in respect of the prospective marriage, but allowed it for the expenses of the marriage that took place before the decree in the first Court, on the ground that the joint family status was not dissevered until the decree for partition, and that the joint family liability continued until then. This view is opposed to the law laid down in the case of *Girja Bai v. Shadashiv Dhundiraj* (2), where it was held expressly, that under the law of the Mitakshara, to which the parties in the present case are subject, an unambiguous and definite intimation of

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intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which, until then, he had held in jointness. This intention was clearly intimated to the co-parceners when the Plaintiff Narayana served on them the notice, Ex. II, on the 30th of July 1909. That notice effected a separation so far as his branch of the family was concerned, and no obligation rested on the joint family in respect of his sons' marriages. The decree of the Subordinate Judge dismissing the claim was therefore correct.

As regards the properties in Schs. XI and XIII, there are not sufficient materials before their Lordships to determine whether they belonged to the joint family or formed the exclusive property of the Plaintiffs. It will be for the first Court to decide the question upon proper materials when giving effect to the decree for partition. But the parties would be well advised to settle it amicably.

It is admitted that the land allotted to the widow of Subramania Annavi (Defendant No. 5), on her decease, became divisible among the heirs of her husband, in other words the male members of the family, parties to this action. To this extent the declaration made by the Subordinate Judge will be varied.

The High Court directed in its discretion that each party should bear his own costs. With that direction their Lordships do not propose to interfere. But having regard to the nature of the contentions, they consider that the Plaintiffs must pay the costs of Defendants Nos. 1, 6 and 4. The Defendants Nos. 1 and 6, who alone impugned the right of Defendant No. 2 to a share in the joint family properties, must pay his costs. The Plaintiffs' cross-appeal will be dismissed with costs.

Their Lordships will accordingly humbly advise His Majesty to set aside the decree of the High Court and restore the decree of the Subordinate Judge, subject to the above variation, with the above directions as to costs.

Solicitors: *Messrs. Chapman Walkar and Shephard* for K. Ramalinga Annavi and Dharmi Ammal (Defendants Nos. 1 and 6).

Solicitors *Messrs. Barrow Rogers and Nevill* for Narayana and his sons (Plaintiffs).

Solicitor: *Mr. Douglas Grant* for Rama Krishna Annavi (Defendant No. 2).

Solicitor: *Mr. Edward Dalgado* for Ponnu Ammal (Defendant No. 4).

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1660 of 1916.

TEUNON, J.

RICHARDSON, J.

1918,

21, May.

GURU CHARAN SIRKER,
Plaintiff, Appellant,

v.

UMA CHARAN SIRKER,
Defendant, Respondent.

Civil Procedure Code (Act V of 1908), Sch. II, cls. 20 and 21—Private arbitration award filed and judgment pronounced and decree following, if can be re-opened in subsequent suit to set aside the award and decree—Res judicata.

Matters heard and determined in proceedings under cl. 21 of Sch. II of the Civil Procedure Code are res judicata and cannot be reopened in a subsequent suit between the same parties and brought for the purpose of setting aside the award and the decree following upon the judgment pronounced in accordance therewith.

A proceeding under cl. 21 of Sch. II, C. P. C. is a suit within the meaning of sec. 11 of the Civil Procedure Code.

This was an appeal against the decree of P. C. De, Esq., Covenanted Subordinate Judge of Zillah Nadia, dated the 20th

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April 1916, affirming the decree of Babu Kumud Nath Roy, Munsif, 1st Court at Kusthia, dated the 22nd of May 1915.

The facts of the case briefly are as follows :—

Appellant and Respondent are brothers. There were disputes between them over their paternal property—it was decided to settle them by arbitration : an arbitrator was appointed, and he gave an award. The Respondent applied in Court to have the award filed under sec. 20 of Sch. II of the Civil Procedure Code. Notices were issued by Court on the other party who objected on the ground that the award was fraudulently obtained. The Court disallowed the objection and filed the award. Then the Appellant sued the Respondent for setting aside the decree of the Court passed in accordance with the award on the grounds that the decree was obtained by fraud.

The learned Munsif of Kusthia did not enter into the merits of the case but held that the subject-matter of the suit was *res judicata* and dismissed the Appellant's suit and this decision was affirmed in appeal by the Subordinate Judge of Nadia.

The Appellant preferred this second appeal in this Hon'ble High Court.

Babu Shib Prosonno Bhattacharji (with Babu Pashupatinath Sastri) for the Appellant contended that—Proceeding before the first Court filing the award was not a 'suit' and hence the decision in that proceeding was not a bar to the present suit as *res judicata*. *Har Chandra Pratap v. Lal Raghuraj* (2) and *Kunji Lal v. Durga Prasad* (3) were referred to.

Babu Phanindra Lal Moitra, Vakeel, for the Respondent.—Sch. II, Art. 20, sub-cl. (2) shows that the application for

filing the award "shall be numbered and registered as a suit," Art. 21 of that Schedule shows "that the Court shall proceed to pronounce judgment according to the award and cl. (2) states "upon the judgment so pronounced a decree shall follow : " definition of decree in sec. 2, cl. (2) shows that it means that it is an adjudication determining the rights of the parties with regard to matters in controversy "in the suit," and sec. 26 states that "every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed." The latter portion of this section was added in the present Code of 1908. So an application must be treated as a suit if it is numbered and registered as a suit and if the judgment is delivered it is bound to be followed by a decree.

Under sec. 526 of the former Code there was no provision for passing any judgment and decree on an award. But that is no longer the law. Under the present Code there is no difference between corresponding secs. of 526 and 522 of the old Code.

Even under the Old Code in *Ghulam Khan v. Muhammad Hossain* (4) it was held that order under sec. 526 was decree under sec. 522 of the Old Code, the cases of *Wazir Mahton v. Chamir Singh* (5) and *Vyankatesh v. Sakharam* (6) are authorities for holding that the judgments on awards are *res judicata*.

In *Ad. Wahid-uddin v. Hakimian* (1), it was held that an order under sec. 525 of the old Code rejecting the application is a decree.

Therefore the word 'suit' in sec. 11 of

(2) I. L. R. 29 All. 519 : s. c. 11 C. W. N. 341 (P. C.) (1907).

(3) I. L. R. 32 All. 484 (1910).

(1) I. L. R. 25 Cal. 757 : s. c. 2 C. W. N. 529 (F. B.) (1898).

(4) I. L. R. 29 Cal. 167 at pp. 183, 184 : s. c. 6 C. W. N. 226 (P. C.) (1901)

(5) I. L. R. 7 Cal. 727 (1881).

(6) I. L. R. 21 Bom. 465 (1896).

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the C. P. C. is wide enough to include proceedings under paras. 20 and 21 of the Sch. II of the Code. The decree passed under sec. 21 of Sch. II was in the nature of a consent decree and no appeal against that decree was allowed in the Code; but order filing the award was appealable. The Appellant did not challenge that order in appeal. The Court which tried the former proceeding is quite competent to decide the present suit. So all the elements of *res judicata* are present.

The cases cited by the Appellant have no bearing. The case in *Har Shankar Pratap v. Lal Raghuraj* (2) was under a special Act; it was with regard to an award by the Committee of Oudh Talukdars appointed under sec. 33 of the Oudh Estates Act. The case in *Kunji Lal v. Durga Prasad* (3) is distinguishable as the order was not followed by the decree.

Babu Shib Prosomno Bhattacharji replied.

THE JUDGMENT OF THE COURT was as follows:—

TEUNON, J.—The only question in this appeal is whether matters, heard and determined in proceedings under the 2nd Schedule to the Civil Procedure Code, cl. 21, may be re-opened in a subsequent suit between the same parties and brought for the purpose of setting aside the award and the decree following upon the judgment pronounced in accordance therewith.

We have little difficulty in answering this question in the negative.

Even under the Civil Procedure Code of 1882, it was held by the Full Bench in the case of *Mohammed Wahid-uddin v. Hakiman* (1) that an order refusing to

file an award was a decree. In cl. 21 of the 2nd Schedule it is now expressly provided that an order filing an award shall be followed by a judgment and a decree. These provisions and the further provision in sec. 26 that a suit may be instituted otherwise than by presentation of a plaint make it clear that a proceeding under cl. 21 of the 2nd Schedule is a suit and that a subsequent suit brought for the purpose of reagitating the matters therein heard and determined is barred by the provisions of sec. 11 of the Code.

The appeal will therefore be dismissed with costs.

RICHARDSON, J.—I agree as in my opinion the word "suit" in sec. 11 of the Civil Procedure Code is wide enough to include proceedings under paragraphs 20 and 21 of the second Schedule. It is true that the adjudication by which the Court directs the award to be filed is in the form of an "order" from which only one appeal is allowed under sec. 104 (1) (f) and sec. 104 (2). It is also true that upon the order being made, the Court is to pronounce judgment according to the award and that from the decree which follows no appeal is to lie except in so far as the decree is in excess of or not in accordance with the award. Clearly the decree is in the nature of a consent decree. But inasmuch as the order under which the award is filed is made upon notice to the parties to the arbitration and it is open to any party objecting to the award being filed to prove any of the grounds mentioned or referred to in paragraphs 14 and 15, it seems to me clear that under sec. 11 the bar of *res judicata* applies to the matters which thus came to be directly and substantially in issue between the parties and that the issues so arising cannot again be raised in a subsequent suit, always assuming that the Court which

(1) I. L. R. 25 Cal. 757 : s. c. 2 C. W. N. 529 (F. B.) (1898).^e

(2) I. L. R. 29 All. 519 : s. c. 11 C. W. N. 841 (P. C.) (1907).

(3) I. L. R. 32 All. 484 (1910).

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made the order was a Court competent to try such subsequent suit.

Under Exp. II of sec. 11 competency is to be determined irrespective of any provisions as to a right of appeal.

In the present case it is clear that the suit re-opens questions which were fully dealt with in the order under which the award was filed. It may also be observed that no appeal was preferred from that order. It is sufficient to say that the whole matter was decided by a Court of competent jurisdiction in a former suit. I concur in dismissing the appeal with costs.

S. C. C. *Appeal dismissed.*

(CIVIL APPELLATE JURISDICTION.)**APPEALS FROM APPELLATE DECREES**

Nos. 2586 AND 2603 OF 1919.

GREAVES, J.	NARPAT SINGH.
B. B. GHOSE, J.	Plaintiff, Appellant,
1922,	v.
Heard, 16 and	RAJA BHUPENDRA
17, February.	NAKAIN SINGH, De-
Judgment,	fendant, Respondent.
27, February.	

Chowkidari Chakran lands within the ambit of a putni, resumed by Government—Respective rights of putnidar and Zamindar in such lands.

The interest of the putnidar in resumed Chowkidari Chakran lands comprised in his putni is derived from the putni itself and nothing else and the Zamindar cannot claim a share in the profits derived from the settlement of such lands and thus in effect to vary the putni.

The law to the contrary laid down in MOHARAJA BIJOY CHAND v. KRISHNA (1) and the decisions followed therein is not correct, in view of the decisions of the Privy Council in RANJIT SINGH BAHADUR v. KALI DAS DEBI (2) and RANJIT SINGH

BAHADUR v. MAHARAJ BAHADUR SINGH (3).

These were appeals preferred on the 5th December 1919 against the decrees of the District Judge of Birbhum (P. C. De, Esq.), dated the 13th September 1919, affirming the decrees of the Munsif at Rampurhat (Babu Ram Dulal Deb), dated the 30th September 1910.

The facts of the case will appear from the judgment.

Mr. B. Chakravarty, Babus Brojolal Chakravarty and Susil Kumar Bose for the Appellant.

Babus Mahendra N. Roy and Priya San-kar Mazumdar for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

These appeals are preferred by the Plaintiff against decisions of the District Judge of Birbhum affirming decisions of the first Munsif at Rampurhat.

The suits were brought to recover *khas* possession of certain resumed Chowkidari Chakran lands together with mesne profits. The Plaintiff claimed these lands as included in the *putni taluk* granted to his predecessors-in-interest by the predecessors-in-interest of the first Defendant, who is the Zamindar, by a *putni pattah* of the year 1853, the Bengali date being the 29th Kartik 1260. It is not disputed that the lands in question were included in the *putni pattah* but it is said that these lands were not taken into account in settling the rent payable under the *pattah* and that consequently the Zamindar, the Respondent, is entitled to a share of the rent derived from settling the resumed lands with tenants. No dispute arises with regard to the payment of the Government revenue which has been assessed on the resumed lands and which, under the terms of the *putni pattah*, is payable by

(1) 34 C. L. J. 275 (1920).

(2) L. R. 44 I. A. 117; s. c. 21 C. W. N. 609; I. L. R. 44 Cal. 841 (1917).

(3) I. L. R. 46 Cal. 173; s. c. 23 C. W. N. 198 (P. C.) (1918).

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the Appellant. It is conceded that, from the time of the creation of the *putni* until the *lanre* were resumed, the Chowkidars rendered private personal services to the *putnidar* and not to the Zamindar.

The first Court declared the Appellant's title to the lands in suit and decreed *khas* possession on condition that the Appellant paid to the Zamindar in respect of the resumed lands an additional rent to that named in the *putni pattah*. The Appellant was awarded mesne profits. The District Judge affirmed this decision and remanded the cases to the first Court (1) for determination of the conditions and terms under which the *putnidar* was to hold the lands under the Zamindar, (2) for the ascertainment of mesne profits.

The Appellant resists the Zamindar's right to share in the rents and profits derived from the settlement of the resumed lands firstly on the ground that the lands are comprised in the *putni pattah* and that consequently the rents and profits are his; secondly, on the ground that these rents and profits must be taken as the equivalent of the personal services formerly rendered to him by the Chowkidars prior to the resumption.

The Zamindar Respondent, as already stated, claims a share of the rents and profits as he says that these lands were never taken into account when the *jama* was fixed and he relies on a long series of decisions, to which we have been referred, as establishing the Zamindar's right to a share of the rents and profits, in addition to the amount payable to the Chowkidari fund under the provisions of Act VI of 1870, unless it can be shown that the lands were taken into account in fixing the *jama* when the *putni* was created. These decisions have recently been considered and followed in the case of *Moharaja Bijoy Chand v. Krishna* (1), which

(1) 34 C. L. J. 275 (1920).

was decided in December 1920, and no useful purpose would, we think, be served by going through them again. They undoubtedly do support the contention urged before us on behalf of the Zamindar Respondent and it is useless to suggest that they are in the main distinguishable from the cases before us. But, with the exception of the case of *Moharaja Bijoy Chand v. Krishna* (1), above referred to, they were all decided prior to the decisions of the Judicial Committee in *Ranjit Singh Bahadur v. Kali Dasi Debi* (2) and *Ranjit Singh Bahadur v. Maharaj Bahadur Singh* (3). By the first of these decisions it was for the first time finally established that the Zamindar at the time of the permanent settlement obtained or retained in the Chowkidari Chakran lands situate within the territorial boundaries of a village comprised in his Zamindari an interest capable of being made the subject of a *putni* lease and in *Ranjit Singh Bahadur v. Maharaj Bahadur Singh* (3), where the nature of the *putnidar's* rights in resumed Chowkidari Chakran lands was considered, it was laid down that upon the resumption of such lands by Government the rights of the *putnidar* were those conferred on him by the estate and interest created by the *putni* lease and that it was this right which was kept alive by sec. 51 of Bengal Act VI of 1870.

By the joint effect of these decisions the *putnidar's* interest in such lands if, as here, they are comprised in his *putni*, is derived from the *putni* itself and from nothing else. This being so it is difficult to see on what principle the Zamindar can claim to vary the *putni* by enhancing the rent in respect of lands which were

(1) 34 C. L. J. 275 (1920).

(2) L. R. 44 I. A. 117; s. c. 21 C. W. N. 609; I. L. R. 44 Cal. 841 (1917).

(3) I. L. R. 46 Cal. 173; s. c. 23 C. W. N. 198 (P. C.) (1918).

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included in the original demise even assuming that the profits of these lands were not taken into account in fixing the rent. The learned Vakil for the Respondent has not been able to suggest to us any principle, although by way of analogy he prays in aid the assessment by Government of additional revenue in respect of these lands. This analogy however cannot assist him as the Government's right to make such assessment is derived from the provisions of Act VI of 1870 and is therefore a right conferred by statute.

Under the circumstances stated above we do not think that the decisions relied on by the Respondent Zamindar can be taken now to be correct and the case of *Moharaja Bijoy Chand v. Krishna* (1) admittedly only follows these decisions. We think it would not be correct to say that the *putnidar* is only entitled to obtain possession on terms and that the Court is to assess rent on these lands when it has been held that his title accrued from the time of the *putni* settlement. We agree with the decisions in the unreported cases to which we have been referred, No. 1500 of 1914 and No. 2261 of 1916. In the result these appeals succeed and we set aside that portion of the decision of the District Judge which remands the cases to the original Court to determine the conditions and terms under which the *putnidar* is to hold the lands under the Zamindar. The rest of the remand order will stand. That portion of the Munsif's decree which imposes on the Appellant, as a condition of obtaining *khas* possession, the payment of additional rent to the Zamindar Respondent will be set aside. The Appellants will be entitled to their costs in this Court and in the lower Appellate Court.

S. C. M.

(1) 34 C. L. J. 275 (1920).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2644 of 1919.

N. R. CHATTERJEA, J.	} BAMANDAS VIDYA-
PANTON, J.	
1921,	
Heard, 18 and	
19, April.	SAGAR BHATTACHARJA, Plaintiff,
Judgment, 22, April.	Appellant,
	v.
	SADHU MAJHI and
	ors., Defendants,
	Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 50 and 115—Presumption—Record-of-rights—Presumption under sec. 50 if arises after finality of record-of-rights.

After the record-of-rights becomes final in respect of a tenancy under Chap. X of the Bengal Tenancy Act, the tenant is precluded by sec. 115 from claiming the presumption under sec. 50 of that Act.

This was an appeal preferred on the 12th December 1919 against the decree of the Officiating Subordinate Judge of Faridpur (Babu Mati Lal Roy), dated the 5th September 1919, modifying that of the Munsif, 3rd Court at Bhanga (Babu Nishi Kanta Banerjee), dated the 2nd April 1919.

The facts of the case will appear from the judgment.

Babu Surendra Chandra Sen (with him *Babu Hemendra Chandra Sen*) for the Appellant.

Babu Mukunda Behari Mallik for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for recovery of arrears of rent. The Plaintiff also claimed additional rent for additional lands found in the tenant's possession and also enhanced rent for rise in the price of staple food-crops.

It appears that originally there were two holdings, one consisting of 5 bighas

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1½ cottas at a *jama* of Rs. 6-5-9 and Rs. 1-12-9 was reserved as *hajat*. There was another holding of 5 bighas ¾ cottas at a *jama* of Rs. 6-2-3 and Rs. 2-1-0 was kept as *hajat*. The total area of the two holdings was 10 bighas 2½ cottas and the *jama* was Rs. 12-8. The Plaintiff's case was that out of the total *hajat* of these two *jamas*, namely Rs. 3-13-9 a sum of Rs. 1-15 was made a part of the current rent and the *jama* became Rs. 11-7-0 by the amalgamation of the two *jamas*, taken with Rs. 1-15-0 on account of the *hajat*, and that there has been an increase in the area of 4 bighas 4½ cottas. The Plaintiff contended that he was entitled to the full *hajat* rent and additional rent for the additional area at the rate of Rs. 1-9-7 which would be the rate if the entire *hajat jama* were added to the rent.

The Court of first instance gave a decree to the effect that the Plaintiff was entitled to the full *hajat jama*, so that he was entitled to the full rent of Rs. 16-5-9 and additional rent for the additional area at Rs. 1-9-7 per bigha from 1321 to 1324. That Court also allowed enhancement at annas two per rupee from 1326.

On appeal the lower Appellate Court held that *hajat jama* could not be recovered, as it is an amount held *in terrorem* over the tenant and that the rent recoverable, therefore, was at the rate of Rs. 12-8. The additional rent accordingly was allowed at the rate of Rs. 1-3-9. The learned Judge was of opinion that there was a presumption under sec. 50 of the Bengal Tenancy Act arising from the payment of rent at a uniform rate for 29 years preceding the institution of the suit. He accordingly disallowed the claim for enhancement of rent.

Two questions arise for our determination in this appeal. The first is whether any presumption arises under sec. 50 of

the Bengal Tenancy Act in the circumstances of the present case.

Now, it appears that there was a record-of-rights and in the record-of-rights the tenant was shown as an occupancy raiyat and not a raiyat at a fixed rate. Sec. 115 of the Bengal Tenancy Act lays down that when the particulars mentioned in sec. 102, cl. (b) have been recorded under Chap. X in respect of any tenancy, the presumption under sec. 50 shall not thereafter apply to that tenancy. There is no question in this case that the record-of-rights is final and that the Defendant is entered therein as only an occupancy raiyat. That being so, we think, having regard to the terms of sec. 115 and the decided cases on the point, that there is no presumption after the publication of the record-of-rights in respect of the ten provisions of sec. 115 from claiming the presumption under sec. 50 of the same Act.

In the case of *Pirithi Chand v. Basarat Ali* (1) the question arose when an application was made under sec. 105. It was held that the presumption did arise under sec. 50 of the Bengal Tenancy Act. The Full Bench, however, had to consider the meaning of the word "thereafter" contained in sec. 115, having regard to the decisions in the case of the *Secretary of State v. Kajimuddi* (2) and the case of *Maharaja Radha Kishore v. Umed Ali* (3). The learned Judges were of opinion that the decision in the former case disregarded the plain terms of the section which are general in expression, and contain nothing to justify the limited construction that had been placed on them. It has been held in a series of cases that after the publication of the record-of-rights

(1) I. L. R. 37 Cal. 30; A. C. 13 C. W. N. 1149 (F. B.) (1909).

(2) I. L. R. 26 Cal. 617 (1899).

(3) 12 C. W. N. 904 (1908).

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in respect of a tenancy under Chap. X, the tenant is precluded by sec. 115 from claiming the presumption under sec. 50 of the Act. [See *Muralidhar Aditya v. Radha Mohan* (4), *Jagdeo Narain Singh v. Bhagwan Mahto* (5), *Harihar Persad Bajpai v. Ajub Misir* (6), *Janki Kuer v. Hiranund Pande* (7) and an unreported case* (Second Appeal No. 2319 of 1919) decided by Teunon, J., on the 6th January 1921]. We are accordingly of opinion that the Defendant is not entitled to the presumption under sec. 50 of the Bengal Tenancy Act.

The next question is whether the Plaintiff is entitled to the rent reserved as *hajat*.

It is contended that a portion of the *hajat* rent was converted into the current rent two years after the execution of the *kabuliyat*. The learned Subordinate Judge, however, has found that "there is no evidence on the record to support the contention. It might as well have been for addition of some lands to the tenancy. The learned Munsif's finding that this alteration of rent in 1293 was on account of conversion of a portion of the *hajat* rent to current rent is not supported by evidence and is based on the mere statement in the plaint."

It does not appear for what period the rent was kept as *hajat* nor the circumstances under which and the date from which the *hajat* was to be recovered from the tenant. In the circumstances, we are unable to hold that the Plaintiff is entitled to the *hajat* as part of the rent. That being so, we cannot interfere with the rate of rent allowed by the Court of

appeal below with regard to the additional area.

The result is that the decree of the Court of first instance so far as it allows an enhancement at the rate of two annas in the rupee will be restored and the decree of the Lower Appellate Court to that extent will be set aside. Otherwise, the decree of the Lower Appellate Court will stand.

The Plaintiff will get two-thirds of the costs incurred by him in the Lower Courts. We make no order as to costs in this Court.

H. C. S. *Appeal partly allowed.*

(CIVIL APPELLATE JURISDICTION.)**LETTERS PATENT APPEAL**

No. 13 of 1921.

PRASANNA KUMAR SEN,
MOOKERJEE, J. Defendant, Appellant,
CUMING, J. v.
1922, DURGACHARAN
10, February. CHAKRABARTY, Plain-
tiff, Respondent.

Bengal Tenancy Act (VIII of 1885), secs 50 and 115—Enhancement suit—If presumption under sec. 50 arises after a record-of-rights becomes final.

After a record-of-rights becomes final, a tenant is debarred by the provisions of sec. 115 of the Bengal Tenancy Act from claiming the presumption under sec. 50 of that Act.

The expression "thereafter" in sec. 115 means "after the particulars have been finally recorded after recourse to all the provisions contained in Chap. X of that Act for the attainment of finality in this respect."

HARIHAR PERSAD v. AJUB MISIR (1), MURALIDHAR v. RADHA MOHAN (2) and BAMANDAS v. SADHU MAJHI (6) followed.

(4) 51 Ind. Cas. 552.

(5) 1 P. L. T. 27; 54 Ind. Cas. 672 (1919).

(6) 1 L. R. 45 Cal. 930 (1913).

(7) 58 Ind. Cas. 25 (1920).

* 25 C. W. N. xlvii (1921); on L. P. App. 26 C. W. N. 947 (1922).

(1) 1 L. R. 45 Cal. 930 (1913).

(2) 51 Ind. Cas. 552.

(6) 64 Ind. Cas. 445: Since reported in 26 C. W. N. 945 (1921).

PRASANNA KUMAR SEN *v.* DURGA CHARAN CHAKRABARTY.

SECRETARY OF STATE *v.* KAJIMUDDI (3)
and RADHA KISHORE *v.* UMED ALI (4)
dissented from.

PIRTHI CHAND *v.* BASARAT ALI (5) *referred to.*

This was an appeal under sec. 15 of the Letters Patent preferred on the 5th February 1921 against a judgment of Teunon, J., dated the 6th January 1921, in Appeal from Appellate Decree No. 2319 of 1919, which had been preferred against a decree of the Officiating Subordinate Judge of Faridpur (Babu Mati Lal Roy), dated the 9th July 1919, which reversed a decree of the Munsif, 3rd Court; at Bhangra (Babu Nishi Kanta Banerji), dated the 2nd January 1919).

The facts material to the report are as follows :—

This appeal arose out of a suit instituted on the 30th January 1918 for recovery of arrears of rent at Rs. 5-8 per year and for enhancement of rent on the ground of rise in the price of staple food-crops under sec. 30, cl. (b) of the Bengal Tenancy Act. The Defendant was entered in the record-of-rights as a *হিতবান রায়ত* (*i.e.*, an occupancy raiyat). The record-of-rights was finally published in 1914. After the final publication of the record-of-rights neither party took any proceeding under secs. 105, 105A or 106 of the Bengal Tenancy Act. The Defendant contended that he was entitled to the benefit of the presumption under sec. 50, cl. (2) of the Bengal Tenancy Act and that his rent was not liable to be enhanced. The Munsif held that the Defendant was entitled to such presumption but on the evidence adduced the presumption was sufficiently rebutted. He granted a decree for arrears of rent as well as for en-

hancement at the rate of 4 as. 9 pies in the rupee.

On appeal by the Defendant the Lower Appellate Court allowed only a decree for arrears of rent but set aside the decree for enhancement of rent and held that sec. 115 of the Bengal Tenancy Act was no bar to the Defendant's claiming the benefit of the presumption under sec. 50, cl. (2) of the said Act, and that the Defendant proved that the rate of rent had not changed for more than 20 years before the institution of the suit and as such he was entitled to the said presumption.

Against this decision the Plaintiff preferred a second appeal to the High Court which was allowed by Teunon, J.

The judgment of Teunon, J., was as follows :—

This appeal arises out of a suit for rent and for enhancement of rent on the ground of rise in prices of staple food-crops. It is not disputed that in respect of the area within which the holding in question is situate there has been a record-of-rights prepared under the provisions of Chap. X of the Bengal Tenancy Act. It is also not disputed that in respect of the holding in question the tenants have been recorded not as tenants holding at fixed rate but as purely occupancy raiyats. The record-of-rights, it is also conceded, was finally published sometime in the year 1914. The present suit was brought in the year 1918. In respect of this tenancy there have been no proceedings under secs. 105, 105A or sec. 106 of the Bengal Tenancy Act and the time for any such proceedings has long gone by. It follows therefore that in this particular case we have a finally published and completed record. In such a case it has been held in this Court in the cases of *Harihar Persad Bajpai v. Ajub Misir* (1) and *Murali-*

(3) I. L. R. 26 Cal. 617 (1899).

(4) 12 C. W. N. 804 (1908).

(5) I. L. R. 37 Cal. 30: s. c. 13 C. W. N. 1149; 10 C. L. J. 348 (F. B.) (1909).

(1) I. L. R. 45 Cal. 930 (1913).

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dhara Aditya v. Radha Mohan Hazra (2) that by the provisions of sec. 115 of the Act the tenants who are the Respondents before me are not entitled to claim the benefit of the presumption arising under sec. 50 (2) of the Act.

That being so, it follows that the decision of the Subordinate Judge of Faridpur must be set aside and the case remanded to him in order that approaching the case from the proper standpoint, namely, that the tenants are not entitled to the benefit of the presumption arising under sec. 50 of the Act he may consider and determine whether the rent is or is not liable to be enhanced. Should he decide that the rent is liable to be enhanced he must next proceed to determine the extent of the enhancement to which the landlord who is the Appellant before this Court is entitled.

The case is accordingly remanded to the Lower Appellate Court to be disposed of in accordance with the directions given above.

Costs of this hearing will be costs in the case.

[Against this judgment the Defendant preferred the present Letters Patent appeal.]

Babu Gunada Charan Sen (with him *Babu Jnan Chandra Roy*) for the Appellant.—The Defendant is a raiyat at a fixed rate and so his rent is not liable to enhancement. Uniformity of rent for 20 years immediately before the institution of the suit has been proved. The Defendant who was entered in the record-of-rights as an occupancy raiyat is therefore entitled to the presumption under sec. 50 of the Bengal Tenancy Act. Sec. 115 of that Act is not a bar to his claiming the benefit of the presumption under sec. 50. I rely upon the cases in *Secretary of State*

(2) 51 Ind. Cas. 552.

v. *Kajimuddi* (3) and *Radha Kishore v. Umdu Ali* (4). I submit that the word "thereafter" in sec. 115 of the Bengal Tenancy Act was, correctly interpreted in these cases.

Babu Surendra Chandra Sen (with him *Babus Hemendra Chandra Sen* and *Rajendra Nath Bakshi*) for the Respondent.—Sec. 115 of the Bengal Tenancy Act is a bar to the Defendant claiming the presumption under sec. 50, cl. (2). The record-of-rights was finally published in 1914. There were no proceedings under secs. 105, 105A, 106, 108 and 108A and the periods for such proceedings had expired. The present suit was brought in 1918.

The words "have been recorded" in sec. 115 mean "have been *finally* recorded after all corrections, if any, under the aforesaid sections." So, in proceedings under secs. 105, 105A, 106, 108, 108A the tenant is no doubt entitled to the presumption under sec. 50, inasmuch as the record cannot be said to have been *finally* prepared till then, and the particulars under sec. 102, cl. (b) can still be corrected. But when after the proceedings under the aforesaid sections are taken and the corrections, if any, are entered in the record, or when no proceedings are taken under those sections and the periods of limitation for taking those proceedings expire, and then a regular suit is brought in the Civil Court by the landlord, as in the present case, the tenant cannot then avail of the presumption under sec. 50.

The word "thereafter" in sec. 115 means that once the particulars under sec. 102 (b) have been *finally* recorded as explained above, *i.e.*, after recourse to all the provisions contained in Chap. X for the attainment of finality in this respect, sec. 50 will cease to apply. The restric-

(3) 1. L. R. 28 Cal. 617 (1899).

(4) 12 C. W. N. 904 (1908).

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tion is in regard to the period both *prior* and *subsequent* to the final preparation of the record-of-rights.

I submit that sec. 115 was not correctly interpreted in the decisions in *Secretary of State v. Kajimuddi* (3) and *Radha Kishore v. Umed Ali* (4) cited by the Appellant. In view of the conflict between the decision by Doss, J., in *Radha Kishore v. Umed Ali* (4) and that of Brett, J., in *Ram Sewak v. Mahont Bansi Das* (7), the question was referred to a Full Bench in which the case of *Radha Kishore v. Umed Ali* (4) was not approved. See the Full Bench case, of *Pirithi Chand v. Sheikh Basarat* (5). Following the principle of this Full Bench case it has been held in a series of cases that the presumption under sec. 50 (2) does not arise when a "record-of-rights has been *finally* prepared." See *Harihar v. Ajub Misir* (1), *Muralidhar v. Radha Mohan* (2), *Jaydeo Narain v. Bhaguran Mahto* (8) and *Bamandas Vidyasagar v. Sadhu Majhi* (6), in which the judgment of Teunon, J., now under appeal was referred to with approval.

Babu Gunada Charan Sen in reply.

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal under cl. 15 of the Letters Patent from the judgment of Mr. Justice Teunon in a suit for enhancement of rent.

It appears that a record-of-rights was published in 1914 and an entry was made

therein to the effect that the tenant Defendant was a *হিভিবান রায়ত*, that is, an occupancy raiyat. On the 30th January 1918 the Plaintiff landlord instituted the present suit for enhancement of rent on the ground of rise in the price of staple food-crops. The Defendant resisted the claim on the ground that he was a raiyat at a fixed rate, and in support of this allegation he invoked the aid of sec. 50 of the Bengal Tenancy Act. His contention was negatived by the primary Court and the claim for enhancement was allowed. Upon appeal the Subordinate Judge held that the Defendant was entitled to the benefit of the presumption mentioned in sec. 50 and disallowed the claim for enhancement. Upon appeal to this Court Mr. Justice Teunon has reversed the decision of the Subordinate Judge on the ground that under sec. 115 the tenant was not entitled to rely upon the presumption mentioned in sec. 50; in support of this view, reference has been made to the cases of *Harihar Persad Bajpai v. Ajub Misir* (1) and *Muralidhar Aditya v. Radha Mohan Hazra* (2). On the present appeal the view taken by Mr. Justice Teunon has been assailed, as contrary to the decision in *Secretary of State for India in Council v. Kajimuddi* (3) and *Radha Kishore Manikya v. Umed Ali* (4). We are of opinion that sec. 115 was not correctly interpreted in the decisions mentioned, which are in conflict with the principle of the decision of the Full Bench in *Pirithi Chand Lal Chowdhury v. Basarat Ali* (5).

Sec. 115 provides that when the particulars mentioned in sec. 102, cl. (b) have been recorded under Chap. X of the Ben-

(1) I. L. R. 45 Cal. 930 (1913).

(2) 51 Ind. Cas. 552.

(3) I. L. R. 26 Cal. 617 (1899).

(4) 12 C. W. N. 904 (1908).

(5) I. L. R. 37 Cal. 30; s. c. 13 C. W. N. 1149; 10 C. L. J. 343 (F. B.) (1909).

(6) 64 Ind. Cas. 445; Since reported in 26 C. W. N. 945 (1921).

(7) 13 C. W. N. 1151 (foot note) (1909).

(8) 11 P. L. T. 27; 54 Ind. Cas. 672 (1919).

(1) I. L. R. 45 Cal. 930 (1913).

(2) 51 Ind. Cas. 552.

(3) I. L. R. 26 Cal. 617 (1899).

(4) 12 C. W. N. 904 (1908).

(5) I. L. R. 37 Cal. 30; s. c. 13 C. W. N. 1149; 10 C. L. J. 343 (F. B.) (1909).

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gal Tenancy Act in respect of any tenancy, the presumption under sec. 50 shall not thereafter apply to that tenancy. On behalf of the Appellant, reliance has been placed upon the dictum in the case of *Secretary of State for India in Council v. Kajimuddi* (3) that this section seems to contemplate a case in which a raiyat is seeking to get the benefit of the presumption for a period subsequent to the time when the record-of-rights was framed. We are unable to accept this interpretation of the scope of sec. 115. The expression "thereafter" in that section clearly signifies "after the particulars have been finally recorded after recourse to all the provisions contained in Chap. X for the attainment of finality in this respect." This was the view adopted by the Full Bench in the case of *Pirithi Chand Lal Chowdhury v. Basarat Ali* (5), where it was ruled that sec. 115 did not exclude the application of the presumption when the particulars had been recorded under Chap. X and it was found necessary still to have recourse to the procedure prescribed by one or other of the sections in that Chapter. The case before us however is of an entirely different description. Here the record was finally published in 1914. The tenant might have, but did not, come within the prescribed time to get the record altered by recourse to one or other of the provisions of Chap. X. The result was that the record became final. A suit has now been instituted for enhancement of rent. This is not a suit instituted under Chap. X of the Bengal Tenancy Act. Consequently in such a suit the tenant is not entitled to the benefit of the presumption under sec. 50. The entry which was made in this case under sec. 102 (b) was

that the tenant belonged to the class of occupancy raiyats; in other words, that he was not a raiyat holding at a fixed rate. His rent was consequently liable to enhancement in accordance with the provisions of the Bengal Tenancy Act. The landlord claims to enhance the rent of the tenant. The tenant sets up the defence that he is a raiyat holding at a fixed rate; and in support of this contention he relies upon the presumption mentioned in sec. 50. The presumption is excluded by the express terms of sec. 115 and is of no avail to him. In these circumstances, Mr. Justice Teunon has correctly held that the judgment of the Subordinate Judge which was based upon the presumption under sec. 50 cannot be supported and that the case must be remanded for reconsideration from this standpoint. We are of opinion that this view is in accordance with the decision in *Bamandas Vidyasagar v. Sadhu Majhi* (6), where the judgment of Mr. Justice Teunon now under appeal was referred to with approval.

The result is that the judgment of Mr. Justice Teunon is affirmed and this appeal dismissed with costs.

H. C. S. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2505 OF 1919.

N. R. CHATTERJEA, J.
PEARSON, J.

1921,
26, July.

PABAN KHAN,
Plaintiff, Appel-
lant,
v.
BADAL SARDAR,
Defendant, Res-
pondent.

*Transfer of Property Act (IV of 1882), sec. 59—
Validity of mortgage bond, where the scribe who*

(3) T. L. R. 26 Cal. 617 (1899).

(5) T. L. R. 37 Cal. 30; s. v. 13 C. W. N. 1149; 10 C. L. J. 343 (F. B.) (1909).

(6) 64 Ind. Cas. 445: Since reported in 26 C. W. N. 645 (1921).

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executed the deed on behalf of the mortgagor, attested his own signature—Evidence Act (I of 1872), secs. 68 and 70, proof of the deed by the scribe who also acted as an attesting witness, if sufficient, where execution of the deed is admitted.

In a suit upon a mortgage bond, the Defendant admitted the execution of the bond but pleaded inter alia that the bond should not be regarded as a mortgage bond. The first Court held that the execution of the bond being admitted, the necessity of its proof did not arise and decreed the suit. On appeal it was held that the scribe having executed the deed on behalf of the Appellant was not competent to attest his own signature, and there being no other evidence, dismissed the suit:

Held—That the validity of a mortgage bond and the proof of its execution are two different questions. The question of the validity of a mortgage bond with reference to the provisions of sec. 59 of the Transfer of Property Act can arise even though the document might be proved according to law or is not required to be proved by calling an attesting witness under sec. 68 of the Evidence Act, by reason of the execution of the document being admitted by the executant, as laid down in sec. 70 of the Evidence Act.

SATIS CHANDRA MITRA v. JOGENDRA NATH MAHALANABIS (1) and NIBARAN CHANDRA SEN v. RAM CHANDRA SEN (2) distinguished.

Where in the above circumstances the Plaintiff produced only the scribe who executed the deed on behalf of the executant to prove the deed, although the names of other persons appeared as attesting witnesses in the document:

Held—That instead of dismissing the suit the Plaintiff should be given an

(1) I. L. R. 44 Cal. 345: s. c. 20 C. W. N. 1044 (1916).

(2) 22 C. W. N. 444 (1917).

opportunity of producing evidence to show that the document was executed in the presence of attesting witnesses so as to satisfy the requirements of sec. 59 of the Transfer of Property Act.

RAJANI KANTA BHADRA v. PANCHANAND (3) referred to.

This was an appeal against the decree of Krishna K. Sen, Esq., Officiating Additional District Judge of Zillah Khulna, dated the 9th of September 1919, reversing the decree of Babu Jogendra Kumar Das, Additional Munsif of Khulna, dated the 18th of November 1918.

The facts will fully appear from the judgment.

Babu Nalin Chandra Pal for the Appellant.

Babu Samatul Chandra Dutt for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit upon a mortgage bond.

The Defendant admitted the execution of the bond but pleaded payment and satisfaction of it. He also raised the defence that the bond should not be regarded as a mortgage bond.

The Court of first instance held that the execution of the bond not being challenged, the necessity of its proof did not arise. That Court overruled the other pleas of the Defendant and gave a decree to the Plaintiff.

On appeal by the Defendant, the learned Additional District Judge was of opinion that the provisions of sec. 59 of the Transfer of Property Act had not been complied with. He held that the scribe having executed the deed on behalf of the Appellant was not competent to attest his own signature, and there being no other evi-

(3) 23 C. W. N. 220 (1918).

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dence, allowed the appeal and dismissed the suit.

It has been contended on behalf of the Plaintiff who is the Appellant before us that, having regard to the provisions of sec. 70 of the Evidence Act, there was no necessity for calling any attesting witness under sec. 68 of the Act; and reliance was placed upon the cases of *Sydis Chandra Mitra v. Jogendra Nath Mahalanabis* (1) and *Nibaran Chandra Sen v. Ram Chandra Sen* (2).

In those cases, however, the only question related to proof of execution of the mortgage bond. No question was raised before, or decided by, this Court, in either of the two cases as to the validity of the mortgage bond with reference to the provisions of sec. 59 of the Transfer of Property Act. The two questions are different, one being the question of proof of execution of a document required to be attested by calling one attesting witness under sec. 68 of the Evidence Act, which, however, is not required where the execution of the document is admitted by the executant as laid down in sec. 70 of the Evidence Act. The other question relates to the validity of the mortgage even though the document might be proved according to law. This distinction does not appear to have been kept in view in the Court below; and although the question of the validity of the mortgage bond was set up in the written statement and put in issue, the Court of first instance, at any rate, does not appear to have appreciated the distinction between the two.

It appears that the mortgage bond, on the face of it, contained the names of four attesting witnesses, of whom two were illiterate and the scribe of the deed says that he put down the names of those

illiterate witnesses at their request. It is not clearly stated, however, whether they were attesting witnesses in the sense that the document was executed in their presence. There were, however, two other witnesses who signed their own names and although the scribe by reason of his having signed the name of the executant on the document on his behalf is not a competent attesting witness as laid down in the case of *Rajani Kanta Bhadra v. Panchanand* (3), there are, as stated above, other persons whose names appear as attesting witnesses in the document. Under the circumstances, the Plaintiff should be given an opportunity of producing evidence to show that the document was executed in the presence of attesting witnesses so as to satisfy the requirements of sec. 59 of the Transfer of Property Act. This, however, must be on terms, as the point was taken in the written statement.

We accordingly direct that upon the Plaintiff-Appellant paying to the Defendant-Respondent all the costs incurred up to this stage within a fortnight of the arrival of this order in the Court of appeal below, that Court will allow the Plaintiff an opportunity of adducing evidence to show that the document was properly attested within the meaning of sec. 59 of the Transfer of Property Act and then dispose of the case according to law. The Court of Appeal below may direct the Court of first instance to take fresh evidence under Or. 41, r. 28.

If the aforesaid costs are not paid within the time specified, the appeal will stand dismissed with costs.

J. N. R.

Appeal allowed:

Case remanded.

(S) 23 C. W. N. 280 (1918).

(1) I. L. R. 44 Cal. 245 (S. C. 20 C. W. N. 1044 (1916)).

(2) 23 C. W. N. 444 (1917).

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.

LORD ATKINSON.

LORD CARSON.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1921,

Heard, 5 and 6,

December.

1922,

Judgment, 17, January.

SANYASI CHARAN

MANDAL,

Appellant,

v.

KRISHNADHAN

BANERJI,

Respondent.

Dayabhaga family with a minor coparcener—Loan by karta for new business started after father's death—Liability of minor—Adult brothers adjudicated insolvent and Receiver appointed of their share—Partition between Receiver and minor and share of all properties including after-acquired given to minor—Suit against minor for money borrowed for new business—Receiver if necessary party—Indian Contract Act (IX of 1872), sec. 247, scope and meaning of—Order directing accounts to ascertain Defendant's liability, appeal against—Order, if "final"—Civil Procedure Code (Act V of 1908), secs. 109, 97.

The Defendant a minor and his brothers were members of a Dayabhaga family. The ancestral businesses which their father had were carried on after the father's death by the eldest brother as karta assisted by the adult brothers and they started a new business for which they borrowed sums of money from the Plaintiffs in the two suits out of which the present appeals arose. Proceedings under the Insolvency Act were taken and the adult brothers were adjudicated insolvent and a Receiver was appointed to take possession of the adult brothers' proportionate share of all ancestral and after-acquired properties. A partition took place between the Receiver and the infant's guardian and the infant was given his proportionate share in all properties ancestral and after-acquired. The dividend received by the Plaintiffs in the insolvency falling short of the amount due they sued to recover

from the share of the Defendant, the minor, who disclaimed all interest in the new business:

Held—That the suits to which the Receiver was not a party were misconceived. In the circumstances the Receiver was a necessary party to any proceeding for the purpose of realising assets liable for the firm's debts and the proceeds of any realisation would be applicable not towards the exclusive discharge of any individual debt but for rateable distribution among the whole body of the firm's creditors.

All the property of the firm vested in the Receiver on the making of the order of adjudication and if any part of it got improperly into the possession of the minor the right to recover it was in the Receiver.

The distinction between an ancestral business and one started after the death of the ancestor as a source of partnership relations is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business with its benefits and obligations. In the other they rest ultimately on contractual arrangement between the parties.

Under sec. 247 of the Contract Act a minor may be admitted to the benefits of partnership but cannot be made personally liable for any obligations of the firm, but the share of such minor in the property of the firm is liable for the obligations of the firm. This share is no more than a right to participate in the property of the firm after its obligations have been satisfied.

The High Court in reversing a decree dismissing the suits against the minor Defendant directed certain accounts against the Defendant, not because his liability was established but for the purpose of determining whether or not he was liable. On appeal to the Judicial Committee a

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preliminary objection that the order was not "final" and in consequence not appealable was overruled by the Judicial Committee.

Consolidated appeals against two decrees of the High Court of Judicature at Fort William in Bengal, dated the 31st January 1919, reversing two decrees of the Subordinate Judge of Alipur, dated the 28th February 1916.

The suits in which these decrees were passed were brought by the present Respondents respectively against the present Appellant, a minor, who attained majority during the course of the litigation.

The first suit was brought to recover Rs. 5,329 and the second suit to recover Rs. 19,000 in respect of money borrowed from the Plaintiffs by Nil Ratan under the circumstances hereinafter mentioned. Both suits were dismissed with costs by the Subordinate Judge, but his decrees were reversed on appeal by the High Court, which remanded the cases for trial ordering certain accounts to be taken and enquiries made.

Bhuban Mohan, a Hindu governed by the Dayabhaga law, was a merchant who carried on business at Munshigunj and Kalibazar. He died in November 1899, leaving five sons of whom the present Appellant, then a child, was the youngest. The eldest son, Nil Ratan, was appointed guardian of the infant in 1900 under the provisions of Act VIII of 1890. In 1912 he was removed from the office of guardian and a new guardian was appointed who defended the present suits on behalf of the infant.

After the death of their father, Nil Ratan and his adult brothers carried on the said businesses at Munshigunj and Kalibazar and after an interval started a new business at Orphangunj close to the Kalibazar business. Both the lower Courts found that the new firm was not

a branch of the ancestral business. It carried on business till 1912 and for this purpose moneys were borrowed from among others the respective Respondents in the present appeal. The first Respondent on the 7th June 1908, advanced the sum of Rs. 5,000 on a hand-note executed by Nil Ratan and his two adult brothers and his claim in the said suit was for the sum now due thereon. The second Respondent based his claim on a *hath-chitta* for Rs. 19,700, dated the 1st October 1909 and executed by Nil Ratan and his three adult brothers, the third having meanwhile attained his majority.

In 1912 Nil Ratan and his adult brothers were adjudicated insolvent and Ashutosh Ghose was appointed Receiver of four-fifths of the property.

The Receiver thereupon brought a suit against the present Appellant, which resulted in a decree in the terms of the award of an arbitrator to whom the matters in dispute were referred with the consent of the District Judge. By the award and the decree passed in pursuance thereof, the ancestral properties and the after-acquired properties were divided between the Receiver and the minor, "with a provision that the portion of the after-acquired properties to be allotted to the said minor according to the share claimed by him, shall remain in the possession of the said Receiver until the final hearing of the appeal in the Honourable High Court, and that the same will be dealt with according to the decision in the said appeal." The decree on this award was dated the 4th January 1913 and the judgment on appeal in *Sanyasi Charan Mandal v. Ashutosh Ghose* (2) was pronounced on the 17th March 1914. Meanwhile the present Respondents proved in the insolvency and received a first dividend of three annas in the rupee.

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From the evidence given by the Receiver in the present litigation it appears that he had in possession about Rs. 4,000 worth of the insolvents' assets and had still to realize two decrees of the aggregate value of Rs. 10,000.

On the 27th March 1914 the first Respondent brought his suit, and on the 2nd December 1914, the second Respondent brought the second of the said suits to recover from the Defendant the sums due to them respectively. Each Plaintiff pleaded (to avoid the bar of limitation) acknowledgments signed by Nil Ratan by which they submitted the infant was bound. Their case was that the money was borrowed for the purposes of an ancestral business of the family and that for this reason the present Appellant's property was liable for their claims.

On behalf of the Defendant it was denied that he was liable for the debts incurred by his brothers in their business either by reason of the business being the ancestral business of the family or otherwise. The defence of limitation was set up and it was submitted that in view of the insolvency proceedings and the decree obtained by the Receiver the Plaintiffs were not entitled to maintain the suits at any rate, without joining the Receiver.

Two other like suits against the same Defendant were pending in the same Court, they were all tried together, and the same issues were raised in all of them.

On the 28th February 1916 the Subordinate Judge delivered his judgment, and passed decrees dismissing the suits of the present Respondents respectively with costs.

Against the said decrees appeals were preferred to the High Court and judgment was delivered therein on the 31st January 1919.*

The learned Judges were in substantial agreement with the trial Judge as to the questions of fact, but the case having been re-argued with reference to new contentions raised on behalf of the present Respondents, they determined not to affirm the decree of the trial Judge. They considered that the minor (by reason of his having lived with his guardian and other brothers as a member of a joint family) had, at some date not stated, been "admitted to the benefit of partnership" in the insolvent firm. That although it was not shown that he had in his possession any share in the property of the firm, and although the plaint did not ask for an account, an account should be taken to ascertain whether or not this was the case, and they considered that such property, if any, was available to the Plaintiffs suing as individual creditors and was not recoverable only by the Receiver. Further, the learned Judges were of opinion that the enquiry which they directed might show that the Defendant was actually subject to a personal liability for the Plaintiffs' claim under Contract Act, sec. 248.

Mr. Kenworthy Brown for the Appellant.—This is an attempt by creditors to make me personally liable for the firm's obligations. As a minor I cannot be so liable.

Sec. 247, Indian Contract Act, IX of 1872.

I cannot be liable under sec. 248 of the Contract Act, because I did, on attaining majority, repudiate any share in the Orphangunj business by adopting the written statements already filed in these suits by my guardian.

[LORD BUCKMASTER.—There does not appear to be any decree against you at all. The High Court have merely directed an account to be taken.]

Mr. Kenworthy Brown.—The fact that

* Reported : 23 C. W. N. 500.

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the decree made by the High Court is merely a preliminary one, does not mean that it cannot be appealed against.

Sec. 97, Code of Civil Procedure (Act V of 1908).

Ahmed Musaji Saleji v. Hashim Ebrahim Saleji (3).

There is in any event a finding and an order by the Court which I say is wrong and unless I appeal now I shall never be able to protest.

The Board intimated that they would hear the Respondents on this point.

Messrs. DeGruyther, K. C. and E. B. Raikes for the Respondent.—The major members of a joint family governed by the Dayabhaga carried on the business and the minor member got a share of the benefit.

Certain of the profits of these businesses are in the hands of the minor and we claim to be able to follow them.

The High Court say it is not clear that the share taken by the minor included a share of the profits of the new Orphan-gunj business. So there must be an account, because until an account has been taken I cannot acquit the Appellant of liability.

I would have liked to cross-appeal but I cannot, because there is no decree.

Mr. Kenworthy Brown.—The Respondents cannot make me personally liable. *Sanyasi Charan Mandal v. Ashutosh Ghose* (2), and in any event the proper person to institute proceedings is the Receiver and not the creditors. [Provincial Insolvency Act, III of 1907, secs. 16 (2), 18, 20].

This is an attempt by the Respondents to put themselves in a better position than the general body of the creditors.

Messrs. DeGruyther, K. C. and E. B.

(2) 1 L. R. 42 Cal. 225 (1914).

(3) L. R. 43 I.A. 91 at p. 95: s. c. 1 L. R.

43 Cal. 914; 19 O. W. N. 449 (1915).

Raikes. The Orphan-gunj business was merely a branch of the Kalibazar business and an addition to the joint family estate.

In the insolvency the minor said no portion of his share could vest in the Receiver, and he retained one-fifth, as a matter of fact the whole property should have vested in the Receiver.

We are creditors of the joint family and as the Appellant is in possession of part of the joint family assets we are entitled to follow them in his hands.

Mr. Kenworthy Brown in reply referred to.—*Grande Gangayya v. Grande Venkataramiah* (4).

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—There are consolidated appeals from two decrees of the High Court of Judicature at Fort William in Bengal, passed in separate suits on the 31st January 1919, reversing two decrees of the Subordinate Judge of the 24-Parganahs, dated the 28th February 1916.

In each suit a money decree was sought against the present Appellant, who was a minor at its institution. One suit was brought on a hand-note signed by the minor's three adult brothers; the other on a *hath-chitta*, signed by his four adult brothers, the youngest of them having then attained majority.

The ground of liability stated in the plaint is that the Defendant and his brothers are owners and partners in ancestral businesses, and the money claimed was borrowed by the brothers for the purposes of the businesses.

The minor defended in each case by his guardian for the suit.

The Defendant and his brothers were the five sons of Bhuvan Mohan Mandal, a Hindu governed by the Dayabhaga.

(4) 34 Mad. L. J. 271 (1917).

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school of law. He died in November 1899, and at that time his two younger sons were minors. Nil Ratan, the eldest brother and the *karta* of the family, was appointed their guardian under Act VIII of 1890.

Bhuban Mohan had two businesses, one for fuel wood at Munshigunj, and the other for rice and other articles at Kalibazar. Each devolved as an ancestral business on the five sons, and was carried on by Nil Ratan as the *karta*, assisted by his adult brothers. After the father's death a new business in rice was started by Nil Ratan at Orphangunj, and it is the Defendant's case that the money sued for was borrowed exclusively for the purpose of this business, and that the business was not ancestral.

The Subordinate Judge decided in the Defendant's favour and dismissed the suits. The High Court on appeal apparently took the same view in the first instance, but as the result of a re-argument, set aside the Subordinate Judge's decrees and directed certain accounts against the Defendant, not because his liability was established but for the purpose of determining whether or not he was liable. It is from these decrees of the High Court that the present appeals have been preferred.

A preliminary objection was taken that the appeals did not lie "because the order was not final," but their Lordships did not give effect to it and the appeals have been heard.

The businesses were conducted by Nil Ratan and his adult brothers for many years with success. Ultimately, however, there were financial difficulties, and on the 19th February 1912, proceedings under the Provincial Insolvency Act, 1907, were commenced by a creditor against all five brothers in the Court of the District Judge at Alipur. It was established to the

satisfaction of the Judge that the Defendant was a minor and so could not be adjudicated insolvent, and that the minor was a joint owner in the family business inherited from his father. There was, however, an adjudication against the adult brothers, "they being the members of the firm Bhuban Mohan Mandal and Nil Ratan Mandal."

A Receiver was appointed under sec. 18 (1) of the Act, and the property of the insolvents thereupon vested in him. He was ordered to realise not only the four-fifth shares of the insolvents in the joint property, but also the minor's share in the joint properties acquired after the father's death. As a result of his insolvency, Nil Ratan was removed from the guardianship of the minor, and Mati Lal Roy was appointed in his place.

On the 19th August 1912, with the sanction of the Judge, Mati Lal Roy and the Receiver agreed to appoint an arbitrator to effect a partition of the immovable properties, and on the 8th October 1912, an award was made under which the minor got one-fifth in both ancestral and after-acquired properties, Mati Lal Roy having claimed that the after-acquired properties were purchased out of the income of the ancestral properties. On the 14th January 1912, a decree was passed in terms of the award.

In the meanwhile cross-appeals had been preferred by Mati Lal Roy and the creditors from the orders of the Judge in Insolvency, and on the 17th March 1914, they were heard by the High Court with the result that the order refusing to adjudicate the minor an insolvent was affirmed, but so much of the order as directed the Receiver to realise the minor's share was set aside, and in lieu thereof it was ordered that the Receiver should "take possession of four-fifths share of the business, and four-fifths share of all the properties pur-

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chased since the death of Bhuban Mohan Mandal, and also four-fifths share of the other properties jointly held by the infant and his brothers."

It is in these circumstances that the present suits were commenced, as the dividend received by the Plaintiffs in the insolvency fell short of the amount due.

It is established by concurrent findings by the Lower Courts, first, that the money now in suit was borrowed exclusively for the purposes of the Orphan-gunj business, and secondly, that this business was neither ancestral nor an extension of the ancestral business. These findings must now be deemed conclusive, and this strikes at the very root of the case made by the Plaintiffs in the first Court.

The distinction between an ancestral business and one started like the present after the death of the ancestor, as a source of partnership relations, is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and its obligations. In the other they rest ultimately on contractual arrangement between the parties. The inability of a *karta* to impose on a minor co-parcener the risks and liabilities of a new business started by himself, is fully discussed by both Courts, and their Lordships agreeing with the conclusion at which they have arrived on this point, do not deem it necessary to enter on a further discussion of this aspect of the case.

What has to be seen in the peculiar circumstances of this dispute is not merely whether the minor has come under any liability in respect of the debts of the Orphan-gunj business, but whether that liability can be enforced by the Plaintiffs in the suits as constituted.

It is important at this point to bear in mind (a) that at the institution of the

suits the Defendant was a minor; (b) that in the written statement filed in each suit on his behalf by his guardian for the suit, it was denied that he was a co-sharer in the business, or had any responsibility with regard to it; (c) that when at a later stage of the litigation the minor attained majority, he adopted these written statements; and (d) that at that time the business of the firm had ceased.

The ancestral character of the Orphan-gunj business being negatived, the Plaintiffs have attempted to formulate other grounds of liability. Before the Subordinate Judge the claim seems to have been rested on general principles rather than on the specific provisions of the Contract Act. Thus in the grounds of appeal it is contended that the Defendant and his four brothers having all along lived as members of an undivided Hindu family, and properties having been acquired with the joint funds and the Defendant having got some of those properties in his share on partition with the Receiver, the learned Subordinate Judge ought to have passed a decree against the Defendant at any rate so far as the assets of the firms allotted to his share are concerned.

The answer to the case thus made is given by the Subordinate Judge towards the close of his careful and well-reasoned judgment, and their Lordships are in complete agreement with what is there said. In the High Court, however, reliance was evidently placed on the Contract Act for its provisions are mentioned and discussed. It becomes necessary, therefore, to examine the Act so far as it bears on the question now in contest.

Sec. 247 provides that a person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of partnership but cannot be made personally liable for any obligation of the firm; but the share of such

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minor in the property of the firm is liable for the obligations of the firm.

To bring this section into play it must be proved that the minor has been admitted to the benefits of the partnership. This is a fact to be established by evidence, and though it was neither pleaded nor made an issue at the trial, the High Court, without inviting evidence specifically directed to this point, held the admission proved, and thus set up a new case in appeal. The Defendant has just ground of complaint as to this, and the procedure is not one to be commended; still in the view their Lordships take they will deal with the case on the basis of the High Court's finding without expressing an opinion as to its correctness. Under the section liability is limited to the share of the minor in the property of the firm.

In sec. 239 there is a definition of the word "firm." It is there said the persons who have entered into partnership with one another are called collectively a "firm." In the earlier part of the section it is enacted that "partnership" is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business and to share the profits thereof between them.

A person under the age of majority cannot become a partner by contract [*Mohori Bibee v. Dhurmodas Ghose* (1)], and so according to the definition he cannot be one of that group of persons called a firm. It would seem, therefore, that the share of which sec. 247 speaks is no more than a right to participate in the property of the firm after its obligations have been satisfied.

Though there may be this right, in fact it is not claimed by the Defendant. On the contrary, the written statements deny

his membership of the partnership; this denial was made on his behalf during his minority, and it was adopted by him when he attained his majority. This attitude he still maintains, and it can only be regarded as a relinquishment of all claim to a share in the property of the firm. It is still the property of the firm, and is liable as such to the obligations of the firm.

But all the property of the firm vested in the Receiver on the making of the order of adjudication (Provincial Insolvency Act, sec. 16), and if any part of it has got improperly into the possession of the minor, the right to recover it is in the Receiver. This is not disputed by the Defendant; and it is only by its coming into the hands of the Receiver that its rateable distribution among the general body of creditors can be secured. Nor does it make any difference that the business was conducted by the male adult members of a Hindu family governed by the Dayabhaga; the rights and liabilities of a minor member of such a family would be measured by similar principles for the purpose now under consideration.

The learned Judges in the High Court seem to have thought that the judgment on appeal in the insolvency proceedings put a bar in the way of a recovery by the Receiver, and so justified the Plaintiffs' suits; but this proceeds on a misconception of what was actually decided.

It is quite true that in that judgment it was said that "the essence of the matter is that the share of the infant has not vested in him and he is consequently not entitled to deal with it. . . . But whatever remedies may be available hereafter to the Receiver or to the creditor, it is clear that the properties of the infant cannot be dealt with by either of them in these proceedings." This was a correct statement of the legal position; but it in

(1) L. R. 30 I. A. 114; s. c. I. L. R. 30 Cal. 539; 7 C. W. N. 441 (1903).

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no way justifies the conclusion in the judgment now under appeal that in consequence of it "the Defendant cannot now contend that it is only the Receiver (and not any individual creditor) who can deal with his share of the partnership properties." No property belonging to the minor could vest by the adjudication in the Receiver, but what would vest in him would be the right (if it existed) to recover from the minor property in his possession belonging to the firm.

It was then urged that any suit now instituted by the Receiver would be barred by limitation; but when Counsel for the Plaintiffs was asked whether to obviate this, he was prepared to add the Receiver as a party, so that any assets realised could come into his hands for rateable distribution, he declined the offer, and frankly admitted that it would be of no use to his clients unless they could recover for their own exclusive benefit.

The absence of the Receiver from the suits is not an objection taken for the first time at this stage of the litigation. It was pleaded as a defect in the written statement, and an issue was framed on the point.

The Plaintiffs do not now contend that the Defendant has become personally liable, and so it is unnecessary to discuss the terms of sec. 248.

In their Lordships' opinion, therefore, these suits constituted as they are, are misconceived. In the circumstances the Receiver is a necessary party to any proceeding for the purpose of realising assets liable for the firm's debts, and the proceeds of any realisation would be applicable not towards the exclusive discharge of any individual debt as the Plaintiffs desire, but for rateable distribution among the whole body of the firm's creditors.

Their Lordships will therefore humbly advise His Majesty that the appeals be

allowed, and that in each suit the decrees of the High Court, dated the 31st January 1919, be discharged, and the decrees of the Subordinate Judge, dated the 28th February 1916, be restored, and that the Respondents to each appeal do pay to the Appellant the costs of the appeals in the High Court. They will also pay the costs of these appeals.

Solicitor: Mr. E. Dalgado for the Appellant.

Solicitor: Mr. Douglas Grant for the Respondent.

G. D. M.

Appeals allowed.

[CIVIL REVISIONAL JURISDICTION.]

S. C. C. REF. No. 1 of 1922.

SANDERSON, O. J.

RICHARDSON, J.

1922,

16, March

I. J. COHEN

v.

G. DIAS.

Calcutta Rent Act (III, B. C., of 1920), sec. 8—Standardisation of rent by the Rent Controller—Certificate to be issued under sec. 8—Rent increased by the Tribunal, whether a fresh notice is necessary to be served on the tenant.

A notice under sec. 8 of the Calcutta Rent Act, 1920, is not necessary when the standard rent as fixed by the Controller has been further increased by the President of the Tribunal, the landlord having complied with the provision of sec. 8 as regards the increase allowed by the Controller.

This was a reference under sec. 69 of the Presidency Small Cause Courts Act by Mr. T. Thornhill, Chief Judge, Calcutta Court of Small Causes.

The facts of the case will appear from the judgment of the High Court.

The judgment of the learned 3rd Judge (Mr. J. C. Gupta) of the Small Cause Court was as follows:—

In this suit the Plaintiff is seeking to recover the balance of the standard rent from 5th May 1920 to June 1921 at the rate assessed by the President of the Tribunal.

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Originally the Controller fixed the rent at Rs. 93-12 a month; against this order the Plaintiff moved the Tribunal which modified the decision of the Controller and raised the standard rent to Rs. 100 a month.

The Defendant contends that he should have been served with a notice in terms of sec. 8 of the Rent Act before the landlord could recover at the enhanced rate. He also takes the plea of jurisdiction during the trial.

Plaintiff's case is Defendant deposited rent at the enhanced rate fixed by the Controller after due notice and when the matter had been referred to the Tribunal, no fresh notice was necessary, and sec. 8 has no application.

In my opinion, when the order of the Controller has been modified or set aside by the Tribunal under sec. 18 of the Act, it is not necessary for the landlord to give another notice. Sec. 8 deals with those cases where rent has been standardised by the Controller only; it does not apply to the Tribunal where it has been referred for considering the adequacy of the enhancement made by the Controller.

The reference to the High Court was in these terms—

"The Plaintiff (I. J. Cohen) is the landlord of certain premises in Calcutta called Cohen Mansions, and the Defendant (G. Dias), tenant of Suite No. 8 thereof. The monthly rent of the suite was Rs. 75. The Rent Controller appointed under the Calcutta Rent Act by his order of July 15, 1920, fixed the standard rent at Rs. 93-12. Being disappointed with the said order, the Plaintiff, on August 24, 1920, applied under sec. 18 of the Act to the President of the Tribunal, for revision of the said order. By the decision of the President of the Tribunal the standard rent was fixed at Rs. 100 per month. It is admitted that subsequent to the Rent Controller's order the Plaintiff complied with the provisions of sec. 8 of the Act by serving on the Defendant a notice in writing of his intention to increase, accompanied by a certificate from the Controller fixing the standard rent at Rs. 93-12. This increased rent has been paid by the Defendant up to January 30, 1921. The Defendant did not appear in the revision

proceedings before the President of the Tribunal. It is admitted that the Plaintiff gave notice in writing to the Defendant of the further increase made on revision. The Plaintiff now claims to be entitled to recover the difference between the standard rent fixed by the Controller and the revised rent fixed by the President of the Tribunal. The Defendant's contention is that the notice mentioned above not having been accompanied by a certificate from the Controller this sum is irrecoverable under sec. 8 of the Rent Act. The decisions of the judges of the Small Cause Court have not been uniform and there are a number of similar cases pending.

From sec. 2 (b) of the Act the expression "standard rent" would appear to mean the rent fixed by a definite individual who is called the Rent Controller. There are, however, strong indications throughout the Act that that expression applies also to the rent fixed by revision; otherwise, the Act would appear to be unworkable. The decision of the President of the Tribunal or of the Controller is in no way a decree capable of execution. The landlord may, or may not, wish to collect rent according to that decision. If he does, his only remedy against an unwilling tenant is under sec. 8 of the Rent Act. According to my reading of sec. 8, the tenant has one month to consider whether he will hold on at the revised rate or vacate and, this month counts from the day of service of the certificate from the Rent Controller. The present Defendant's means may quite entitle him to pay a rent of Rs. 93-12 which he has paid, but not a rent of Rs. 100 which he has never paid. A further increase by the President of the Tribunal of the rent fixed by the Controller is, in my opinion, just as much an increase of the rent of the premises as an increase by the Controller of the rent payable by mutual agreement."

Sec. 15 of the Act appears general. "The Rent Controller shall grant a certificate certifying the standard rent." It is pointed out and is a fact that the order made by the Controller in such cases is to the following effect:—"The order of the President of the Tribunal not having been communicated to this Court, I am not in a posi-

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tion to grant you a revised certificate." It would, therefore, appear to be the duty of the person requiring such certificate to see that the President's decision is so communicated. A case might arise where the Rent Controller would fix the standard rent at the same sum as the tenant had been paying but this might be increased on revision. Could it then be said that the landlord is exempted from the provisions of sec. 8?

This case came before the Third Judge. A similar case came before the Sixth Judge. One decision was quite contrary to the other. It then came before a Full Bench, consisting of the Third Judge, Sixth Judge and the Chief Judge with the result that the opinion of the Sixth Judge was upheld, the Third Judge dissenting. The learned Third Judge's opinion was that when the order of the Controller is set aside or varied by the Tribunal under sec. 18, it is not necessary for the landlord to give another notice. His reason is that sec. 8 deals with those cases where rent has been standardised by the Controller only, it does not apply to the Tribunal where the matter has gone upon appeal to decide the adequacy of such enhancement. In fact, the Controller refused to grant a certificate when asked by the landlord to do so, on the ground that the order of the Tribunal had not been communicated to him. The suit has been dismissed by the Full Bench, subject to the opinion of the Honourable Judges of the High Court. The questions referred to the High Court are:—(1) whether notice under sec. 8 of the Rent Act is necessary, when the standard rent as fixed by the Controller has been further increased by the President of the Tribunal, the landlord having complied with the provisions of sec. 8 as regards the increase allowed by the Controller: (2) If so, whether the said notice should be accompanied by a certificate from the Controller in order to entitle the landlord to recover rent so increased by the President of the Tribunal.

Mr. F. S. R. Surita for the Plaintiff.

Mr. M. Ashraf Ali for the Defendant.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is a reference

by the learned Chief Judge of the Court of Small Causes in Calcutta; and, the facts which are material for this reference are set out in the reference. They are stated as follows:—

"1. The Plaintiff is the landlord of certain premises in Calcutta known as Cohen Mansions and the Defendant is tenant of Suite No. 8 thereof.

"2. The monthly rent was Rs. 75.

"3. The Rent Controller appointed under the Calcutta Rent Act, 1920, by his order, dated 15th July 1920, fixed the standard rent at Rs. 93-12-0.

"4. Being dissatisfied with the said order, the Plaintiff on the 24th August 1920, applied under sec. 18 of the said Act to the President of the Tribunal appointed under the Calcutta Improvement Act for revision of the said order.

"5. The decision of the President, dated the 11th February 1921, fixed the standard rent at Rs. 100 a month.

"6. It is admitted that subsequent to the Rent Controller's order the Plaintiff complied with the provisions of sec. 8 of the Rent Act by serving on the Defendant a notice in writing of his intention to increase, accompanied by a certificate from the Controller fixing the standard rent at Rs. 93-12-0.

"7. This increased rent has been paid by the Defendant up to 30th June 1921.

"8. The Defendant did not appear in the revision proceedings before the President of the Tribunal.

"9. It is admitted the Plaintiff gave notice in writing to the Defendant of the further increase made on revision. The Plaintiff now claims to be entitled to recover the difference between the standard rent fixed by the Controller and the revised standard rent fixed by the President of the Tribunal.

"10. The Defendant's contention is that the notice mentioned in para. 9 hereof

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not having been accompanied by a certificate from the 'Controller' this sum is irrecoverable under sec. 8 of the Rent Act."

The questions which are submitted to this Court are—

"(1) Whether notice under sec. 8 of the Rent Act is necessary when the standard rent as fixed by the Controller has been further increased by the President of the Tribunal, the landlord having complied with the provisions of sec. 8 as regards the increase allowed by the Controller.

"(2) If so, whether the said notice should be accompanied by a certificate from the Controller in order to entitle the landlord to recover rent so increased by the President of the Tribunal."

The only fact which it is necessary for me to add to the facts, which are stated in the reference, is that it appears that the Defendant was given notice of the landlord's application to the President of the Tribunal. He did not appear in the revision proceedings and we were informed that after the President had given his decision, the Defendant appeared and alleged that the notice had not been served upon him. The President of the Tribunal, we were informed, came to the conclusion that the notice had been served. Therefore, it must be taken as a fact that the Defendant was served with the notice of the landlord's application to the President of the Tribunal and he did not appear in the proceedings.

The first question which is referred to this Court is with reference to the notice under sec. 8. With reference to that question, it is necessary to refer to three or four sections of the Act.

The first section to which I wish to refer is sec. 2, cl. (f) which defines "standard rent." It says "standard rent" in relation to any premises means,

(i) the rent at which the premises "were let on the first day of November 1918, or, where they were not let on that date, the rent at which they were last let before that date and after the first day of November 1915, with the addition in either cases of ten per cent., on such rent; (ii) in the case of any premises which were or shall be first let after the first day of November 1918 the rent at which the premises were or may be first let; (iii) in the cases specified in sec. 15, the rent fixed by the Controller."

On reference to sec. 15 we find that there it is provided that "The Controller shall, on application made to him by any landlord or tenant, grant a certificate, certifying the standard rent of any premises, leased or rented by such landlord or tenant, as the case may be." Then the section sets out certain cases in which the Controller is given power to fix the standard rent at such amount, as having regard to the provisions of the Act and the circumstances of the case, he deems just; and it is further provided by sub-sec. (4) that "before exercising any of the powers conferred on him by this Act the Controller shall give notice of his intention to the landlord and tenant, if any, and shall duly consider any application received by him from any person interested, within such period as shall be specified in the notice." By sub-sec. (5) it is provided that "All orders of the Controller passed under this Act shall be in writing, and a certified copy thereof shall be affixed to some conspicuous part of the premises to which it relates, or to some conspicuous object near such premises and a certified copy shall also be delivered to the landlord, or his authorised agent, in such manner as the Local Government may, by rule, prescribe." In this case, the application was made to the Controller by the land-

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lord. We were informed by the learned Counsel that the Controller fixed the rent, basing his decision upon sec. 2, cl. (f), sub-sec. (1) and, that the application was made to the Controller in pursuance of sec. 15, cl. (1). The Controller granted a certificate certifying the standard rent in accordance with that section. It is admitted that in accordance with the provisions of sec. 8, the landlord gave a notice in writing of his intention to increase the rent, accompanied by the certificate from the Controller fixing the standard rent. So far the landlord complied with the provisions of the Act in every respect. Then comes sec. 18 for consideration; and, that section provides, "If the decision of the Controller fixing the standard rent for any premises is questioned, either the landlord, or the tenant may, in respect of premises in Calcutta, apply for revision of such order to the President of Tribunal appointed under sec. 72 of the Calcutta Improvement Act, 1911."

The decision of the President of the Tribunal shall be final." The provision in the Act as to the procedure to be followed by the President of the Tribunal is contained in sec. 24, which provides, "In revising the decisions of the Controller, the President of the Tribunal. . . shall follow as early as may be the procedure laid down in the Code of Civil Procedure, 1908, for the regular trial of suits." I take it, therefore, that in applying the procedure laid down in the Civil Procedure Code, the President of the Tribunal would see that the parties received such notice as would be given to the parties in the regular trial of suits, and, as it has been already stated, in this case the tenant did receive notice before the President of the Tribunal entered upon the consideration of the application of the

landlord. Then the President of the Tribunal gave his decision and after that the landlord gave notice of the decision to the tenant.

The question is whether sec. 8 applies to the decision of the President of the Tribunal. That section is as follows, "(1) Wherever an increase of the rent of any premises is allowable under the provisions of this Act, no such increase shall be recoverable until the expiry of one month after the landlord has served on the tenant a notice in writing of his intention to increase the rent, accompanied by a certificate from the Controller fixing the standard rent."

In my judgment, construing the various sections of this Act, as best as I can, the meaning of the Act is not that that section should apply to the decision of the President of the Tribunal. Further, it seems to me that this must be so from that wording of sec. 8 itself. The certificate which is to accompany the notice in writing, contemplated by that section, is a certificate from the Controller fixing the standard rent; that must mean, in my judgment, a certificate which certifies the decision of the Controller himself, whereby he fixes the standard rent. When a party applies for a revision of decision of the Controller, fixing the standard rent, to the President of the Tribunal, it is the President of the Tribunal who fixes the standard rent and his decision is final. When the President of the Tribunal has revised the decision of the Controller and fixed the standard rent, the Controller has no power to interfere with the President's decision: it is provided that the decision of the President of the Tribunal shall be final. The certificate contemplated by sec. 8, in my judgment, is the certificate to be granted by the Controller when he, the Controller fixes the standard rent.

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There is no corresponding section in the Act applicable to the decision of the President of the Tribunal, nor is there any provision, directing a remission of the case to the Controller after the decision of the President of the Tribunal in order that the Controller might issue a certificate fixing the rent. In my judgment, the true construction of the Act is that the provisions of sec. 8 are not applicable to the case when the President of the Tribunal revises the decision of the Controller and fixes the standard rent.

Therefore, I answer the first question in this way, that a notice under sec. 8 of the Rent Act is not necessary when the standard rent as fixed by the Controller has been further increased by the President of the Tribunal, the landlord having complied with the provisions of sec. 8 as regards the increase allowed by the Controller.

As regards the second question it seems to me that the answer to that must follow the answer to the first one, because it is based on the conclusion that the provisions of sec. 8 are not applicable. I answer the second question, therefore, by saying that under the circumstances which are stated in the reference, a certificate from the Controller was not necessary in order to entitle the landlord to recover the rent so increased by the President of the Tribunal.

I wish to add for the purpose of safeguarding myself that we do not express any opinion on the question, which was raised by the learned Counsel for the Respondent during the argument, namely, in respect of what period is the increased rent recoverable in consequence of the decision of the President of the Tribunal. That question may or may not have to be decided when the suit is tried. This suit has been dismissed merely on the ground that the suit would not lie in consequence

of the notice and the certificate referred to in sec. 8 not having been served in respect of the decision of the President of the Tribunal. The merits of the suit, as I understand, have not yet been investigated.

We make no order as to the costs of this reference.

RICHARDSON, J.—With much respect to the opinion of the learned Chief Judge and the learned Sixth Judge, I agree with my Lord that in view of the terms of sec. 8 of the Calcutta Rent Act, that section can have no application to a decision of the President of the Tribunal under sec. 18, revising, in the sense of increasing, the rent fixed by the Controller under sec. 15. In the Act the provisions relating to the Controller and his powers are kept separate and distinct from the provisions relating to the President of the Tribunal and his powers. We are told from the Bar that the Controller and the President do not occupy the same building. I agree generally with what my Lord has said, and it does not appear to be desirable at present to say more than is necessary, because a further question has been raised and may require decision when the suit comes to be tried, as to the precise effect of the President's decision in relation to the Controller's certificate fixing the standard rent in the first instance, or as to the date from which the President's decision operates.

There is one point however on which a word may be added. A difficulty perhaps arises as to the effect of cl. (1) of sec. 15. That clause enables the Controller on the application of any landlord or tenant to certify the standard rent of any premises leased or rented by such landlord or tenant as the case may be. As I conceive, what is contemplated is not a certificate of a ministerial character stating what rent has been fixed as the

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standard rent, but the power conferred by the clause is one of the powers before exercising which the Controller is to give the notice required by cl. (4) of sec. 15. Sec. 15, including cl. (1), must be read with reference to the definition of "standard rent" in sec. 2. As I understand the matter, therefore, a standard rent certified by the Controller under cl. (1) of sec. 15 may be revised by the President under sec. 18. The Act appears to be so understood, because in the present case the rent revised by the President was a standard rent certified by the Controller under cl. (1) of sec. 15. Accordingly, it would not seem to be the intention of the Act, that after the President has given his decision under sec. 18, the Controller should have any power under cl. (1) of sec. 15 to certify or recertify a standard rent.

The Act was hurriedly passed and is in some respect not easy to construe, but the view I have expressed receives confirmation from the fact that sec. 8 speaks of "a certificate from the Controller fixing the standard rent." With these words in mind, the phraseology of sec. 18, "the decision of the Controller fixing the standard rent" would seem to apply as much to a certificate given under cl. (1) of sec. 15 as to an order, for instance, fixing the standard under cl. (3) of that section.

With these observations I agree with the answer which my Lord has proposed to the questions referred to us by the learned Chief Judge of the Court of Small Causes.

Mr. N. C. Mitra, Solicitor for the Plaintiff.

Mr. Mahomed Habib Haq, Solicitor for the Defendant.

M. N. K.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1608 OF 1921.

MOOKERJEE, J.

CHOTZNER, J.

1922,

Heard, 25 and

26, April.

Judgment,

. 12, May.

SARAT CHANDRA SEN,
Defendant, Appellant,
v.

RAJ KUMAR MOOKERJEE,
Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908), Sch. II, para. 18—Suit pending decision of arbitrators—Award of arbitrators whether a bar to the suit where no application for stay of suit made—Proper procedure.

The Plaintiff and the Defendant were owners of adjoining parcels and the controversy between them constituted a boundary dispute. On the 19th May 1915 they executed a deed of agreement and referred the matter in dispute to three arbitrators who held an enquiry. On the 4th November 1917 one of them announced a decision which was signed only by himself and was unfavourable to the Plaintiff. On the 8th March 1918 the Plaintiff commenced a suit to establish his title and enforce his claim. The arbitrators were apprised of the institution of the suit and on the 30th March 1918, they published their joint award. The Defendant who did not receive notice of the suit till the 4th April entered appearance on the 11th April and filed his written statement on the 26th April:

Held—That as the Defendant did not take recourse to the proper procedure, namely, apply for stay of the suit, cancellation of the award as made without jurisdiction and thereafter remission of the matter to the arbitrators, the award had been rightly rejected by the Court below as made without jurisdiction and the suit was properly tried on the merits by the Court.

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RAM CHANDRA v. KRISHNA LAL (1), DINABANDHU JANA v. DURGA PROSAD JANA (2), RAM PROSAD v. MOHAN LAL (3), JOKIRAM v. GHANESHYAM (6) and RAM CHAND v. GOBINDRAM (7) considered.

That the Defendant should not be given an opportunity at this late stage to comply with the requirement of the law as the death of one of the arbitrators rendered a reconsideration by the original arbitrators impossible, the agreement not containing any provision for a reconstitution of the committee of arbitrators upon such a contingency.

This was an appeal preferred on the 25th of July 1921, against the decree of Babu Hem Chandra Das Gupta, Officiating Subordinate Judge, 2nd Court of Zillah 24-Parganahs, dated the 20th of May 1921, modifying the decree of Babu Saroda Kumar Sen Gupta, Munsif, 1st Court at Sealdah, dated the 29th of May 1919.

The Plaintiff and the Defendant referred a boundary dispute to the arbitration of three persons. There was no time limit within which the award was to be made. On the 4th November 1917 an award purported to be signed by one of them was published. On the 8th March 1918 the Plaintiff-Respondent instituted a suit relating to the matter which was the subject of the arbitration proceedings alleging that the award made on the 4th November 1917 was invalid as it was vitiated by misconduct. On the 30th March 1918 all the arbitrators joined in making another award which was in agreement with that made on the 4th November

1917. On the 4th April 1918 the Defendant was served with summons of the case. The learned Munsif held that the only award that was operative in law was the award of the 30th March 1917, the earlier one being no award at all not being duly stamped, and the said award was a bar to the Plaintiff's suit. The learned Subordinate Judge on appeal held that the award made on the 4th November was invalid as all the arbitrators did not join in making it and the award made on the 30th March was without jurisdiction as the institution of the suit made the arbitrators *functus officio*. He held therefore that the suit was maintainable and gave the Plaintiff a decree after going into the merits of his claim.

The Defendant appealed to the High Court.

Babu Monmotha Nath Mukherjee (with him *Babu Pannalal Chatterjee*) for the Appellant.—The suit was not maintainable, otherwise if the view of the Subordinate Judge be maintained, a party who has a suspicion that the arbitrators are going to decide against him can nullify the whole proceeding by rushing into Court at the very last moment. See *Jokiram Kaya v. Ghaneshyam Das Kedarnath* (6). Here the award was made before the Defendant had any opportunity to apply for a stay of the suit under para. 18 of Sch. II of the Civil Procedure Code.

Babu Rupendra Coomar Mitra for the Respondent.—The institution of a suit ousts the jurisdiction of the private tribunal. The history of the law of arbitration shows that the authority of a private tribunal to decide disputes was one of gradual growth. In England in the first stage an agreement to have a dispute decided by private persons was considered illegal as interfering with the jurisdiction

(1) 15 C. W. N. 351 (1912).

(2) I. L. R. 46 Cal. 1041: s. c. 23 C. W. N. 716; 29 C. L. J. 399 (1919).

(3) I. L. R. 47 Cal. 753 (1920).

(6) I. L. R. 47 Cal. 849: s. c. 25 C. W. N. 62 (1920).

(7) [1918] 13 S. L. R. 183.

(6) I. L. R. 47 Cal. 849: s. c. 25 C. W. N. 62 at p. 65 (1920).

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of the King's Court. In the second stage such agreements were given a limited effect. The existence of such an agreement did not prevent either party from having the dispute settled in Court, the remedy of the parties only lay in instituting a suit for damages for breach of the agreement. In the third stage when such damages were considered as inadequate a party could at the earliest opportunity apply for a stay of the suit, which had an indirect effect on the other party. See Fletcher Moulton, L. J., in *Doleman & Sons v. Ossett Corporation* (4), also *Russell on Arbitration*, p. 75. Hence the jurisdiction of the Courts is curtailed only to the extent as provided by express statute. This case is not provided for in the Civil Procedure Code and hence the institution of the suit ousts the jurisdiction of the private tribunal, otherwise there would be a race between two tribunals, the public and the private.

In *Doleman's* case (4) it is pointed out that the institution of the suit makes the arbitrators *functus officio*, the fact that the award is made after the institution of the suit but before the summons is not treated as material.

See also *Apparu v. Seeni* (5), which has been approved in *Dinabandhu v. Durqa Prosād* (2).

Secondly when there is a reference which does not in express terms provide for making more than one award, the arbitrators have power to make one award only.

See Halsbury, Vol. I, p. 468, *Gould v. Staffordshire Potteries Waterworks Co.* (8). When award was made on the 4th November 1917 the arbitrators had

no jurisdiction to make a second award namely of the 30th March 1918 and the award of the 4th November 1917 being invalid as it was signed by only one of them, there was no bar to a suit.

See *Abu Hamid v. Golum Sardar* (9) and *Ramesh Chandra v. Karunamoyi* (10), *Ibrahim Ali v. Mohsin Ali* (11) and *Stalworth v. Innes* (12).

Babu Monmotha Nath Mukherjee in reply.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the Defendant in a suit for recovery of possession of land upon establishment of title. The Plaintiff and the Defendant are owners of adjoining parcels and the controversy between them constitutes a boundary dispute. On the 19th May 1915, they executed a deed of agreement and referred the matter in dispute to three arbitrators. The arbitrators held an enquiry, and on the 4th November 1917, one of them announced a decision which was signed only by himself and was unfavourable to the Plaintiff. On the 8th March 1918, the Plaintiff commenced the present litigation to establish his title and to enforce his claim. The arbitrators were not apprised of the institution of the suit, and on the 30th March 1918, they published their joint award. The Defendant, who did not receive notice of the suit till the 4th April, entered appearance on the 11th April and filed his written statement on the 26th April. Amongst other defences, he urged that the award was a bar to the maintenance of the suit. Thereupon the following issues were raised :—

(2) I. L. R. 46 Cal. 1041; s. c. 23 O. W. N. 716; 39 O. L. J. 899 (1919).

(4) [1912] 3 K. B. 287 at p. 288.

(5) I. L. R. 41 Mad. 116 (1917).

(8) [1850] 5 Exch. 214 (223); 14 Jurist 528.

(9) 25 O. L. J. 896 (397) (1916).

(10) I. L. R. 33 Cal. 498 (1906).

(11) I. L. R. 18 All. 422 (427) (F. R.; (1896).

(12) 13 M. & W. 466 (1844).

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1. Has the Plaintiff any title to the land in suit?

2. Does the disputed land appertain to holding No. 161?

3. Is the suit barred by law of limitation?

4. Is the Plaintiff's suit barred by the laws of estoppel and acquiescence?

5. Is the suit maintainable under the law?

6. Is the award made by the arbitrators with reference to land in suit void and inoperative?

7. To what relief, if any, is the Plaintiff entitled?

The trial Court held on the authority of the decision in *Ram Chandra v. Krishna Lal* (1) that the Plaintiff was not competent to resile from the agreement to refer to arbitration and that the award was not void and inoperative. The Court also investigated the case on the merits and finally dismissed the claim. Upon appeal, the Subordinate Judge held that as soon as the suit was instituted, the arbitrators became *functus officio* and the award was consequently invalid. On the merits, he held that the Plaintiff had established his title as found by the Commissioner, and in this view he decreed the claim in part. On the present appeal, the Defendant has contended that the award was not void and must be deemed operative, till, at any rate, the Plaintiff should establish that the proceedings of the arbitrators had been vitiated by corruption or misconduct. The Plaintiff has argued, on the other hand, that para. 18 of the second Schedule to the Civil Procedure Code of 1908 shows that the only remedy of the Defendant, if any, was to apply to the Court to stay the suit, and that as he did not take recourse to the procedure prescribed, the suit could not be deemed barred by the award.

(1) 17 C. W. N. 351 (1912).

The true effect of para. 18 has been considered by this Court in three recent cases. In *Dinabandhu Jana v. Durga Prasad Jana* (2), it was pointed out that where, for the determination of the controversy between the parties, two competent tribunals are available, the Court and the arbitrators, and Plaintiff chooses the latter but in fact has recourse to the former, it is not open to the Defendant to enforce specific performance of the contract or to plead the contract as a conclusive bar to the suit, but the Defendant may apply to the Court to stay the suit in the exercise of its judicial discretion, so as to enable either of the parties to obtain a decision from the arbitrators. When the Court is apprised that the suit has been instituted in contravention of an arbitration agreement, the Court has thus a discretion to stay the suit. The burden lies upon the Plaintiff to show that some sufficient reason exists why the matter should not be left to be decided by the arbitrators and not on the Defendant to show that no such reason exists; it is the *prima facie* duty of the Court to act upon the agreement between the parties. It may be added that in the case then before the Court, the suit had been instituted two days after the agreement to refer the matters in controversy to arbitration.

The question presented itself for consideration again in the case of *Ram Prasad v. Mohan Lal* (3) in connection with sec. 19 of the Indian Arbitration Act, 1899, which furnished the model for para. 22 of the second Schedule to the Civil Procedure Code. There, a reference to arbitration was made by a buyer of goods on the 3rd May 1919. On the 21st May 1919, the sellers instituted a suit for damages for breach of contract. On the

(2) I. L. R. 46 Cal. 1041 : A. C. 23 C. W. N. 716; 29 C. L. J. 399 (1919).

(3) I. L. R. 47 Cal. 752 (1920).

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20th June 1919 the award was made, and on the 9th July following, it was filed in Court. On the 22nd July, the sellers applied to set aside the award. Mr. Justice Greaves granted the application on the ground that though the reference to arbitration had been made before the suit in terms of the contract between the parties, the award was of no effect, as the suit had not been stayed pending the arbitration. This conclusion was approved by the Court of appeal, as supported by the decisions in *Doleman and Sons v. Ossett Corporation* (4), *Apparu v. Secni* (5) and *Dinabandhu v. Durga Prosad* (2). It cannot thus be disputed that if the Court has refused to stay the action, or if the Defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision and by its decision alone that the rights of the parties are settled. We need not consider whether a Plaintiff who has instituted a suit in contravention of the agreement to refer to arbitration may not deprive himself of his right to prosecute the suit if, at the same time, he goes on with the arbitration and obtains an award. The facts of the present case do not raise such a question; if it did require examination, it might be difficult to reconcile the views of Fletcher Moulton, L. J., and Farwell, L. J., as expounded in *Doleman & Sons v. Ossett Corporation* (4).

The point arose again in *Jokiram v. Ghaneshyam Das* (6). In that case, a seller of goods referred a dispute between him and his buyer to arbitration on the 24th April 1919, in accordance with an arbitration clause contained in the con-

tract. On the 14th August 1919, the buyer, with full knowledge of the arbitration, instituted a suit for recovery of damages from the seller on the allegation that the seller was in default. The seller received intimation of the suit on the 24th August 1919, but the writ was not served on him till the 26th September 1919. On the 16th October 1919, the arbitrators made an award in favour of the seller. On the 17th November 1919, the buyer made an application to the Court to set aside the award on the ground that by reason of the institution of the suit the arbitrators were *functus officio* and their award was consequently void for want of jurisdiction. This application was granted and the award was set aside on the 28th November 1919. On the 1st December 1919, the seller applied for stay of the suit under sec. 19 of the Indian Arbitration Act. This application was refused by the trial Court but was granted by the Court of appeal. The arbitrators were thus left free to proceed with the arbitration. It was pointed out that though as the result of the institution of the suit the arbitrators became *functus officio* from that very moment and their authority to deal further with the matter referred became extinguished, the validity of the reference itself, which, when made, was in exact conformity with the agreement of the parties, was not affected.

The true position consequently is that as soon as the suit is instituted the arbitrators lose their authority. If the Defendant still desires that the controversy should be decided by arbitration he must endeavour to obtain a stay of the suit by an appropriate application under para. 18 of the second Schedule to the Civil Procedure Code. If the application is refused by the Court in the exercise of its discretion, the remedy by arbitration ceases to be available. If the suit is

(2) I. L. R. 46 Cal. 1041; s. c. 23 C. W. N. 716; 29 C. L. J. 399 (1919).

(4) [1912] 3 K. B. 257.

(5) I. L. R. 41 Mad. 115 (1917).

(6) I. L. R. 47 Cal. 849; s. c. 25 C. W. N. 63

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stayed, two possible contingencies may require consideration. If the arbitrators have not yet made an award, they are free to bring their proceedings to a termination and make an award in accordance with law. If, on the other hand, the arbitrators have made an award after the institution of the suit as happened in *Ram Chand v. Gobindram* (7), the award cannot be pleaded as an effective bar to the suit. The award so made should be brought up before the Court under para. 20 of the second Schedule to the Civil Procedure Code; the Court will refuse to enforce it under para. 21 read with para. 14 (c), and as the award will thus stand cancelled because made without jurisdiction, the arbitrators will be left free thereafter to resume their proceedings on the basis of the original reference. If this view were not adopted, the result would follow that a party to a submission, who had appeared throughout and had taken his chance before the arbitrators, might, at the very last moment, when the award, possibly an adverse award, was about to be made and when there would be no time left for his opponent to obtain a stay order, institute a suit and thereby render infructuous the entire proceedings.

In the case before us, the Defendant did not take recourse to the proper procedure, namely, apply for stay of the suit, cancellation of the award as made without jurisdiction, and thereafter remission of the matter to the arbitrators. His failure was possibly attributable to ignorance of the law which was explained in the case of *Dinabandhu v. Durga Prosad* (2), long after the institution of this suit. We have accordingly considered whether the Defendant should at this late stage be given an opportunity to comply with the

requirements of the law, as was done in the case just mentioned. In our opinion, the answer must be in the negative for the death of one of the arbitrators renders a reconsideration by the original arbitrators impossible. Unlike the case of *Jokiram v. Ghaneshyam Das* (6), the agreement to refer to arbitration here does not provide for reconstitution of the committee of arbitrators if one of them should die. Consequently, even if we were inclined to concede to the Defendant the same advantage as was given to the Appellant in *Dinabandhu v. Durga Prosad* (2), he would not be benefited thereby. There is thus no escape from the position that in the present case the award has been rightly rejected as made without jurisdiction and the suit tried on the merits by the Court. The appeal consequently fails and is dismissed with costs.

S. C. C.

Appeal dismissed.

[CRIMINAL APPELLATE JURISDICTION.]

APP. NO. 193 OF 1922.

WALMSLEY, J.

ABDUL GOHUR

SUHRAWARDY, J.

SIRKAR and ors,

1922,

Appellants,

Heard, 22, June.

v.

Judgment,

THE KING-EMPEROR,

28, June.

Respondent.

Jury, trial by—Misdirection in charging jury—Omission to explain that onus is on prosecution to prove charge—Omission to give proper direction on questions of fact

When the Sessions Judge in his charge to the jury did not clearly explain that the onus of proof was on the prosecution and did not set out all the points for decision and omitted to give proper direction on the facts of the case:

(2) I. L. R. 46 Cal. 1041: s. c. 23 C. W. N.

716; 29 C. L. J. 399 (1919).

(7) [1918] 13 S. L. R. 198.

(2) I. L. R. 46 Cal. 1041: s. c. 23 C. W. N. 716; 29 C. L. J. 399 (1919).

(6) I. L. R. 47 Cal. 849: s. c. 25 C. W. N. 62 (1920).

ABDUL GOHUR SIRKAR v. THE KING-EMPEROR.

Held—That *this was misdirection which vitiated the verdict and rendered the conviction liable to be set aside*

This was an appeal preferred on the 15th May 1922 against an order of the Additional Sessions Judge of Backergunj (Mr. H. G. Blomfield), dated the 27th January 1922.

The material portion of the Sessions Judge's charge to the jury is set out below :—

" The case for the prosecution is that one evening early in last October the female accused Sarojini, who with her daughter Sukhadha, a girl of about 14, was staying in the house of her brother Prasanna, took her daughter out for a walk, but instead of returning to her brother's house, took her to that of Abdul Gahur, one of the two male accused. From there she was removed to Sabi Mullah's house, where she stopped that night, and the next night she was taken by the two male accused and 3 or 4 other men to the house of Erfan, her intended husband, her mother also being one of the party. That night she was left alone in Erfan's room, and he outraged her, repeating the performance during the next 4 or 5 nights, her own mother and his mother conniving at his villainy. She was then taken to various places, and finally ended up at Pirojpur, where the party took up their abode in a boat on a *khal* near the house of one Mafezuddi Mukhtar, who for some reason best known to himself afforded shelter to the abductors. From this ignominious position she was eventually rescued by the prompt action of the S. I., who took her before the Magistrate, by whom she was made over to her brother-in-law and her uncle, who were members of the search party.

The case for the defence is that mother and daughter were a bad lot, and that so

far from the latter having been abducted by the former, on the contrary, the pair were turned out, bag and baggage, by their righteous uncle, who resented the slur cast on the fair fame of his family. Thereafter, it is said, they embraced Muhammadanism, and the two male accused embraced them; for not only is it alleged (or at any rate suggested) that the daughter went through a form of marriage with Erfan, but also—and this the prosecution admit or rather expressly state—that the mother is the mistress of Abdul Gahur. Thus there was no guardianship, the girl was not either kidnapped or abducted, and the accused Erfan merely had connection with her, not against her will, but with her consent. *Ergo* no offence has been committed.

(The evidence on both sides was here referred to.)

Two stories are thus before the jury—one in which a definite and palpable offence has been committed—the offence of kidnapping or abduction *cum* procuration or disposal of a minor for immoral purposes, and the other in which the accused have done nothing contrary to law (for seduction *per se* is no offence). It is for the gentlemen of the jury to decide which hypothesis the better fits the facts and the probabilities—that of guilt or innocence.

The question which the jury will have to answer is this.

Did the accused either kidnap or abduct the girl with an immoral purpose, and was that purpose carried out? For if it was, that will be the best evidence of the purpose. So with the charge of disposal and obtaining possession of a minor.

Now as regards the charge of kidnapping, the question of guardianship is material. But for abduction it is not. For one can abduct any person. There-

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fore, whether the girl was in anyone's custody or not, she may still have been abducted with intent that she should be seduced.

There seems very little reason to doubt that the accused Erfan had intercourse with her. He does not trouble to deny it, but instead asserts that he married her, after she had become a Muhammedan. Positive evidence of conversion and marriage, especially of the latter, are alike wanting. At the same time it is but fair to point out that in a case like the present the so-called conversion is no more than nominal, or is at best but a very perfunctory performance dictated entirely by ulterior motives and accepted as purely utilitarian by the other members of both religions. Evidence has been adduced to shew that the two women were expelled by their own family with no more than the clothes they stood up in. If this version is believed, then mother and daughter were in a very awkward predicament. They could not return to their relations for their own relations had themselves turned them out; the other members of their caste would have nothing to do with them; and they had neither food, shelter, nor money. What was to be done? Go to the landlord, or go to the devil? Become (and marry) a Muhammedan and become a prostitute? They had little choice. The only religion that would have taken them in on equal terms, and would have provided them with husbands of their own choice, had they so desired, was one of which they could know nothing, but it is still open to them. If the jury accept the testimony of the three Hindu gentlemen as to their being turned out of their habitations in pious honour by their self-righteous brethern, this will materially weaken the prosecution case.

If they go further and believe that the

women voluntarily went, or allowed themselves to be handed over, to Erfan and Gohur respectively, and of their own accord lived with them, whether married or not, then the case for the prosecution will go altogether.

Before, however, coming to any such conclusion, let the jury consider well the narrative of events that culminated in the finding and recovery of the girl from the clutches of the lawyer of Pirojpur. The motives of the person in harbouring the accused I must leave to the jury; to me they appear questionable, in view of the allegation against him made by the girl, and of his refusal to give her up when called upon to do so. If Sukhada was voluntarily living with Erfan, why was she carted about from place to place, and finally taken to Pirojpur? Here again the defence have an answer ready: they say that the two women went to Pirojpur of their own accord, to take legal advice for the recovery of their property from their relations.

It is necessary to point out that the persons chiefly concerned, *viz.*, the brother-in-law and the uncle, as well as the women-folk of the family, flatly deny that they have turned out either the mother or the daughter, and especially not the latter. If they had already done so, would they have troubled to run this case and to give evidence for a girl in whom they had on their own shewing no further interest. I would ask the jury to give careful consideration to this point before they conclude that the girl was already outcasted at the time either of the alleged abduction or of the recovery. Briefly, if the jury believe that the girl was to any extent removed or made to go from any place to any other with intent to force or seduce her to any (even one act of) unlawful intercourse against her will or even

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against her inclinations, then they will be bound to return a verdict of guilty under sec. 366, I. P. Code.

—The jury must ask themselves which view of the facts they find the more consistent and the more probable, and which seems to them the better supported by the evidence they have heard; and should return a verdict accordingly."

Moulvi A. K. Fazlul Huq and Babu Radhika Ranjan Guha for the Appellants.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—The three Appellants were all charged under sec. 366, I. P. C. and there were separate charges, against Abdul Gohur under secs. 372, 109, I. P. C., against Erfan under sec. 373, I. P. C. and against Sarojini under sec. 372, I. P. C. They were found guilty on all the charges, and the learned Judge sentenced Abdul Gohur to three years' rigorous imprisonment, and the other two to four years' rigorous imprisonment each all under sec. 366, I. P. C., but did not pass any separate sentences on the other charges.

The girl in the case is Sukhada, the daughter of Sarojini, and briefly stated the story is that Sarojini took her to Abdul Gohur's house and afterwards made her over to Erfan for purposes of co-habitation. The defence is that the woman became a Musalman, and that Erfan wanted to marry the girl.

So far as the charges under secs. 372 and 373, I. P. C. are concerned, the age of the girl is an essential point. It was necessary for the prosecution to prove that she was under the age of sixteen years. For this purpose the Assistant Surgeon was examined, and he expressed a definite opinion that she was below sixteen years.

The first objection taken to the learned Judge's charge is that he has not dealt properly with the question of minority. In explaining the law he said that for kidnapping, the girl must be under sixteen years, and in explaining the terms "disposing of" and "immoral purpose" he used the word minor, but he nowhere said that if the girl was not proved to be under sixteen, there could be no offence under sec. 372 or 373, I. P. C. Further on the question of fact, he merely referred to the medical evidence, said that the defence tried to make out that she was sixteen, and left it to the jury to decide. That seems rather a summary treatment of an important matter, but looking at the evidence on the record I am not prepared to hold that the verdict is vitiated by the defects. Secondly, it is said that the learned Judges did not explain to the jury that the burden of proof lay on the prosecution. It is pointed out that at the beginning of the summing up, he said "It is for the gentlemen of the jury to decide which hypothesis the better fits the facts and the probabilities—that of guilt or innocence," and that his conclusion is in similar words, "The jury must ask themselves which view of the facts they find the more consistent and the more probable, and which seems to them the better supported by the evidence they have heard; and should return a verdict accordingly." On the other hand, the charge began with general remarks on the burden of proof and the benefit of the doubt and the earlier of the two passages which I have quoted is immediately followed by the words: "The question which the jury will have to answer is this: Did the accused either kidnap or abduct the girl, etc." In the absence of details as to what the learned Judge said about the burden of proof I think this criticism is well founded, for when the jury was asked to decide which

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hypothesis suited the facts better, they were in effect told that the prosecution would discharge its onus by producing the better hypothesis. That was the last instruction they received from the Judge, and I think it is very probable that in consequence they looked at the evidence from a wrong point of view.

Thirdly, it is said that the learned Judge has expressed his own views very emphatically with nothing more than a conventional direction that the responsibility of deciding questions of facts rests with the jury. This criticism does not commend itself to me, for I find it difficult to understand what view of the facts as a whole the learned Judge did take. He certainly takes it for granted that Erfan was cohabiting with the girl, to the knowledge of Sarojini but those are facts not in dispute, for the Appellant's story is that the mother and daughter were married to Abdul and Erfan respectively. So far from taking from the jury the duty of determining questions of fact, I think the charge is defective rather because it does not set out all the questions that required decision, and because it offers extremely little guidance.

Another criticism, affecting only Abdul Gohur, is that he is not said to have taken the girl to his house, and that he was not at home when she was brought there. The learned Judge has not said anywhere in his charge what act on the part of Abdul Gohur could render him liable to a charge under sec. 366, I. P. C. : he took no part in bringing the girl to his own house : the removal on the first night to Sabi Molla's house does not appear to have been in furtherance of any scheme for abducting the girl, so that if Abdul Gohur participated in any abduction it must have been when he escorted the girl to Erfan's house. The learned Judge has not dealt

with this matter, although he should have told the jury when and where the abduction was said to have taken place, and asked them to say whether Abdul Gohur took any part in it.

In regard to the exposition of secs. 372 and 373, I. P. C. I wish to point out that the learned Judge was wrong in referring to the amendments proposed in 1914, for they have not become part of the law, and also to say that the meaning of the sections has been discussed in the case of *Queen-Empress v. Sukee Raut* (1). If the Judge had studied that authority his explanation of the terms "dispose of" and "use" would have been very different.

As I have indicated the charge is defective in several respects particularly in the manner in which the burden of proof was treated. The case is a very perplexing one, and I cannot say that in spite of misdirections the jury has arrived at a right decision.

The course which we must adopt is to set aside the convictions and sentences, and leave it to the authorities to decide whether there should be a fresh trial or not. The Appellants will be released.

STRAWARDY, J.—I agree.

S. C. M.

(1) 1, L. R. 21 (Ct. 97 (1903).

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

VISCOUNT HALDANE.]

LORD PHILLIMORE.

MR. AMBER ALI.

1922,

Heard, 31, January.

Judgment,

9, March.]

K. GOPALA CHETTY,

since deceased, and

anr., Appellants,

v.

T. G. VIJAYARA-

GHAVACHARIAR,

Respondent.

Limitation Act (IX of 1908), Sch. I, Art. 106—Money received by partner after dissolution of partnership—Suit by other partner for recovery of share therein, if maintainable after suit for general accounts barred—Position where an item falls in after accounts squared off—Fresh cause of action.

It is contrary to the policy of the Legislature to allow a partner, whose right to sue for a general partnership accounts has been barred by limitation, to sue for his share of specific payments received from debtors by one partner subsequently to the dissolution of the partnership, permitting the latter by way of set off to claim what may be found due to him upon taking the partnership accounts.

If a partnership has been dissolved and the accounts have been wound up and each partner has paid what he has to contribute to the debts of the partnership and received his share of the profits, the mutual rights and obligations having been thus all discharged, and then it turns out afterwards that there was some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or for any other cause, which item afterwards becomes of value and falls in, it ought to be divided between the partners in proportion to their shares in the original partnership.

If on the other hand no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have re-

course to that remedy, when it is too late to claim a share in an item as part of the partnership assets.

KNOX v. GYE (1) considered.

Obiter dictum to the contrary in *Datta v. KHATAV* (2) and decisions in *MERWAT v. RUSTOMJI* (3), *SOKKANADHA v. SOKKANADHA* (6) and *THIRUVENGADA v. SADAGOPA* (7) overruled.

This was an appeal against a decree of the High Court of Madras in its Appellate Jurisdiction, which affirmed subject to a variation a decree of the said Court in its Ordinary Original Civil Jurisdiction.

The facts are set out in the judgment of the Board but may be shortly stated as follows:—

The two Appellants, the Respondent and Narasimhachariar carried on business in partnership from June 1908.

In 1911 Narasimhachariar died and in November 1913 his adopted son filed a suit for an account and for payment to him of his adopted father's share. The claim of the adopted son was settled and the present Respondent was by order of the Court made Plaintiff.

The latter (*inter alia*) prayed for an account of the partnership business.

The suit was tried before Bakewell, J., who delivered judgment on the 26th February 1915, and held that the partnership having been dissolved in April 1910 the suit was barred by sec. 106 of the Limitation Act. From this judgment no appeal was made but on the 30th April 1915 the Respondent filed the present suit to recover his share of certain monies alleged to have been received by the Appellants from a debtor of the late firm.

The suit was tried by Kumaraswami Shastriar, J., who held that the monies

(1) L. R. 5 H L 656 (1872).

(2) 12 Bom. H C. R. 97 (1875).

(3) I. L. R. 6 Bom. 628 (1882).

(6) I. L. R. 28 Mad. 344 (1904).

(7) I. L. R. 34 Mad. 112 (1910).

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received by the Defendants were monies due to the late firm and that "a suit by the Plaintiff to recover his share out of the specific items of the partnership assets recovered by the Defendants would lie, although a suit by him for a dissolution of the partnership and taking of the partnership accounts would be barred."

In the course of his judgment the learned Judge referred to the decisions in:—

Sokkanadha Vannimundar v. Sokkanadha Vannimundar (6) and *Sadhu Narayana Aiyangar v. Ramaswami Aiyangar* (9) and said "It is argued by Mr. Krishnaswamy Ayyar that the effect of allowing a Plaintiff to sue for the recovery of specific items alleged to have been received by the Defendants and of allowing the Defendants to set up the plea that if a general account is taken the Plaintiff would be entitled to no relief, would virtually be to put an end to any period of limitation for taking the partnership accounts. Were the matter "*res integra*" I should think there is considerable force in the argument: but I am concluded by the Madras cases above referred to."

An appeal by the Appellants to the High Court in its Appellate Jurisdiction was dismissed by Wallis, C. J., and Napier, J. In the course of their judgment the learned Judges referred to the above-mentioned decisions and stated: "They appear to proceed upon the view that the receipt of assets by a former partner after dissolution gives rise to a fresh cause of action, otherwise it would be quite impossible to distinguish the decision in *Knox v. Gye* (1)."

The Appellants now appealed to His Majesty in Council.

Sir G. R. Lowndes, K. C. and Mr. A.

(1) L. R. 5 H. L. 656 (1872).

(6) I. L. R. 28 Mad. 344 (1904).

(9) I. L. R. 32 Mad. 203 (1908).

M. Talbot for the Appellants.—The suit is not maintainable in any event.

Partnership in India is codified in the Contract Act, IX of 1872; sec. 265 of which enables a partner to recover his share of profit from partnership transactions but only by taking a general account.

The English Law of partnership is the same:—

Sir Lindley on Partnership, 8th Edn., p. 402.

Halsbury's Laws of England, Vol. 22, sec. 104.

Richardson v. Bank of England (10) and *Marshall v. Maclure* (11).

In India the High Court has decided this in *Sokkanadha v. Sokkanadha* (6), *Thiruvengada Mudaliar v. Sadagopa Mudaliar* (7), *Gottipati China Kondian v. Gottipati Narasappa Naidu* (12) and *Merwanji v. Rustomji* (3).

In the latter case certain *dicta* in *Knox v. Gye* (1) have been misconstrued.

Their true meaning was that if a general account has been taken and adjusted and subsequently a further asset is received by a surviving partner the executor of a deceased partner can maintain a suit.

Apart from these *dicta* the decision is in my favour. *Merwanji v. Rustomji* (3) was based on the judgment of Green, J. in *Dayal Jairaj v. Khatao Ladha* (2), but the Court in *Merwanji v. Rustomji* (3) overlooked the fact that in that case it was expressly held that the transaction in question was wholly outside the partnership transaction.

Merwanji v. Rustomji (3) was adversely criticised in *Rivett Carnac v. Gocul-*

(1) L. R. 5 H. L. 656 (1872).

(2) 12 Bom. H. C. R. 97 at p. 107 (1875).

(3) I. L. R. 6 B. m. 628 (1882).

(6) I. L. R. 28 Mad. 344 (1904).

(7) I. L. R. 34 Mad. 112 (1910).

(10) 4 Myl. & Cr. 165 (1838).

(11) L. R. 10 A. C. 315, 334 (1885).

(12) 26 Mad. L. J. 221.

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das Sobhanmull (4), by the trial Judge (Candy, J.), though he felt bound to follow it.

His judgment was confirmed on appeal but on quite a different ground, [vide *Rivett Carnac v. Goculdas Sobhanmull* (4) and *Bhugwandas Mitharam v. Rivett Carnac* (5)], and the point that is now being argued was never alluded to. In *Nehal v. Kishen* (8), the Court rightly refused to follow *Merwanji v. Rustomji* (3).

The Indian cases which have been followed in this suit are in any case distinguishable, because here a suit for a general account had already been brought and had been dismissed as barred by limitation.

The items now sued on were received prior to the judgment, and therefore the doctrine of "*res judicata*" applies:—*Vinayak Shirrao v. Dattatraya* (13).

The payment gave rise to no new cause of action [Vide *Knox v. Gye* (1)] and the present suit is barred by Or. 2, r. 2 of the Indian Civil Procedure Code, 1908.

Mr. Parikh for the Respondent.—A partner can always sue for a specific item in the hands of another partner but subject to the latter's right to a general account.

This is established by a long line of decisions and should not be overruled unless subversive of justice, equity and good conscience.

There is no suggestion that this is the case.

There is no new cause of action here arising out of obligations under secs. 258 and 263 of the Indian Contract Act IX of 1872.

(1) L. R. 5 H. L. 656 at pp. 673, 686 (1872).

(3) I. L. R. 6 Bom. 628 (1882).

(4) I. L. R. 20 Bom. 15 (1895).

(5) L. R. 26 I. A. 32; s. c. I. L. R. 23 Bom. 544 (1898).

(8) [1910] P. R. No. 97.

(13) I. L. R. 26 Bom. 661 at p. 667 (1902).

Such an action is maintainable in England.

Lindley on Partnership, 8th Edn., pp. 628 and 630.

Knox v. Gye (1) was decided under the English Statute of Limitations.

The fact that the claim is not by the representative of a deceased partner is immaterial. The case of *Nehal v. Kishen* (8) was based on totally different considerations.

Sir G. R. Lowndes in reply.—The rule of justice, equity and good conscience is the rule of English law unless inapplicable.

Waghela Rajsanji v. Sheikh Mashudin (14).

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—About the year 1908 a partnership was formed between Narasimhachariar, the Respondent Vijayaraghavachariar, the Appellant Gopala now deceased and the Appellant Ethirajulu, who for the purposes of this appeal also represents the first Appellant. Narasimhachariar having died in 1911, a suit was filed on the 15th November 1913 in the High Court at Madras by his adopted son against the Respondent and the two Appellants, praying for partnership accounts, and payment to him of his adopted father's share. The Plaintiff in this suit was, in some manner not now important to consider, settled with, and retired from the suit and by an order of the High Court the Respondent was transposed from his position as Defendant and became Plaintiff, continuing the suit against the other Defendants, the present Appellants.

The suit came on for hearing before a

(1) L. R. 5 H. L. 656 at pp. 673, 686 (1872).

(8) [1910] P. R. No. 97.

(14) L. R. 14 I. A. 89; s. c. I. L. R. 11 Bom. 551 (1887).

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Judge of the High Court on the 26th February 1915, when it was found that the partnership had been dissolved before the death of Narasimbachariar, namely, in April 1910, and that therefore the suit was barred by Art. 106 of Sch. I of the Indian Limitation Act, 1908, which provides that a suit for accounts and a share of the profits of a dissolved partnership must be brought within three years of the date of dissolution. The Respondent did not appeal. But on the 30th April of the same year he launched a second suit against the present Appellants, which is now in question before their Lordships.

In this suit, after setting out the proceedings in the previous suit and admitting that he had become disentitled to claim a general account and the payment to him of what might be found due and payable on the taking of a general account, he said that the sum of Rs. 18,842 had been received by the Appellants in various payments on various dates from debtors to the old firm, and he claimed his quarter share in this total sum. The Appellants put in a written statement in which they denied that they had received any assets of the firm, said that if the accounts were to be taken the Respondent would be found to be indebted to the firm, pleaded the Indian Limitation Act, and that the suit was barred by *res judicata* and certain other defences. The suit was tried before Kumaraswami Sastriar, J., who gave judgment on the 27th March 1916, deciding the bulk of the issues in favour of the Plaintiff, now Respondent, and giving him a declaration that he was entitled to a quarter share of the amount claimed and ordering an account to be taken with a view to showing whether there was any set off in respect of sums which might be due from the Respondent to the Appellants. By the schedule of the decree it appeared that approximately Rs. 11,000

of the sum claimed had been received before the institution of the first suit, and the whole of the balance before the decree in the first suit. The learned Judge held that though a general partnership account was barred by the Indian Limitation Act and by the decision in the first suit, there was nevertheless a right in a partner to sue his other partners for his share of the assets of the partnership, for which the period of limitation would be six years and not three; and that, therefore, the second suit had been brought in time. The learned Judge came to this conclusion on the authority of certain cases decided in the High Court of Madras, following earlier decisions in the High Court of Bombay.

The present Appellants appealed to the High Court in its Appellate Jurisdiction. The appeal came on before Sir John Wallis, C. J. and Napier, J. and was dismissed, the learned Judges saying that they were not prepared to go behind three Madras decisions to the effect that a cause of action arises from the receipt after dissolution of partnership of assets by a former partner.

They observed that these decisions appeared to proceed upon the view that the receipt of assets by a former partner after dissolution gives rise to a fresh cause of action. Otherwise, as they said, it would be quite impossible to distinguish the decision in *Knox v. Gye* (1). It is from this dismissal that the present appeal is brought.

Though in the opinion of the Appellate Judges the case of *Knox v. Gye* (1), unless it can be distinguished, would destroy the case of the Respondent, it so happens that it is upon a reading of certain passages in the speeches of the noble Lords who took part in that judgment that the series of cases in the Bombay and Madras High

(1) L. R. 5 H. L. 656 (1872).

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Courts, upon the authority of which judgment has been given for the Respondent, proceed. It is, therefore, important to begin the consideration of the law with a careful analysis of that case.

Gye was lessee of the Covent Garden Theatre and for the purpose of the concern obtained in 1853 a considerable sum of money from one Thistlethwayte on terms of partnership. Thistlethwayte died in 1854, making Knox his executor. Knox in the second bill which he filed (which was the one that came under consideration in the House of Lords) contended that thereafter he and Gye continued the partnership. In 1854 negotiations were entered into with one Hughes for the temporary use of Her Majesty's Theatre, and a sum of £5,000 was paid to Hughes in advance for this purpose. Hughes did not carry out his share of the bargain. Gye sued him for the £5,000 and recovered judgment, but not succeeding in getting the money, he ultimately accepted, in 1862, the sum of £2,500 by way of compromise. In 1856, the Covent Garden Theatre was burnt down and Gye took the Lyceum Theatre. In October 1864, Knox, filed the bill against Gye, praying for accounts from the date of the original advance by Thistlethwayte, for the winding up of the alleged partnership between Gye and Thistlethwayte, that Knox might have his share of the sum advanced by Thistlethwayte, including a share of the money recovered or which ought to have been recovered from Hughes, and a share of the profits of the partnership. The answer set up by Gye in substance pleaded that Thistlethwayte's share was confined to the business of the old theatre, the whole capital of which was lost by the fire; that Knox was not entitled to any accounts; that his rights if any arose at law and not in equity; and that whichever way they

arose, the statute of limitation was a good answer.

The Vice Chancellor, Sir William Page Wood, made a decree in favour of Knox, being of opinion that the statute of limitation did not apply, either as regards the money received from Hughes, which he treated as an equitable claim enforceable in equity, or as regards the share of Thistlethwayte, in the partnership, the statute being prevented from applying to that part of the claim because of the fiduciary relation between Thistlethwayte and Gye, and by the fact that the money recovered from Hughes was received within six years before the institution of the suit.

On appeal the Lord Chancellor, Lord Chelmsford, reversed this decree. When the case came on for hearing before the House of Lords, the House was composed of Sir William Page Wood, now become Lord Hatherley and Lord Chancellor, Lord Chelmsford and Lords Westbury and Colonsay. At the close of the Appellant's case the House was of opinion that the partnership never extended to the Lyceum business, and counsel for the Respondent were directed to confine themselves to the argument upon the statute of limitation. It was apparently considered that if the statute of limitation was to be applied, the right of Knox accrued in December 1854, upon the death of Thistlethwayte, the partnership being dissolved by his death; and that the bill not being filed till 1864 was out of time; and with the possible exception of Lord Hatherley, the noble and learned Lords who composed the House held that the receipt of money from Hughes more than six years after the partnership was dissolved did not take the case out of the operation of the statute. If, therefore, the statute was to be applied it constituted a good defence. The matter then remaining for decision was whether this was a

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case where equity followed the law, and consequently the relief was barred. This was so held, Lord Hatherley dissenting, and the suit was accordingly dismissed.

Now it will be observed that the sum of £2,500 was received within the statutory period, and its receipt was the receipt by Gye of a partnership asset.

The case would seem, therefore, to be in point, and (the suit having been dismissed) adverse to the present Respondent. But as the suit was one for a general account and not merely or even by way of addition to recover Knox's share of the sum received from Hughes, and as there are in the speeches of the noble and learned Lords some passages where a case like the present is put by way of hypothesis, the decision in *Knox v. Gye* (1) need not be taken for the purposes of the present judgment as laying down a final determination of the law on this point.

Nevertheless the observations in that case when carefully considered do not warrant the construction which has been put upon them by some of the Courts in India, but on the contrary warrant the conclusion to which independently of authority a little clear thinking leads.

Lord Hatherley, for the purposes of his observations, takes the case of a partnership dissolved by death and an account being taken "that everything which could be ascertained had been then ascertained and adjusted, that the account was complete and that releases were given"—releases which as he says "could only go to the extent of the claim that then existed against the surviving partner." He assumes that in that case an asset for which no allowance has been made falls in and is received by the surviving ex-partner; and he holds that in such a case

the executor of the deceased ex-partner could claim his share.

Lord Colonsay with a similar train of thought speaks of a sum of money "unexpectedly recovered."

Lord Chelmsford says: "It was said that upon payment of the debt by Hughes a new right had accrued to the Appellant. But the right to sue for what? The answer must be for an account. But that he was entitled to all along, and the account must have included this very debt of Hughes, the receipt of which is supposed to have created a new right to an account." It is true that there is later on in his speech some rather vague language which may have led to his having been supposed to take the view that even when partnership accounts cannot be taken a suit may be brought for a specific item; but the whole tenor of his reasoning shows that he is contemplating the circumstances supposed by Lords Hatherley and Colonsay. Lord Westbury's language is striking—he is not contemplating this particular case, but discussing the effect of the statute of limitation. He says:—

It will be asked whether the bar by statute can be greater than a release between the parties. In the answer to that question the nature of the release must be required to be stated. If on an account stated a release is given, the release will be limited to that account, and will not bar the right of an executor to have an account of subsequent receipts. But if the release be of the right to an account altogether, then the release will be exactly equivalent to the bar here created by the statute and will bar all right whatever to claim the benefit of any subsequent receipt by the accounting party.

The rule of law then is the following:—

If a partnership has been dissolved and the accounts have been wound up and each partner has paid what he has to contribute to the debts of the partnership and received his share of the profits, the

(1) L. R. 5 H. L. 656 (1872).

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mutual rights and obligations having been thus all discharged, and then it turns out afterwards that there was some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or for any other cause, which item afterwards becomes of value and falls in, it ought to be divided between the partners in proportion to their shares in the original partnership. There is no reason why one should have it more than the other.

The case will not often occur. If the debt is incurred to the firm and both the ex-partners are alive the debtor can only safely pay upon the receipt of both, for the agency of each for the other has ceased with the dissolution of partnership, and both receiving and being in possession each can insist upon his proper share.

Lord Hatherley points out the most probable occasion when it would arise, namely, when one of the partners is dead and the debt has accrued at law to the surviving partner who thus becomes solely possessed of the former partnership item; and he says that in such a case the executors of the deceased ex-partner would have a right to recover their testator's share from the ex-partner who has received the whole. It is not so certain that this particular case would arise in India by reason of the provisions of sec. 45 of the Indian Contract Act, upon which section apparently different decisions have been given in the several High Courts in India. (See Sir F. Pollock's work on the Indian Contract Act, p. 193). It is, however, possible to conceive of other cases in which this principle might have to be applied. A partner might contract really for the partnership, but apparently as sole principal and in that capacity be the sole recipient of a partnership item.

"At any rate, in all cases where for any reason it did occur that after the dissolution and complete winding up of a partnership an asset which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership.

If on the other hand no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy, then it is also too late to claim a share in an item as part of the partnership assets, and the Plaintiff does not prove, and cannot prove that upon the due taking of the accounts he would be entitled to that share. It might well be the case that one of the reasons why no final balancing of accounts took place was that A. owed the partnership so much money and that it was anticipated that B. would hereafter receive a particular item which would operate substantially to balance the claim.

The principle above set forth being reasonably clear and intelligible, it remains for their Lordships to discuss certain decisions in the Indian Courts.

The first case on this matter was *Dayal v. Khatar* (2) decided in the year 1875. The judgment in that case rested upon other and incontrovertible grounds, but there were *obiter dicta* in the course of the judgment which no doubt would help the present Respondent. These *obiter dicta* were relied upon by Latham, J., in *Merwanji v. Rustomji* (3), decided in the year 1882. That decision is no doubt in point and in favour of the Respondent; but it is to be observed that it was largely

(2) 12 Bom. H. C. R. 97 (1875).

(3) I. L. R. 6 Bom. 628 (1882).

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based upon the *obiter dicta* in the previous case.

The third Bombay case was *Rivett Carnac v. Goculdas* (4). Candy, J., sitting as a single Judge in the first Court criticised the previous Bombay decisions, but said that he was bound by them. Accordingly he held that though a claim for a general partnership account was barred by limitation a claim for a share of moneys received by the partnership within the period of limitation was not barred; that the Plaintiff was entitled to recover Hemabai's and Goculdas's shares of the said money; and that the second Defendant was entitled to set off against this his share of certain moneys received by the Plaintiff as part of the assets of the said partnership. The High Court in appeal held that the Respondent's claim to an account of the partnership dealings was not barred by limitation because under sec. 17 of the Limitation Act (Act XV of 1877) when a person, who, if living, would have a right to sue, has died, the period of limitation is to be computed from the time when there is a legal representative of such person capable of instituting the necessary suit, and gave the Plaintiff a decree for the assets which he claimed. The case came on appeal to His Majesty in Council in 1898, and is reported as *Bhugwandas Mitharam v. Rivett Carnac* (5). This Board agreed with the decision of the High Court that the claim was not barred by the Limitation Act, but their Lordships thought that the decree given by the High Court was too wide, and directed an account to be taken of the partnership transactions. They made no observations on the particular point now under consideration, and the case may be left out of consideration ex-

cept to the extent to which it embodies the criticisms of Candy, J.

Their Lordships now turn to the Madras cases. In *Sokkanadha v. Sokkanadha* (6), decided on appeal by the High Court in 1904, the decision in *Merwanji v. Rustomji* (3) was followed as an authority, and reasons were superadded why in the opinion of the learned Judges it was right. One passage may usefully be quoted:—

Even on principle it would seem that this conclusion is the better one, for why should the fact that a suit for a general account is no longer maintainable be used to secure some of the partners exclusively the benefit of realisation of assets made under circumstances which raise no question of limitation with reference to a claim strictly confined to a share of what was realised. Of course, to allow such a claim to be maintained without the Defendant being at liberty to go into the whole accounts and if possible defeat the Plaintiff's claim by showing that the net balance is against the Plaintiff would be quite unjust. The view we follow avoids such undesirable results while it secures to all the partners their fair and proper shares in assets with reference to which no question of lapse of time is capable of being raised under the law.

With great deference this reasoning begs the question. How is it to be known that some of the partners would exclusively benefit by the realisation of assets which come in after dissolution? To meet this objection the learned Judges assume that accounts may be taken and that they have done enough for the ex-partner who is sued in saying that he may have the accounts taken. But if the policy of the law be that after the period of limitation no accounts shall be taken, for the excellent reason that materials for taking such accounts may have disappeared, it is not legitimate to say to the person sued, "Either pay on the footing

(4) I. L. R. 20 Bom. 15 (1895).

(5) L. R. 26 I. A. 32; S. C. I. L. R. 23 Bom. 544 (1898).

(3) I. L. R. 6 Bom. 623 (1892).

(6) I. L. R. 28 Mad. 344 (1904).

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that accounts have been taken which we know have not been taken and on the footing that all matters have been squared up between you and your partner when we have no knowledge that there has been any such squaring up, or submit to that taking of accounts against which the legislature has protected you."

Thiruvengada v. Sadagopa (7), also referred to in the judgment of the High Court in the case now under appeal may be taken to be to the same effect.

On the other hand, the Chief Court of the Punjab has expressed its inability to follow these cases [*Nehal v. Kishen* (8)].

Their Lordships have no information as to the matter having come before the High Court of Calcutta.

These decisions having been thus analysed appear to rest upon some *obiter dicta* which do not purport to express Indian law, but are the result of the construction which some learned Judges have put upon the decision of the House of Lords in *Knox v. Gye* (1) and inferences drawn from that decision, and except for the reasoning upon which their Lordships have already commented in *Sokkanadha v. Sokkanadha* (6) to have no other basis. As their Lordships have already pointed out the *obiter dicta* in the Bombay High Court are founded upon a misapprehension of what took place in *Knox v. Gye* (1).

The present case is a striking illustration of the mischief which might result from following the conclusion at which the learned Judges in the Court of Appeal have arrived. The very items for which the Respondent is now suing were actually items which would have come into the account on his claim against the Appel-

lants for a partnership account in the suit in which he failed.

As their Lordships have arrived at this conclusion, it is unnecessary to consider the further point raised on behalf of the Appellants that the dismissal of the previous suit constituted the bar of *res judicata*.

Their Lordships will humbly recommend His Majesty that the appeal be allowed and that the suit be dismissed and that the Appellants have their costs here and below.

Solicitor: Mr. Douglas Grant for the Appellants.

Solicitor: Mr. J. Josselyn for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1994 of 1919.

WOODHOFFS, J.

1922,

Heard, 7, April.
Judgment, 1, May.

WALMSLEY, J.

SUBRAWARDY, J.

1922,

Heard, 9, February.
Judgment,

17, March.

JNANENDRA MOHAN
DUTT and ors., Plain-
tiffs, Appellants,

v.

UMESH CHANDRA
GUHA and ors.,
Defendants,
Respondents.

Possession, suit for—Dar-miras tenure sold for arrears of rent—Same under-tenure again sold 12 years after for arrears of rent under decree obtained against the purchaser at the first sale who never obtained possession—Suit by mirasdar for possession—Right acquired by original dar-mirasdar by adverse possession against purchaser if an encumbrance—Sec. 167, Bengal Tenancy Act (VIII of 1885)—Omission to annul encumbrance within one year how affects suit—Civil Procedure Code (Act V of 1908), sec. 98—Reference of point of law to third Judge—Procedure when third Judge does not decide question referred, but an altogether new one—Limitation Act (IX of 1908), Art. 137, applicability of, where tenure purchased under rent law

(1) L. R. 5 H. L. 656 (1872).

(6) I. L. R. 28 Mad. 244 (1904).

(7) I. L. R. 34 Mad. 112 (1910).

(8) [1910] P. B. No. 97.

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and not right and interest of judgment-debtor only.

The Plaintiffs were the owners of a miras tenure and under them was a dārmīras tenure held by the Defendants. This under-tenure was sold in execution of a rent decree and purchased by a third party who never obtained possession and in execution of a rent decree obtained against the latter the under-tenure was again sold more than twelve years after and purchased by the Plaintiffs who sued for possession:

Per WALMSLEY, J. (WOODROFFE and SUHRAWARDY, JJ., contra).—That Art. 137 of the Limitation Act applied to the case and the suit was barred.

Per SUHRAWARDY, J.—Art. 140 or Art. 144 applied to the case.

Per WOODROFFE, J. (to whom the case was referred under sec. 98, C. P. C.).

That none of the articles of the Limitation Act applied to the case but the suit was barred under sec. 167 of the Bengal Tenancy Act.

Where a rent-decree has been properly obtained the tenure itself passes to the purchaser and not the right, title and interest of the judgment-debtor only and the rights of the purchaser must be determined by the provisions of the Bengal Tenancy Act under sec. 158B and sec. 159. The Plaintiffs by their purchase acquired the under-tenure with power to annul encumbrances and the interest acquired by the Defendants by adverse possession against the recorded tenants, of which the Plaintiffs were aware, was an encumbrance which the Plaintiffs could have and should have annulled under sec. 167, Bengal Tenancy Act, within one year; and not having done so their right to recover possession was lost.

The word encumbrance as used in secs. 159 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a

trespasser by adverse possession ~~of the~~ land of a defaulting tenant.

Per WOODROFFE and SUHRAWARDY, JJ.—Art. 137 of the Limitation Act ~~does~~ not apply to a case where the tenure itself and not the right, title and interest alone of the judgment-debtor is purchased.

Per WOODROFFE, J.—That the difference of opinion not having arisen in a Letters Patent Appeal, sec. 98, C. P. C., covered the case and the objection that the reference was not in order and should have been decided by the opinion of the senior Judge failed.

That under the present law the third Judge cannot dispose of the appeal generally but can only decide the point of law referred and then dispose of the appeal, the referring Judges having indicated how it should be disposed of according to the possible answers to be given.

As the question of law actually referred to the third Judge was not decided by him, and the reference consequently proved infructuous, the Division Bench disposed of the appeal under cl. (2) of sec. 98, C. P. C., the decree appealed against being confirmed.

This was an appeal preferred on the 10th November 1919 against a decree of the Additional District Judge of Zillah Dacca (B. K. Bose, Esq.), dated the 23rd July 1919, reversing a decree of the Munsif of Dacca (Babu Mohini Mohan Banerjee), dated the 29th July 1918.

The facts of the case will appear from the judgment.

Dr. Sarat Chandra Basak and Babu Paresh Lal Shome for the Appellants.

Babu Sachindra Kumar Roy for the Respondents.

This appeal first came on hearing before Walmsley and Suhrawardy, JJ., who delivered the following judgments:—

WALMSLEY, J.—The Plaintiffs are the

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owners of a *miras*. They created a *dar-miras* in favour of the Guhas, the Defendants, and in execution of a decree for rent they put the *dar-miras* to sale in the year 1890, when it was brought by Purna Chandra Dutta, who afterwards sold a six annas share to Sarat Chandra Dutta. The Plaintiffs looked to the purchasers for the rent, and obtained two decrees for rent against them. In execution of a third decree for rent they put the *dar-miras* to sale and bought it themselves on 13th August 1904. They instituted the present suit on 11th August 1916.

The first Court decreed the suit, but on appeal the learned Judge held that the suit was barred by Art. 137 of the Limitation Act.

On behalf of the Plaintiffs the first point urged is that this plea of limitation is not raised in the pleadings. It is true that no reference is made to the particular article of the Limitation Act, but the written statement does assert that the suit is barred by limitation. Considering what Plaintiff alleged as his cause of action I do not think we can say that the Defendants' plea ought to have been stated more explicitly.

The second point is that Art. 137 is not the appropriate article: that Art. 139 is applicable, or failing that the general Art. 144.

If Art. 137 is the appropriate one, the time that has elapsed since the purchase makes no difference to the case: the suit was barred on the day of the purchase in 1904 as hopelessly as on the day when it was instituted nearly twelve years later. Two suggestions are made for taking the suit out of Art. 137. One is that that article applies to suits where the purchaser is a stranger, but the article says nothing of the kind, and we must not read into it words which are not there. A second is that the Guhas were really the

judgment-debtors, because they had allowed Purna and Sarat to represent them and were consequently bound by the decree. The objection to this view is that the landlords were aware of the fact that the Guhas, and not Sarat and Purna, were in possession, but they did not have them joined as Defendants in the rent suit, in fact the Plaintiffs have always taken the position that the Guhas are not tenants. I do not think they can now be allowed to say that they were none the less their judgment-debtors.

The learned Pleader for the Plaintiffs, however, relies more upon his other contention, that Art. 139 is the appropriate article. If it is, the Plaintiffs are within time for the period of twelve years will begin to run from the date on which the sale was confirmed. The article refers to a suit by a landlord to recover possession from a tenant, and time runs from the moment when the tenancy is determined. It is said that these conditions are satisfied by the third prayer in the plaint, that is the prayer for a declaration that the *dar-mirasi* right (acquired at the auction-sale) was merged in the *mirasi* right. I fail to see, however, that by this prayer the Plaintiffs seek to recover possession from a tenant; for their case is that the Guhas are not tenants, and the men who were their registered tenants are not parties to the suit. Similarly, if we look to the starting point the Plaintiffs do not allege that any tenancy of the Guhas has been determined. In my opinion the learned Judge of the lower Appellate Court is right in holding that Art. 139 is not applicable.

As for the contention that Art. 144 applies to the suit if Art. 139 does not, I cannot agree because in my opinion Art. 137 does apply.

I am not troubled by the suggestion that the case is a hard one for the Judge

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finds that Purna and Sarat never got possession and we were told in the course of the hearing that the Plaintiffs were aware of the fact.

In my opinion the decision of the Lower Appellate Court should be affirmed, and the appeal dismissed with costs.

SUHRWARDY, J.—I regret, I am unable to agree with my learned brother in the order he proposes to pass in this case.

On the question of limitation the first Court held that the Plaintiffs' cause of action arose on the date of the sale of the tenure, i.e., 13th August 1904, or when the sale was confirmed, viz., 14th September 1904, the Plaintiffs' suit having been instituted within twelve years of those dates, it overruled the plea of limitation and decreed the suit on the merits. The Lower Appellate Court without entering into the merits of the case held on the allegations made in the plaint that the suit was barred under Art. 137 of the Limitation Act, 1908.

In order to face the plea of limitation, it is necessary to examine the facts as stated in the plaint and as found by the learned Munsif. It appears that the Defendants held a *dar-miras* under the *miras* held by the Plaintiffs' predecessor-in-title which was sold in execution of a rent decree obtained by the Plaintiffs against the Guhas in 1890 and purchased by Purna who subsequently sold a portion of it to Sarat. Since then the names of Purna and Sarat were recorded in the Plaintiffs' books as the tenants of the *dar-miras*, the Plaintiffs looked to them only for their rent. The Plaintiffs aver, and it has been found by the first Court, that "the Plaintiffs were in possession of that *miras* tenure by realising rent from the *dar-mirasdars* Purna and Sarat as is proved by contested decrees Exs. 3 and 4. Subsequently the rent of the *dar-miras* having fallen into arrears the Plain-

tiffs brought a suit for rent against Purna and Sarat and in execution of the decree therein put the *dar-miras* taluq to sale and purchased it themselves in 1904. The Plaintiffs brought the present suit for recovery of *khas* possession on the ground among others that the tenure became extinguished by merger in their superior tenure.

It is found that Purna and Sarat never obtained possession of the *dar-miras* after their purchase in 1890 which remained in the possession, which must be wrongful, of the Defendants. It is therefore argued that as the judgment-debtors were out of possession on the date of the sale in 1904, limitation should run against the Plaintiffs auction-purchasers from the date when the judgment-debtors were first entitled to possession, viz., 1890, and as it was over twelve years from that date when the Plaintiffs brought the present suit their claim is barred under Art. 137. It is beyond cavil that what the Plaintiffs sold and purchased in execution of their decree in 1904, was not the right, title and interest of the judgment-debtors but the tenure itself which is described in the sale-proclamation Ex. 1 as *বিত্ত ভাঙ্গানারী পাটাই নক* (*miras taluqdari right under patta*).

Reading Arts. 136 and 137 together it is clear that the latter article intended to make the law uniform in cases of private and Court sales and the two articles in conjunction lay down that where the purchaser of an immoveable property at a private sale or at a sale in execution of a decree sues for possession of the property of which the vendor or judgment-debtor was out of possession at the time of the sale, he, the purchaser, is not entitled to get a fresh start of limitation from the date of his purchase, but the time is to be calculated as running against him from the date of dispossession of the vendor or judgment-debtor as if there was no sale.

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This premises and presupposes that the purchaser has purchased the interest of the vendor or judgment-debtor, has stepped into his shoes and is claiming through him.

In the present case, as I have observed, the Plaintiffs purchased not the interest of the judgment-debtors, but the tenure itself, and hence they cannot be said to be entitled to the possession of the property through the judgment-debtors. A purchaser in such circumstances is not a purchaser within the meaning of Art. 137. The same consequence will follow if the landlord purchases a tenant's right or the tenant surrenders his interest to the landlord. In all these cases, the landlord is not the transferee of the interest of the tenant but the effect of the transfer is to extinguish the tenancy giving immediate right of entry to the landlord. The revenue sale law affords an analogy for the proposition as it has been held that the purchaser at a revenue sale even of a share of a revenue paying estate is not a person claiming from or through the defaulter, but rather adversely to him and under a paramount title—[*Bilas Chandra v. Akshoy Kumar* (1)]. The terminus *a quo* in cases like these should be the date when the right to immediate possession accrued to the purchaser or, as is otherwise expressed, when the estate fell into possession.

There is another point of view from which the present case should be looked at. It is conceded and rightly conceded in view of authoritative judicial pronouncements from the time of Sir Barnes Peacock to the present day that possession adverse to the lessee is not necessarily adverse to the lessor. Here the Plaintiffs were in receipt of rent of the tenure from Purna and Sarat during the period that the Defendants were holding adversely to

the latter. The possession of the Defendants as against Purna and Sarat in the circumstances was not of such a nature as to operate as an ouster of the Plaintiffs.

In the above view of the law I hold that the article of the Limitation Act applicable to the present case is Art. 140 or Art. 144, and time against the Plaintiffs is to be taken to have begun to run from the date of the confirmation of the sale of the tenure in September 1904, and that the suit is within time. [*Krishna Gobind v. Hari Charan* (2)]. To hold otherwise would be to violate the maxim that "prescription does not run against a party who is unable to act" (*contra non valentem agere nulla currit prescriptio*). Art. 139 contemplates a suit against the tenant and is not applicable in the present case.

For the Appellants it is also contended that as the Defendants had before the sale in 1904 acquired by adverse possession the right and interest of Purna and Sarat they had become unrecorded tenants of the Plaintiffs and as the sale in 1904 was of the tenure in execution of a rent decree obtained against the recorded tenants, it passed the interest of the Defendants in the tenure also. No doubt there is a great deal of force in this contention. In the circumstances of this case what the Defendants acquired by adverse possession was the interest of Purna and Sarat, *viz.*, the tenant's right which should be taken to have been extinguished by sale in execution of a rent-decree obtained against Purna and Sarat who were the registered tenants of the Plaintiffs and against whom alone could they proceed. An analogy is to be found in the effect of sales under the Revenue Sale law where a purchaser has been held to be entitled to recover possession, even though the adverse possession was completed before the sale. [*Kumar*

(1) 16 C. W. N. 587 (1912).

(2) I. L. R. 9 Cal. 367 (1882).

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Kalanand v. Syed Sarafat Hossein (3) and *Rahimuddi v. Nalini Kanta* (4)].

In my judgment this appeal succeeds and should be allowed. The case will be remanded to the Court of Appeal below for the decision of the other issues and for disposal of the case. Costs to abide the result.

WALMSLEY and SUHRAWARDY, JJ.—In view of our difference of opinion in this case, under the proviso of cl. (2) of sec. 98, C. P. C., we state the point of law on which we differ in this manner: "On the facts stated in this case, what is the article of the Limitation Act which is applicable?" Let the case be laid before the learned Chief Justice for reference to another Judge or Judges.

[The matter then came on before Mr. Justice Woodroffe.]

The JUDGMENT OF WOODROFFE, J., was as follows:—

WOODROFFE, J.—This matter has been referred to me on a difference of opinion between Mr. Justice Walmsley and Mr. Justice Suhrawardy, the actual point referred being as follows "On the facts stated in this case what is the article of the Limitation Act which is applicable." A preliminary objection has been taken on the ground that the reference was not in order and that the case should have been decided by the opinion of the senior Judge. But I am of opinion that though that procedure is applicable in the case of Letters Patent Appeals, sec. 98 of the Code governs this case, I therefore overrule the objection. I would first shortly state the facts for the purpose of this judgment. The Plaintiffs are the owners of a *miras* tenure. There was a *dar-miras* tenure under them of which the Guha Defendants were tenants. This under-

tenure was sold in execution of a rent-decree in 1890 and Purna Chandra Dutt was the purchaser. This Purna subsequently sold a six annas share to Sarat Chandra Dutt and Purna and Sarat whom I call the Duttas were registered tenants of the under-tenure. The Duttas never obtained possession. On the 13th August 1904 the under-tenure was again sold in execution of a rent-decree obtained against the Duttas who were registered tenants. It was purchased by the Plaintiffs. The Plaintiffs brought this suit for possession on the 11th August 1916.

The question now is what is the nature of the interest acquired by the Plaintiffs by their purchase on the 13th August 1904. If they purchased the right, title and interest of the judgment-debtors only they purchased nothing as the right of the judgment-debtors was extinguished by adverse possession for over 12 years by the Guhas and the Plaintiffs therefore acquired no title to the under-tenure. No question of limitation as regards the Plaintiffs' right arises at all in that view. Because, a question of limitation arises only on the assumption that there is a title which may be made subject to the operation of the Limitation Act. Nor where no title is shown is recourse to the provisions of the Limitation Act necessary. Art. 139 of the Limitation Act is applicable only where the purchaser acquires the right, title and interest of the judgment-debtor. But the rights of a purchaser at a sale under a decree for rent must be governed by the Bengal Tenancy Act. Where a rent-decree has been properly obtained the tenure itself passes to the purchaser and not the right, title and interest of the judgment-debtor only. The rights of the purchaser then must be determined by the provisions of the Bengal Tenancy Act under sec. 158B and sec. 159. The Plaintiffs by their purchase

(3) 12 C. W. N. 528 (1908).

(4) 13 C. W. N. 407 (1909).

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therefore acquired the under-tenure with power to annul encumbrances under the provisions of the Bengal Tenancy Act. The interest which the Guhas had acquired by their adverse possession against the recorded tenants was according to the decisions of this Court an encumbrance under the Bengal Tenancy Act. If so, the Plaintiffs could have annulled the encumbrance created by the adverse possession of the Defendants and they could do so only under the provision of sec. 167 of the Bengal Tenancy Act. According to that Act (sec. 167), however, if the party does not follow the procedure within one year as laid down in that section his right to recover possession as against the tenant is lost.

In this case there is a finding that the Plaintiffs knew about the possession of the Defendants all along and there is no allegations nor is it suggested before me that notice was served under sec. 167 of the Bengal Tenancy Act. This doubtless is not the way in which the case has hitherto been treated; but no question of fact is involved. It is found that there had been adverse possession, that the tenure itself was purchased, and there is no doubt whatever that no proceedings were taken to annul the adverse possession as an encumbrance. The question then is one of law arising on the facts, whether on such facts the suit is barred, Mr. Justice Walmsley thought it was barred, according to the opinion of Mr. Justice Suhrawardy it was not barred.

It has been argued however that opinion has varied as to whether adverse possession is an encumbrance under the Bengal Tenancy Act. But without discussing this question for the moment it appears to me that the Plaintiffs in this suit can not have it both ways, that is, they cannot invoke the Bengal Tenancy Act in order to establish that they bought

the tenure and not the judgment-debtors' interest and at the same time contend that the adverse possession is not an encumbrance under that Act. If they could claim to have purchased a tenure and that the previous adverse possession was not an encumbrance on it then the limitation would run from the date of their purchase. But this, I am of opinion, cannot be so in the circumstances of this case. They can not say that they purchased the tenure under the Bengal Tenancy Act free from adverse possession without first annulling the latter as an encumbrance.

Moreover, as at present advised I see no reason for differing from the decisions of this Court that the word encumbrance as used in secs. 159 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse possession of the land of a defaulting tenant.

There appears to me to be no substance in the contention that there is no question of encumbrance, because the *dar-miras* which was the subject of the encumbrance had ceased to exist being merged in the superior tenure on the Plaintiffs' purchase. There is in my opinion no merger in the circumstances above stated.

The result is that the suit is in my opinion barred under sec. 167 of the Bengal Tenancy and not in my opinion under any of the articles of the Limitation Act mentioned in the reference.

The position then is this: Walmsley, J. is of opinion that Art. 137 applies and that the suit is barred. But in my opinion that article does not apply to a case such as this where the tenure itself and not the right and interest alone is purchased. Suhrawardy, J. is of opinion, as I am, that Art. 137 does not apply because the tenure was sold but he goes further and holds that the suit is not barred. But if the tenure was sold it could only be sold under the Bengal Tenancy Act and sub-

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ject to avoidance of encumbrances. And as this encumbrance was not set aside the suit is barred under sec. 167, Bengal Tenancy Act, though not under Art. 137 of the Limitation Act. My answer then is that Art. 137 does not operate to bar the suit but that other sections are not applicable so as to admit the suit which should in my opinion be dismissed under Bengal Tenancy Act, sec. 167.

This finding, however, raises a question of difficulty in disposing of the reference. The learned Judges who made it assume that one or other of the sections of the Limitation Act mentioned in their judgments apply. I am asked to decide which. My answer is none of the sections apply. Substantially considered I do not therefore answer the question put to me. It is only on my deciding the question referred one way or the other that I have power to dispose of this appeal. This difficulty arises from the change in the law. Formerly the third Judge could dispose of the case generally, now he must decide the point of law referred and then dispose of the appeal, the referring Judges having indicated how it should be disposed of according to the possible answers to be given. The result is that under the present law a Judge may be asked to decide whether this or that applies when his opinion may be that neither does apply.

There is a further difficulty, namely, that the ground upon which I would hold the suit barred was not taken before the referring Judges. No doubt as I have said the question is under the circumstances one of law. But the point of law which is an important one was not referred to me nor even discussed by the learned Judges, viz., whether adverse possession is an encumbrance under the Act, a proposition which is contested before me. I have expressed my view on this matter but the question still remains whether

whatever be my view upon it I can act on my opinion when this point was not referred to me. If I were at liberty to dispose of the appeal I would dismiss it but I am not satisfied that I have under the circumstances power to dispose of it.

I therefore answer the question referred by saying that none of the sections of the Limitation Act referred to apply and direct that this judgment be placed before the referring Judges. As this reference is infructuous possibly the result may be that as there is no majority of Judges reversing the judgment of the Court below the appeal may be dismissed. But this is a matter for the learned Judges themselves to determine.

The Division Bench (Walmsley and Suhrawardy, JJ.), then passed the following order on 26th May 1922.

In view of the judgment delivered by Mr. Justice Woodroffe to whom this appeal was referred under the proviso of cl. (2) of sec. 98, I. P. C., we think we ought to proceed under cl. (2), that is, the part preceding the proviso and hold that this is a case in which there is no majority which concur in a judgment varying or reversing the decree appealed from and accordingly order that the decree appealed from be confirmed and this appeal do stand dismissed with costs.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1224 OF 1917.

HARIHAR MOOKERJEE	
MOOKERJEE, O. J.	and anr., Plaintiffs,
FLETCHER, J.	Appellants,
1920,	v.
20, May.	JAHARUDDIN MANDAL,
	Defendant, Respondent.

Receiver, teshildar appointed by—Maintainability of suit by the owner of the estate against teshildar for accounts—Receiver, if a representative

HARIHAR MOOKERJEE v. JAHARUDDIN MANDAL.

of the owner of the estate - Fiduciary relation ship, necessity to establish.

The owners of an estate brought a suit for account against a Tehsildar of their estate who had been appointed by a Receiver who had been in charge of the estate under an order of Court but had since been discharged :

Held—That a suit was not maintainable. Such a suit can be sustained only on proof of fiduciary relation between the parties. But the Receiver is not a representative of the owner; he is an officer of the Court. Hence an officer appointed by the Receiver does not stand in the same position as an officer appointed by the owner.

JATINDRA NARAYAN ACHARJYA v. RAJENDRA KISHORE DAS (1) followed.

Although a Receiver has been discharged, it is still open to the party entitled to surcharge him in his accounts and obtain relief against him; and a suit may be maintained against the Receiver if it is established that he has monies belonging to the estate still in his hands, notwithstanding his discharge.

RE EDWARDS (2) and OSMOND BEEBY v. KHITISH CHANDRA ACHARJYA CHOWDHURY (3) referred to.

This was an appeal from a decision of J. A. Woodhead, Esq., District Judge, 24-Parganas, dated the 14th May 1917, affirming that of Babu Umes Chandra Chakravarti, Subordinate Judge, Alipore, dated the 19th January 1916.

The facts will appear from the judgment.

Babu Satish Chandra Mookerjee for the Appellants.

Babus Hira Lal Chakravarti and Biraj Mohun Majumdar for the Respondent.

(1) 8 C. L. J. 114 (1908).

(2) L. R. 31 Ir. 242.

(3) L. L. R. 41 Cal. 771; 5 C. 18 C. W. N. 631 (1914).

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, C. J.—This is an appeal by the Plaintiffs in a suit for account against a Tehsildar of their estate who had been appointed by a Receiver who was in charge of the estate under an order of Court.

The Courts below have held that the suit as framed is not maintainable, but they have made a decree in favour of the Plaintiffs for a sum of Rs. 463-14-6 ps. which it was established was money belonging to the estate, but still in the hands of the Defendant. The Plaintiffs have contended that the suit as framed was maintainable and an enquiry into the accounts should have been directed at their instance. We are of opinion that this contention is not well-founded.

It was ruled by this Court in the case of *Jatindra Narayan Acharjya v. Rajendra Kishore Das* (1) that a suit for account is not maintainable by the owner against a Tehsildar who was appointed by a Receiver to his estate. The reason assigned for the decision was that the Tehsildar was a sub-agent under the Receiver who might be regarded as an agent of the principal, and, as sub-agent, he was liable to render accounts to the Receiver and not to the principal. On behalf of the Appellants, the correctness of this decision has been called in question, and we have been invited to refer the matter to a Full Bench; but we are of opinion that the case is well-founded on principle. A suit for an account of the description now before us is really on the same basis as a bill of discovery, and such a bill can be sustained only on proof of fiduciary relation between the parties. It has been argued that the Receiver appointed by the Court is really a representative of the true owner and that consequently an officer appointed by the

(1) 8 C. L. J. 114 (1908).

HARIHAR MOOKERJEE v. JAHARUDDIN MANDAL.

Receiver stands in the same position as an officer appointed by the owner. This contention is manifestly fallacious. The Receiver is not a representative of the owner : he is an officer of the Court.

It has further been argued that in the present case the Receiver has been discharged and that the Plaintiffs are accordingly entitled to proceed directly against the Tehsildar appointed by the Receiver. There is plainly no substance in this contention. Although the Receiver has been discharged, it is still open to the Plaintiffs, if so advised, to surcharge him in his accounts and obtain relief against him. [See in *Re Edwards* (2)]. On the other hand, the decision of this Court in the case of *Osmond Beeby v. Khitish Chandra Achariya Chowdhury* (3) shows that a suit may be maintained against the Receiver if it is established that he has monies belonging to the estate still in his hands, notwithstanding his discharge. It follows that the Courts below have rightly held that a suit for account, as framed, does not lie.

The result is that this appeal is dismissed with costs.

FLETCHER, J.—I agree.

J. N. R., *Appeal dismissed.*

(2) L. R. 81 Ir. 242.

(3) I. L. R. 41 Cal. 771 : s. c. 18 C. W. N. 681 (1914).

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 176 of 1920.

GOBINDA CHANDRA
 MULLIK and anr.,

Plaintiffs,
 Appellants,

N. R. CHATTERJEA, J.
 PANTON, J.
 1921,

Heard, 21, November
 Judgment,
 25, November.
 CHAIRMAN, HUGHLY
 AND CHINSURA
 MUNICIPALITY,
 Defendant,
 Respondent.

Bengal Municipal Act (III of 1884, B. C.), sec. 261, manufactory or place of business from which offensive or unwholesome smell may arise—Cases in which the offensive smell arises when the water from a mill comes in contact with the stagnant water of the Municipal drain, if come within the purview of the section—The manufactory or business, if must be per se offensive or unwholesome

In a rice-mill within a certain Municipality the water, in which the paddi was steeped, was offensive when it flowed from the drain, but not so offensive as when it came into contact with the stagnant water of the Municipal drain and the finding was that the flow of a large quantity of filthy water was the direct cause of the bad smell:

Held—That the finding was sufficient to bring the case within the category of places of business from which unwholesome or offensive smell may arise and therefore within the purview of sec. 261 (Bengal Municipal Act), which covers not only cases which are per se offensive or noxious but also a manufactory or place of business from which offensive or unwholesome smells may arise.

WANSTEAD LOCAL BOARD OF HEALTH v. WILLIAM HILL (2) and WETHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER (1) distinguished.

(1) [1893] 2 Ch. 10.

(2) 13 Com. Ben. Rep. (N. S.) 479 (1868).

GOBINDA CHANDRA MULLIK v. CHAIRMAN, HUGHLY AND CHINSURA MUNICIPALITY.

This was an appeal preferred on the 16th January 1920 against the decree of Babu Lal Behari Chatterji, Subordinate Judge of Hughly, dated the 24th November 1919, reversing the decree of Babu Rash Behari Mukerji, Munsif at that place, dated the 8th June 1918.

The material facts will appear from the judgment.

Dr. D. N. Mitter, Babus Monindra Nath Banerjee and Debendra Nath Mandal for the Appellants.

Babu Amarendra N. Bose (for Babus Manmotho Nath Mookerjee and Nanda Gopal Banerjee) for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiffs who are the Appellants in this appeal brought a suit against the Hughly and Chinsura Municipality for a declaration that the action of the Municipality in levying a license-fee from them and realising the sum by distress was *ultra vires* and for a permanent injunction restraining the Municipality from levying the fee in future.

The Plaintiffs have a rice-mill within the Municipality and the latter imposed a fee under sec. 261 of the Bengal Municipal Act (III of 1884).

The Court of first instance decreed the suit. That decree has been set aside by the Court of appeal below.

Two contentions have been raised before us; the first is that there is no clear finding as to whether it was a manufactory or place of business from which offensive or unwholesome smell arises and secondly that in order to bring a case within the section, the manufactory or business must be *per se* offensive or unwholesome.

With regard to the first contention, we think the findings are sufficient. The result of the findings is that when paddy is boiled, there is some smell emitted but

that is found not to be offensive. When the water in which the paddy is steeped flows from the drain, it is offensive but not so offensive as when it comes into contact with the stagnant water of the Municipal drain. The learned Subordinate Judge further finds that the flow of such a large quantity of filthy water is the direct cause of the bad smell. We think these findings are sufficient to dispose of the first contention.

As regards the second contention, we have been referred to the case of *Wethington Local Board of Health v. Corporation of Manchester* (1). There a local urban authority proposed to erect a temporary small-pox hospital on land of their own within the district of an adjoining local authority without their consent. The adjoining local authority brought an action and moved for an injunction restraining them from erecting the hospital. The Court of Appeal held that the small-pox hospital was not a noxious or offensive business within sec. 112 of the Public Health Act, 1875 (38 and 39 Vict. c. 55). That section lays down that any person who after the passing of this Act establishes within the district of an urban authority without their consent in writing any offensive trade, that is to say, the trade of blood-boiler, bone-boiler or fell-monger or soap-boiler or tallow-melter or tripe-boiler or any other noxious or offensive trade, business or manufacture shall be liable to a penalty not exceeding £50 in respect of the establishment thereof.

Having regard to the terms of the section the case is clearly distinguishable. Lindley, L. J., after referring to the words of the section such as, "blood-boiler, bone-boiler, fell-monger, etc.," and the words "any other noxious or offensive trade, business or manufacture" observed "when you bear in mind that

(1) [1893] 2 Ch. 19.

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those words have been construed already so as not to include business which may or may not be noxious, the conclusion at which I have arrived is clear and strong that even assuming a hospital to be in some sense a noxious business, still it is not a noxious business to which sec. 112 has any application; but it is a thing to be dealt with under the other group of sections which relate specifically to hospitals and noxious diseases."

In the case of *Wanstead Local Board of Health v. William Hill* (2), which also has been relied upon, the question was raised whether brick-making was "other noxious business, trade or manufacture" within the meaning of the section. The Court held that to bring the case within the general words, the business or trade must be of itself of a noxious or offensive nature.

Sec. 261 of the Bengal Municipal Act on the other hand covers a case of a manufactory or place of business from which offensive or unwholesome smells may arise. There is thus a clear distinction between the English and the Indian statutes.

It is further contended that the clause "manufactory or place of business from which offensive or unwholesome smells may arise" "should be construed *ejusdem generis* with the clauses preceding it, viz., "melting tallow, boiling offal or blood" and so on. But the previous clauses cover not only such cases but also places used as kiln for making bricks, pottery, tiles or lime, or used as a shop for the sale of meat. It appears therefore that the genus comprises trades, business or manufactory which are not offensive *per se* and which would not come within the English statute. We are of opinion that the section covers not only cases which are *per se* offensive or noxious but

also a manufactory or place of business from which offensive or unwholesome smells may arise.

The appeal must accordingly fail and is dismissed with costs.

J. N. R.

Appeal dismissed.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 76 OF 1922.

WALMSLEY, J.

SUBRAWARDY, J.

1922,

Heard, 22, March.

Judgment,

28, March.

ABDUL GOFUR and
anr., Appellants,

v.

THE KING-EMPEROR,
Respondent.

Jury, trial by—Heads of charge must be sufficiently full to enable High Court to ascertain what was actually said to the jury—Verdict set aside on ground of misdirection and accused acquitted.

The law requires the Judge to record only the heads of charge to the jury but this record should be sufficient to enable the High Court to ascertain what was actually said to the jury.

The High Court set aside the verdict on the ground of misdirection to the jury and acquitted the accused.

This was an appeal preferred on the 22nd February 1922 against the order of the Additional Sessions Judge of Mymensingh (D. Vaughan Stevens, Esq.), who accepting the verdict of the jury convicted the accused to 10 years' rigorous imprisonment under sec. 395, I. P. C.

The facts of the case will appear from the judgment.

The heads of charge to the jury are set out below—

Heads of charge.

Preliminary.—Jury judges of fact. Judges explain law. Prosecution to prove case. Accused need not adduce defence and no adverse inference if he does not (here he did). Benefit of doubt. Where more than one accused, evidence against each to be considered.

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Story.—On Sunday 19th Bhadra Abdul Jabbar of Kandapara was sleeping in *kachari* house with four servants. His mother, two daughters, two sons, a beggar woman and daughter were in northern hut. His elder brother Abdul Nabi and his wife in western house.

About midnight 10 or 12 dacoits appeared hanging on roof and walls. One man entered northern hut and threatened mother of Abdul who showed box containing Rs. 650, ornaments and clothes. With the aid of another man took this out. The box was broken open and contents taken and broke door.

They also broke open a box in western hut.

Abdul Nabi, Nobjan Bewa and others fled to Nabi Hossen's *bari*. They roused neighbours and came back after dacoits had gone.

Abdul Jabbar then came out. He had been hiding in the *ghor*.

He said he recognised Chottu Khan and Kala Chand among the dacoits.

Rajar ma, his sister, appeared from "*Tusher ghor*." She said she first hid under the platform, and then fled to *Tusher ghor*.

Nobjan, mother of Abdul, said she recognised Chottu Khan as the man who entered her hut with a lamp and *dao*.

*Ejaha*r was laid on second morning after occurrence, by Abdul Jabbar.

As to fact of a dacoity.

Evidence.—Three *baris* only are at all near to complainant's. These people called and other neighbours. Prove being roused, collecting together, and going to the *bari* after dacoits had left.

State of *bari*, boxes broken, N. and W. houses' doors smashed. Two bamboo *lathis*.

Tin box found near river one mile off next day by one witness. Prove statements of Nobjan and son; Moslem nearest

neighbour says went out, heard dacoits, saw light.

Alamatos produced in Court.

Abdul Jabbar, *Rajar ma*, Nobjan prove 10 or 12 men implicated. Dress of dacoits. Neighbours prove being told of this.

In effect 10 or 12 men beat on roof and walls, broke open door, threatened Nobjan, broke open boxes, terrified inhabitants of *bari*, were armed with *daos*, looted cash, clothes, ornaments.

Is there any reason to doubt there was such an occurrence.

Law "theft" explained—dishonestly—moveables—out of possession—moving with such intention, this with violence or putting in fear of immediate death or hurt is "robbery."

Five or more committing robbery or where whole number present and assisting more than 5—all guilty of "dacoity." Secs. 391, 390, 378 (395).

Occurrence was "Dacoity," sec. 395.

Evidence as to the two accused being concerned.

Kala Chand's daughter married to Abdul Nabi, who took another wife, and Kala Chand's daughter remaining with her father. Kala Chand wanted new Kabin refused.

Daughter had been to see Abdul Jabbar's father Rahim just before death about 10 days before dacoity. Kala Chand visited the *bari*.

Kala Chand not well off. Had been helped. His hut built by Rahim. Lent money. Was now aggrieved party. Chottu his brother.

Kala Chand identified by Abdul Jabbar only. Chottu by Abdul Jabbar, says saw them between *bahir* and *bhitor bari*—lamp on bamboo N. of *bari*.

Police map and Sub-Inspector's evidence—Abdul could see from *lakrir ghar* into *andar bari*.

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Nobjan says Chottu entered N. hut where she was with lamp and *dao*. Threatened her.

Lamp in hand not same as Abdul Jabbar's evidence.

Neighbours corroborate being told this not sure which said first.

Rajar ma in hut with Nobjan. Now says recognised Chottu by feet when hiding under platform. Not too probable.

Moslem Khan, nearest neighbour, says came out by tank and saw Chottu by light of lamp to N. of *bari*. First said nothing through fear, later told Sub-Inspector. Accept with caution.

Against Chottu's brother (Ct. witness) says brother in house all evening.

Two witnesses prove Kala Chand could not have returned home till late that day. His *bari* 10 or 12 miles from place of dacoity. They not sure originally whether it was Saturday or Sunday.

F. I. R. lodged 2nd morning. Delay. Reason given illness of elder brothers. Thana close—*baitok* in *bari*. Still Abdul a boy only—choukidar came late.

Both accused known to inmates. Would they dare openly enter *bari*—Even disguised with topi and shirts?

Considerable doubt.

Rajar ma and Moslem's evidence not too good. Nobjan unintelligent witness. Abdul Jabbar clear and unhesitating as against both accused.

If you believe Abdul Jabbar and his mother you will convict, otherwise if you think they could not have recognised in fright, men in topis, in nearly dark you will acquit both accused.

Mr. A. K. Fazlul Huq and Babu Sachindra Kumar Roy for the Appellants.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The Appellants Abdul Gafur Khan *alias* Kala Chand Khan, and Abdul Sakar Khan *alias* Chohe Khan, have been convicted, on a unanimous verdict, under sec. 395, Indian Penal Code, and sentenced to undergo ten years' rigorous imprisonment each.

The inmates of the house in which the dacoity is said to have been committed were Abdul Jabbar, the complainant, a boy of fifteen, his elder brother Abdul Nabi, another brother, two sisters, one of whom is the witness Alekjan, a girl of eleven, their mother, some servants and a beggar woman.

The occurrence is said to have taken place on the night of September 4th, and information was lodged at the Thana seven miles distant, on the morning of the 6th.

The description of the dacoity is of the usual kind, but there is this singular feature in the case that the Appellant Kala Chand Khan has given his daughter in marriage to the Abdul Nabi just mentioned. Relations are strained because Abdul Nabi has married a second wife and Kala Chand's daughter is living with her father. The second Appellant is brother of the first.

The case for the prosecution is that Kala Chand was recognised at the time of the dacoity by Abdul Jabbar, and by no one else, while Chottu Khan was recognised by Abdul Jabbar and his mother and his sister and a neighbour named Muslem. Apart from this oral evidence there is nothing whatever to show that the Appellants joined in committing the dacoity.

The objections to the charge are threefold. First it is urged that the whole charge is so condensed that it is difficult to understand exactly what the learned Judge really said. Secondly it is said that

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there ought to have been a reference to the fact that the prosecution did not examine all the servants and the beggar woman, and that there ought to have been a direction as to the inference to be drawn from the omission.

Thirdly the manner in which the learned Judge dealt with the evidence of identification is criticised as being incomplete and unlikely to help the jury in arriving at a right conclusion.

With the first objection I agree. It is true that the law requires a Judge only to record the heads of his charge; but the meaning of those words has often been explained in this Court, and I should like to draw the attention of the Judge to the case of *The Queen v. Kasim Shaik* (1). I have no doubt that the learned Judge could from his brief notes prepare a full statement of what he said to the jury, but it is hardly possible for others to do so.

As to the second objection, I think the point is one which ought not to have been overlooked by the Judge; but the case is not one in which it would be reasonable to hold that the witnesses not examined were really important witnesses, and on this ground alone I should not be prepared to hold that the charge was bad.

The third criticism which is to some extent a repetition of the first has much more substance. The Judge's comments on the evidence of identification like the remainder of the charge are recorded in a form which makes it difficult for us to know what was actually said.

In dealing with the evidence of identification there were several points which deserved careful treatment. There was the relationship between the parties, with the question of probability which it raised; there was the long delay in reaching the Thana; there was the fact that only Abdul Jabbar pretended to recognise Kala Chand,

and Abdul Jabbar is a mere boy, and the defence suggested that he had hidden himself in a place from which he could not see the dacoits: there was the absurd story of Alekjan that she recognised Chottu Khan by his feet: there was the contradictory evidence about Muslem's pretended recognition; there was the evidence of neighbours about what they did and did not learn when they came on the scene; all of it coupled with the fact that not a word was reduced to writing for nearly thirty six hours.

I do not mean that the learned Judge did not refer to these points, for he did, but in my opinion, his comments, so far as we can guess what they were, did not give the jury the help that they needed.

It would be tedious to deal with this matter at greater length. For the reasons given I think the charge is vitiated by misdirection.

It remains to consider what order we should pass. Against the first Appellant there is nothing but the evidence of Abdul Jabbar, and against the second Appellant nothing but the evidence of Abdul Jabbar and his mother, after eliminating, as we must, the evidence of Alekjan and Muslem. In the strained relations between the parties it seems to me very doubtful whether those two witnesses should be believed, when there is not a scrap of independent evidence to support them, and my distrust is increased by the extraordinary delay that took place in going to the Thana. In these circumstances I think the case is one in which there ought not to be a retrial. Accordingly I set aside the verdict of the jury and acquit the two Appellants.

SUHWARDY, J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 501 OF 1922.

AKSHOY KUMAR BHAT-**TACHARJA and ors.,****SANDERSON, C. J.** 1st party, Petitioners,**CHOTZNER, J.** v.

1922,

BROJESWAR GHATTAK

10, August. and ors, 2nd party,

Opposite Party.

Criminal Procedure Code, (Act V of 1898), secs. 145, 146—Evidence of possession on both sides equally unreliable—Order under sec. 145, based on presumption of possession arising from title, if valid—Such presumption when applicable—Interference by High Court—Magistrate directed to act under sec. 146.

Where in a proceeding under sec. 145, Cr. P. C., a Magistrate found that the evidence of possession on both sides was equally unreliable, but declared the second party to be in possession relying on the presumption as to possession arising from the title he found in that party:

Held—That the order of the Magistrate under sec. 145 was bad, and he was directed to act under sec. 146, Cr. P. C.

Where a Magistrate finds the evidence on both sides, which in itself is reliable, equally balanced, and he is unable to conclude from such evidence which party is in possession then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he finds in that side. But this principle does not apply in a case like the present one where the Magistrate finds that the evidence of possession on both sides is equally unreliable.

This was a revision against an order of Babu Upendra Nath Ghosh, Deputy Magistrate of Khulna, dated the 31st May 1922.

The facts appear from the judgment.

Babu Manmatha Nath Mukerjee (with Babu Saraj Kumar Chatterjee) for the Petitioners.

Babu Dasarathi Sanyal (with Babu Mon Mohun Bose) for the Opposite Party.

The JUDGMENT OF THE COURT was as follows.

SANDERSON, C. J.—This is a rule calling upon the District Magistrate, and the Opposite Party to show cause why the order complained of should not be set aside on the second and fifth grounds mentioned in the petition.

The second ground is, “for that with regard to the portion lying to the east of Thia khal the Magistrate’s finding being that there was no satisfactory evidence of possession on either side, the order in respect of the said portion is without jurisdiction.”

The fifth ground is, “for that the order is without jurisdiction as relating to 112 bighas of land when the entire area according to the learned Magistrate himself is not less than 250 bighas and no attempt has been made to define a smaller area.”

The proceedings were under sec. 145 of the Criminal Procedure Code and the learned Magistrate declared that the second party was in possession of the disputed land and that the disputed land was bounded on the North by Kangal Mandal’s bhari, on the East by Guatolar khal or Guatola kata khal, on the South by Siminar kata khal and on the West by Thia khalel kata khal.

The disputed land has been described in the judgment as being divided into two parts, one being called the western portion, which lies between the Thia khalel kata khal on the west and Thia khal original on the east. The north and the south boundaries are those which I have already mentioned. The other was called the eastern portion, lying between Thia khal original on the west and the Guatolar khal on the east, the northern and southern

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boundaries being those which I have already mentioned.

The learned Magistrate came to the conclusion on the evidence that the second party was undoubtedly in possession of the western portion; and in my judgment, there is no reason for interfering with the learned Magistrate's order as regards that portion, which I have described and which is called the western portion.

As regards the eastern portion the Magistrate in his judgment said this:—

“Though neither Sovaram nor the first party could adduce satisfactory evidence of possession in respect of the eastern area, I should also find possession of it with Sovaram and his co-sharers with whom I have found the title to this land to be by relying on the recognised principle enunciated in various rulings of the Calcutta High Court, which is very much applicable to a case like the present one and accordingly, as I have already stated, the Magistrate declared the second party to be in possession not only of the western portion but also of the eastern portion of the disputed land.”

It has been argued that having regard to the finding of the learned Magistrate that neither party had adduced satisfactory evidence of possession in respect of the eastern portion, the Magistrate was not entitled to take into consideration the presumption as to possession which might arise from the title which he found to be in the second party. The principle which may be applied to this case is that where a Magistrate finds on each side evidence which in itself is reliable and he finds that the evidence on the one side and the evidence on the other side is equally balanced and he is unable to conclude from such evidence which party is in possession then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from

the title which he has found to be in that side. In my judgment, however, the principle does not apply to a case where the Magistrate has come to the conclusion that the evidence as regards possession is equally unreliable on both sides. The question is, in which category does this case lie? I have been placed in somewhat of a difficulty by the fact that the explanation of the Magistrate, which he has forwarded to this Court, does not seem to me to be consistent with the judgment which he has given. I have already read what the Magistrate said in his judgment and but for his explanation I should have come to the conclusion that he meant to find that there was no satisfactory evidence on either side with regard to the question of possession, and if that be the proper construction to put upon his judgment then, in my judgment, he was not entitled to rely upon any presumption as to possession from the title which he had found in the second party.

In his explanation, however, the Magistrate has said, “Both parties adduced evidence of their respective possession over the portion lying to the east of Thia khal, but I found it evenly balanced on both sides, so I referred incidentally to the question of title and found possession with the party with whom I have found the title to this land, in addition to the evidence of possession adduced by them.”

In my opinion if his explanation had been embodied in his judgment then this Court should not have interfered with the order which the Magistrate made. But in my opinion that explanation is not consistent with the Magistrate's judgment. I have carefully considered the judgment of the learned Magistrate and I am bound to put the natural meaning upon the words used by the learned Magistrate in his judgment and I have come

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to the conclusion that at the time when he delivered his judgment, he meant to find that there was no satisfactory evidence on either side with regard to the question of 'possession', consequently in my judgment, he was not entitled to declare that the second party was in possession of the eastern portion. In my judgment, with regard to the eastern portion, the proper course for the Magistrate to adopt would have been to apply the provision of sec. 146 of the Criminal Procedure Code.

The result is, in my judgment, that this rule should be made absolute only so far as the eastern portion is concerned. We do not intend to interfere with the Magistrate's order as regards the western portion. As regards the eastern portion we remit this matter to the Magistrate and direct that the Magistrate do put in force the provisions of sec. 146 of the Criminal Procedure Code.

CHOTZNER, J.—I agree.

H. C. S. Rule partly made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

REF. NO. 1 OF 1922

AND

APP. NO. 148 OF 1922.

SANDERSON, C. J.

PANTON, J.

.1922,

Heard, 26 and

27, April.

Judgment,

28, April.

KING-EMPEROR

v.

DURGA CHARAN BEPARI
and ors., Accused.

Jury, trial by—Misdirection on points of law and improper direction on facts.

The three accused were found guilty by the unanimous verdict of the jury, two under secs. 302/34, I. P. C. and one under secs. 302/149, I. P. C. and further all under secs. 364, 148, I. P. C.

The Sessions Judge in charging the jury said—"Sec. 34 provides that where it is

doubtful which of several persons has taken the chief part in any given crime committed in furtherance of the common intention of all of them each of such persons is severally liable as if he alone had done the deed."

Held—That it is necessary for the Judge to read the very words of the section itself to the jury if he purports to give them what are the provisions of the section and then if necessary to explain what is the meaning of the section and the direction with regard to sec. 34 was not a proper direction.

In charging the jury as to what constitutes murder the Sessions Judge said—"Murder is the intentional killing of another human being with malice aforethought."

Held—That it is not the way in which Judges ought to charge the jury in this country. It is usual to refer to the sections which relate to culpable homicide and to direct the jury as to what is culpable homicide and in what circumstances culpable homicide amounts to murder.

As to the charge under secs. 302/149, the Sessions Judge charged the jury as follows:—"This charge is to some extent redundant and strictly applies only to one accused A for the other accused are supposed to have been the actual murderers. By sec. 149, A becomes a constructive murderer and liable for the substantive offence just as by sec. 34 all the accused are equally liable for the murder as though each of them had committed it single-handed."

Held—That this was a misdirection.

Held further—That the Sessions Judge was in error in not drawing the attention of the jury to some material evidence and to the fact that many of the prosecution witnesses were related to a person who was the prime mover in the prosecution

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or to one another and to the discrepancies in the evidence and his direction on the evidence in one instance was not borne out by the record.

That the attention of the jury should have been directed to the individual cases of the three accused.

On the ground of misdirection the High-Court set aside the verdict of murder as regards all the accused and holding that there was no misdirection as to the charge under sec. 364, I. P. C., upheld the conviction of two of the accused on that charge, but set it aside in the case of the other accused and set aside the conviction of two of the accused under sec. 148 and upheld it in the case of the other.

This was a reference, dated the 11th March 1922, by the Additional Sessions Judge of Backerganj for confirmation of the sentence of death passed by the Court of the first Additional Sessions Judge of Backerganj (Mr. H. G. Blomfield), upon the accused on the 10th March 1922. There was also an appeal from the conviction and sentence.

Material portions of the heads of charge to the jury are given in their Lordships' judgment.

The Sessions Judge's charge to the jury in dealing with the evidence was as follows :—

III.—The case for the prosecution is that about 11 p.m. on the night of 13th October 1921, a widow lady Nandarani, of Baher Char, P. S. Mendiganj, in the sadar Sub-Division of this District, was forcibly abducted from her house by three men—Durga Charan Mandal, Tarini Mandal and Hasan Dewan—the first two of whom were her nephews by marriage, and dragged through the paddy-fields to the river Kalabador, on the bank of which she was strangled with

her own cloth, and her body cast into the river, where it was discovered shortly afterwards by her lover, Ananda Mandal, one of a search party that had come to look for her. A cloth was found tied tightly round the neck, and the greater part of the left thigh as well as part of the left heel had been eaten by some aquatic or amphibious reptile, probably a crocodile, though the witnesses suggest a tortoise.

The motive for the crime is to be sought in the bitter mutual hatred that is alleged to exist between Kalidas, the father of Durga Charan and Tarini, on the one hand and the deceased on the other, concerning the lands that she inherited from her late husband, who was the younger brother of Kalidas.

IV.—The defence is that this long-standing quarrel was settled recently by a deed of compromise filed in Court, by which half shares in the property were assigned to the respective claimants, Nandarani and her brother-in-law Kalidas. He had therefore no reason to do away with her, and even if she were removed, he, as brother, would not inherit: her daughters (Swarna and another) would come first. *Ergo*, Kalidas and sons had nothing to gain by killing Nandarani. On the contrary, Ananda, the patron of the deceased, had a motive for falsely implicating both the brothers, Durga Charan and Tarini, because his mistress's litigation with their father had already cost him close on Rs. 800. Hasan Dewan was involved because he had bought some of the land, and Alimuddi was added because (1) he is a friend of Hasan's and (2) he was acquitted in a case brought against him by Ananda's nephew, Raj Mohon Mandal. Moreover, the so-called sale by Kalidas of a *kani* of his share of the land to Hasan was not a politic move to import a newcomer on to his side in

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this family conspiracy against his sister-in-law, but was rather the natural outcome of Kalidas's own financial straits consequent on his expensive litigation with the widow. Again, in the quarrel between the parties over the betel-nuts, it was Hasan who proposed that they should be deposited with a third party, thus shewing his fair and impartial attitude.

From all this and from similar *a posteriori* considerations it is argued that the account of events on the Thursday night given by the prosecution cannot be believed, and is really false. What probably happened was that the woman disappeared earlier in the night, and was discovered much later; her absence was not noticed at the time, and all this about the forcible abduction by the three men and the abortive pursuit in the paddy-field is a mere yarn; and (generally) there is nothing to connect these three with her disappearance, still less with her murder.

V.—The evidence is that at the time of her decease Nandarani was living in a house of her own built for her by her protector and paramour, Ananda Mandal, whose own house was close by. At the time of occurrence her son-in-law, the complainant, and her daughter, were staying with her. They are the eye-witnesses of the abduction. They were in the kitchen at the time, while she was in the sitting room, hemming a *hogla* mat with the door of communication open, through which they could apparently both see her. On hearing her screams they rushed into the room and found Durga Charan half throttling her with a cloth, while the other two had pinioned her arms. She clutched the mat wall by the door post, but was torn from it by her captors, who dragged her away across the verandah and the yard, into the paddy-field close by. Her son-in-law

Nagarbashi came out into the yard, and made a feeble attempt to rescue her, but retired at the sight of Alimuddi's spear, and of the other armed men. He and his wife screamed and this (added to the shrieks of Nandarani herself) brought the neighbours to the scene, amongst others Ananda himself. These persons ran after the accused, the complainant himself bringing up the rear; but they had hardly come up with the accused when they were violently threatened by Alimuddi and Jabbar Ali—members of the gang—and fell back in terror on Nandarani's house. Here they collected reinforcements and again started in pursuit. By this time, however, the abductors had got clean away; but by following their track they came to the river bank, and there, in the marshy water at the river-side, half covered with water-hyacinth, they came upon the body of the unfortunate woman. The *dafadar* and *chaukidar* were sent for, and the body was removed to the hut in which Ananda kept his oil-press; and information was given to the police next morning.

So much for the events of the night of Thursday, 13th October between the hours of 11 p.m. and 2 or 3 a.m. (on the Friday morning). We must now return to the night of Tuesday the 11th. This was *Dasahara* day, and there was some form of bean-feast (*Harir Lut*) at Ananda's house that night, at which most of the actors in this tragedy were present. During an interval in the singing, the widow is said to have proposed to convey some of her land to Ananda in payment of her debt to him, and it is said that this was overheard by Durga Charan, and was the immediate cause of the conspiracy.

Going back still further, we come to the 4th October, on which day Kalidas made over a *kani* of his land to Hasan;

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and then going forward, we come to the betel-nut incident of the 7th October, in which Hasan claimed the whole plot and all the nuts, and in which the widow and he, each, threatened the other with violence, his threat to her being one of death. This aggravated the existing bitter feelings between the parties, and the proposed transfer of land brought matters to a head.

The plot was apparently hatched on the Wednesday and carried into effect on the Thursday. On this night the evidence is that Ananda was kept in play by one Biraj—type of the unwelcome caller—who seems to have extended his inopportune visit right up to the time of the abduction, thus keeping the only person likely to interfere, out of the way.

Besides the two eye-witnesses of the actual seizure, the initial stages of the dragging through the paddy were seen by Ananda Mandal himself (P. W. 3), Nishi Kant Byapari (P. W. 4), Radha Charan Byapari (P. W. 7), and Badan Byapari (P. W. 9), these last two coming from Ananda's house and arriving on the scene with him. Nishi Kant had already got there, and was apparently the first to do so. These, with Banamali Byapari (P. W. 14), were the first persons who, with the complainant lagging in the rear, were so easily routed by the display of armed force. Ram Sundar Taluqdar (P. W. 8) arrived in time to join the tale-end of the stern chase, and elicited from Badan the names of the abductors.

The second search party was composed of the above persons, with the addition of Raj Kumar Byapari (P. W. 11), Nikunja Byapari (P. W. 13), and apparently others. Other witnesses are the police, the civil surgeon, the *dafadar*, the linkman Abdul (P. W. 16), and a miscellaneous collection of deed-writers,

pleaders and persons who prove the relationship between Hasan and Alimuddin (the latter is the father-in-law of the former by the second marriage of his daughter Amina), and also the ceremony of the *Harir Lut* on the Tuesday night.

VI.—Summing up. The plain questions for the jury are two:—(1) Was Nandarani murdered? And (2) if so, did the three accused persons murder her?

(1) The medical evidence shews conclusively that death was due to strangulation. This is confirmed by the accounts of all the witnesses who saw the body with its neck tightly bound with a cloth. The only alternative event suggested by the defence in the lower Court was expressly ruled out by the Civil Surgeon, who stated that in suicide by hanging, the symptoms are quite different. Moreover one must hang oneself to or from something, and the body was not found hanging from a tree or lintel or wall, but was discovered in water knee-deep. The cloth round the neck and the expert evidence of the Civil Surgeon, then, exclude the possibility of the woman's having met her death either by natural means or by suicide. I may add here that it has not even been suggested by the defence that she was either drowned or eaten by a crocodile; the damning noose round the neck is against that. The conclusion is irresistible that the deceased was murdered.

(2) If so, by whom? This, as I have now shewn, is the real question for the jury, though technically they have to decide the other also. In coming to a decision, the jury must ask themselves who were the persons last seen with the deceased and under what circumstances and must remember the circumstances under which the body was found; the evidence is that Durga Charan had tied the cloth round the poor woman's neck at the time

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of the capture, and that so they dragged her away: long before she got to the river she must have been half choked, and it would require little more pressure to complete the suffocation. The jury must also take into consideration the admitted hatred that existed between the deceased and her husband's relations, and must ask themselves whether in their experience such hatred does not, in nine cases out of ten, at any rate in Backerganj District, furnish a powerful motive for such a crime. Here the attitude of the accused is indicated by the threats of Hasan on the occasion of the betel-nut incident. The jury must take account of the track through the paddy which was made by the accused and which directly led to the finding of the body, and the apparent impossibility (humanly speaking) of accounting for its discovery under such circumstances except on the hypothesis that those who dragged away Nandarani also made away with her, and slung her body into the nearest river, or left it where it fell when they had choked the life out of her.

Of course all this is a matter entirely for the jury to decide. I regret that my opinion is not binding on the jury, and that the above considerations are merely offered as a guide to the jury in their task of deciding the question of the guilt or innocence of the accused. As I have already said, which of the three abductors actually applied the pressure that ended her life—if this was how she died—is immaterial under sec. 34, I. P. C., all are equally guilty, if the evidence is believed. As against Alimuddi, it is the charge under secs. 302/149 that mainly applies.

If the jury believe that these three men murdered Nandarani, they must find them guilty of murder; if they believe that they did not, they will return a verdict of not guilty.

Babu Suresh Chandra Taluqdar (with *Babus Mohendra Kumar Ghose* and *Sachindra Kumar Roy*) for the Accused.

Mr. Orr, Deputy Legal Remembrancer (with *Babu Manindra Nath Banerji*) for The Crown.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is a reference under sec. 374 of the Code of Criminal Procedure in a case which was tried by the learned first Additional Sessions Judge of Bakerganj and a jury and in which the three accused were found guilty of murder and were sentenced to death. There is also an appeal by the three accused. Two of the accused Durga Charan Byapari and Hasan Dewan were found guilty of murder by the unanimous verdict of the jury under secs. 302 and 34 of the Indian Penal Code and the other Alimuddi Mistry was found guilty of murder under secs. 302 and 149 of the Indian Penal Code. All three were found guilty on the remaining two charges, namely, under sec. 364 which is the section dealing with abduction with intent that the person abducted may be murdered or may be so disposed of as to be put in danger of being murdered, and under sec. 148, which is the section which deals with rioting by a person or persons armed with deadly weapons.

The first ground or rather the ground, upon which the learned Vakil, who argued the case on behalf of the accused, mainly relied, was, that the direction of the learned Judge to the jury was open to criticism. In my judgment the direction by the learned Judge to the jury is open to certain criticism and I have come to the conclusion that there are material matters which, as far as I can ascertain from the heads of charge to the jury which are now before us, were not

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brought to the attention of the jury. Before I deal with those matters attention should be drawn to the way in which the learned Judge dealt with sec. 34 of the Indian Penal Code. I am quite aware that the document, which we have before us is not more than "heads of charge to the jury" and I cannot accept the suggestion which was made by the learned Vakil for the accused, that the learned Judge said no more to the jury than what appears in the heads of charge. The case lasted, (if my recollection serves me right), for six days and the seventh day of the trial was reserved for the learned Judge's summing up; it was not until about 3 o'clock in the afternoon that the jury retired to consider their verdict. I therefore regard this document as no more than "heads of charge to the jury." But even so, I may say that there are certain matters in the heads of charge which are open to criticism. In the first place, the learned Judge has stated as follows:—

"Sec. 34 provides that where it is doubtful which of several persons has taken the chief part in any given crime committed in furtherance of the common intention of all of them, each of such persons is severally liable as if he alone had done the deed." If the learned Judge intended thereby to be informing the jury as to what were the provisions of sec. 34, no one can deny that it is a misdirection, because the provisions of sec. 34 are not as stated by the learned Judge.

But I take it that the learned Judge was giving his own view of the meaning of the section. In my judgment it is necessary for a learned Judge to read the very words of the section itself to the jury, if he purports to give them what are the provisions of the section, and then, if necessary, to explain what is the meaning of the section. The learned Judge did go on to say: "in other words, it pro-

vides for those cases in which all help to commit, *e.g.*, a murder, but in which it is, in the nature of things, difficult to say exactly whose hand actually caused the death of the murdered person." It seems to me that in that sentence the learned Judge was on sounder ground; but even then, having regard to the first part of the direction, I regret to say that I cannot regard it as a satisfactory direction with regard to the provisions of sec. 34.

Then his only direction as to what constitutes murder is contained in one sentence "Murder is the intentional killing of another human being with malice aforethought." That may be a comprehensive way of describing what the meaning of murder is but it is not the way in which learned Judges ought to charge the jury in this country. It is usual to refer to the sections which relate to culpable homicide and to direct the jury as to what is culpable homicide and in what circumstances culpable homicide amounts to murder. I should not however reject this direction to the jury by the learned Judge on this ground alone, if I felt quite clear that the misdirection had not occasioned a failure of justice. Further I do not approve of the last paragraph but one at page 40 of the paper-book where the learned Judge was dealing with secs. 302 and 149, *viz.*: "This charge is to some extent redundant, and strictly applies only to Alimuddi, for Hasan and Durga Charan are supposed to have been the actual murderers. By sec. 149 Alimuddi becomes a constructive murderer and liable for the substantive offence, just as by sec. 34 all these accused are equally liable for the murder, as though each of them had committed it single-handed." In my judgment if the charge was, in fact, delivered to the jury in those words or in words which would convey that meaning,

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in my opinion the jury might misinterpret it and they might have been thereby induced to come to the conclusion that there was no more to be said about the matter. In my opinion, this amounts to a misdirection.

The next paragraph is material in another respect. The learned Judge was dealing with sec. 148 and said: "Similarly, though all three are charged with rioting armed with deadly weapons under sec. 148, Indian Penal Code, it appears from the evidence that the charge will only apply to Alimuddi who was armed with a spear, the other two being unarmed." In spite of that direction by the learned Judge the jury found all three of the accused guilty under sec. 148. This goes to show that apparently the jury had not appreciated the learned Judge's direction: in effect he directed the jury that only one could be convicted under sec. 148 and yet the jury found all three of them guilty under that section.

It is difficult to believe that all that the learned Judge said about the evidence is represented in his heads of charge: If it be a full and correct representation of his charge with regard to the evidence, then it appears that the learned Judge did not draw the attention of the jury to the fact that many of the witnesses who were called on behalf of the prosecution were related to Ananda, who was alleged to be the prime mover in the prosecution, or to each other; nor did he draw the attention of the jury to the discrepancies in the evidence of some of the witnesses, discrepancies which certainly did occur.

Again, the learned Judge said: "The plot was apparently hatched on Wednesday and carried into effect on Thursday." I have read the evidence carefully. I do not know what evidence is supposed to support the suggestion that a plot was hatched on Wednesday. The learned

Counsel and the learned Vakil were not able to assist me on this point: there is the evidence of Iswar Charan Byapari who proved that at Sabdar's house there was a feast and that Alimuddi, Biraj Ali Jamadar, Kuti Mollah and Jabbar Ali were invited to it. Hasan Dewan is the son-in-law of Alimuddi and he lived in that house. The feast took place on Thursday and not on Wednesday and I do not find anything in that evidence which would justify the suggestion that any plot was then hatched.

Towards the end of the learned Judge's summing up he said, "the evidence is that Durga Charan had tied the cloth round the poor woman's neck at the time of the capture, and that so they dragged her away." It is true that Swarna the woman who is alleged to have been present at the time the abduction took place, used the words "tied a cloth round her neck." On the other hand, the first witness for the prosecution Nagarbasi said, "Durga Charan had put the upper part of her cloth round her neck and so had caught her" which may mean that he tied it or it may mean that he had merely wrapped it round her neck for the purpose of dragging her away. That by itself would not be so important but for the sentence which follows it: because the learned Judge says, "long before she got to the river she must have been half-choked, and it would require little more pressure to complete the suffocation." That depends to some extent upon how the cloth was tied, and the learned Judge did not draw the attention of the jury to this question. The learned Judge further said: "The jury must also take into consideration the admitted hatred that existed between the deceased and her husband's relatives and must ask themselves whether in their experience such hatred does not in nine cases out of ten, at any

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rate in Backergunj District, furnish a powerful motive for such a crime."

In my judgment the learned Judge ought to have drawn the attention of the jury to the evidence of Nagarbashi with regard to this point; Nagarbashi said that as between Kalidas and the deceased there was a settlement of the dispute and it was called an amicable settlement, and he went so far as to say "there was no quarrel between them after the case between them was amicably settled last Assarh." In view of this statement I fail to see how the Judge was justified in telling the jury that there was existing "admitted hatred." Finally, the learned Judge directed the jury as follows: "As I have already said, which of those abductors actually applied the pressure that ended her life—if this was how she died—is immaterial."

There were three men involved in the charge of murder. It seems to me that the attention of the jury should have been directed to the individual cases of the three men. As for instance, it may be that Alimuddi had no intention of murdering Nandarani, though he may have been willing to take part in the abduction of the woman; there is no evidence that he laid his hand upon the deceased though there is evidence that he assisted the actual abduction by holding back and threatening the would-be rescuers. For these reasons, in my judgment, it would not be right to allow the verdict of murder to stand in respect of the three accused. Consequently in our judgment, the verdict of murder and the sentences of death passed upon the three accused must be set aside.

That however does not dispose of the case.

The learned Vakil for the accused pressed us to remit the case for a fresh trial, but with regard to the charge under

sec. 364, the learned Vakil frankly admitted that he could not say that there was a misdirection as regards that charge, at all events, so far as the two accused, Durga Charan Byapari and Hasan Dewan, were concerned; in my judgment there was ample evidence in this case to justify the jury in coming to the conclusion that these two men did abduct the woman and that they abducted her either with the intention of murdering her or with the intention that she might be so disposed of as to be put in danger of being murdered. The jury unanimously accepted the evidence in this respect, and there being no misdirection in respect of this charge as regards these two accused, it is not necessary to send this case back for a fresh trial, and in our judgment this Court should uphold the convictions of Durga Charan and Hasan Dewan in respect of the charge under sec. 364 of the Indian Penal Code.

With regard to Alimuddi I have considerable doubt whether the conviction under sec. 364 ought to be upheld. As I have already said, it is possible that this man may have taken part in the abduction without any intention of murdering the woman or putting her in danger of being murdered. The object of the abduction, so far as he was concerned, may have been something quite different. In this connection it is to be remembered that the evidence of Abdul was to the effect that he had seen two men only near the place where the body was found, and in our judgment it would be safer in the interests of justice to hold that in the case of Alimuddi, the conviction under sec. 364 should be set aside.

There remains the conviction under sec. 148. With regard to Durga Charan and Hasan Dewan, I agree with the learned Judge that there is no evidence that those two men were armed with any deadly weapon, or with any such weapon

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as is mentioned in sec. 148. Consequently, the convictions of those two men under sec. 148 must be set aside. The conviction of Alimuddi however under sec. 148 ought in our judgment to stand. He was armed with a deadly weapon and he was guilty of rioting. There was an assembly of five or more persons and on the evidence which has been accepted by the jury, there is no doubt that the common object of that unlawful assembly was to abduct the woman, and by means of criminal force, or show of criminal force, to compel the deceased woman to do what she was not legally bound to do. In other words, the case would come within the meaning of sec. 141, sub-cl. (3) or sub-cl. (5) of the Indian Penal Code. In our judgment therefore the conviction of Alimuddi under sec. 148 must stand.

The result of our judgment is that the convictions of all the three accused, namely, Durga Charan Byapari, Hasan Dewan and Alimuddi Mistri, for murder, and the sentences of death passed upon them are set aside. The conviction of Alimuddi Mistri under sec. 364 of the Indian Penal Code and the convictions of Durga Charan Byapari and Hasan Dewan under sec. 148 of the Indian Penal Code are also set aside. But the convictions of Durga Charan Byapari and Hasan Dewan under sec. 364 of the Indian Penal Code are upheld and the conviction of Alimuddi Mistri under sec. 148 is upheld. Under these circumstances we do not think it necessary to direct a new trial.

Now there remains the question of sentence. My learned brother and I regard this as a very serious case and it is such a serious case that we have had considerable hesitation whether we ought not to remit the case in order that there should be a further trial on the charge

of murder, but after due consideration we have decided not to take that course.

Having regard to the facts of the case, the sentence we pass upon each of the accused Durga Charan Byapari and Hasan Dewan is ten year's rigorous imprisonment under sec. 364; and the sentence on the accused Alimuddi Mistri is three years' rigorous imprisonment under sec. 148 of the Indian Penal Code.

PANTON, J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

JURY REF. NO. 48 OF 1921.

NEWBOULD, J.

PEARSON, J.

1921,

Heard, 14, 15, 16,

19 and 20, Dec-

ember.

1922,

Judgment,

10, January.

KING-EMPEROR

v.

BISESWAR DEY and ors.

Confession, retracted, evidentiary value of—Necessity of corroboration—Effect if any against person other than maker.

It cannot be laid down as an inflexible rule that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for its retraction.

It is unsafe for a Court to rely on and act on a confession which has been retracted unless, after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is

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corroborated by credible independent evidence.

A retracted confession should carry practically no weight as against a person other than its maker.

Held, on a consideration of the circumstances, that the confessions were obtained in some manner under threats and inducements such as would render them inadmissible under sec. 24 of the Indian Evidence Act.

This was a Reference under sec. 307, Cr. P. C., dated the 14th July 1921 from the Sessions Judge of Noakhali (Mr. S. C. Ghosh), disagreeing with the unanimous verdict of the jury who had found the accused not guilty of the charges framed against them.

The facts of the case will appear from the judgment.

Mr. Orr and Babu Atindra Nath Mukerjee for the Crown.

Babu Santosh Kumar Bose for Accused Nos. 1 and 2.

Babus Manmotho Nath Mukerji and Probhat Ch. Dutt for Accused Nos. 3 and 4.

The JUDGMENT OF THE COURT was as follows :—

Five accused persons were put on their trial before the Sessions Judge of Noakhali and a special jury. They were all charged with conspiracy to murder Bipin Behari Shaha; one of the accused Biseswar Dey *alias* Biseswar Raj was charged with having actually committed the murder; two of them Jotindra Mohan Das and Satish Chandra Shaha were charged with having been present abetting the murder and Jotindra Mohan Das was further charged with having abducted Bipin Behari Shaha in order that he might be murdered; the remaining two Kshetra Mohan Shaha and Maharani were charg-

ed with abetment of the murder. After a trial held for 28 days the jury returned a unanimous verdict stating that the case against the first four accused was doubtful and they gave them the benefit of the doubt and that Maharani was not guilty. The Sessions Judge agreed with the verdict as to Maharani and acquitted her. In respect of the others he disagreed with the verdict and held it to be perverse and thought it necessary for the ends of justice to refer the case to this Court under the provision of sec. 307, Cr. P. C. In his opinion these four accused are guilty of the offences mentioned in the charges laid against them.

The case against the accused rested mainly on the evidence of an approver Bidhu Bhusan Shaha (P. W. No. 1) and retracted confessions of the accused. Before considering the strength of the case so made out it will be convenient to state certain facts which are either undisputed or which have in our opinion been proved beyond reasonable doubt.

Bashpara is a village in the jurisdiction of the Chhagaluaya Police Station and the Feni subdivision of Noakhali District. It is $1\frac{1}{2}$ miles from Chhagaluaya and 9 miles from Feni. In this village a rich Shaha family, of which the principal member is Babu Amar Krishna Chaudhury, own a large *pucca* house. Babu A. K. Chaudhury who is called by the witnesses Amar Babu, lived some times in Chittagong and some times at Bashpara. The accused Maharani was a servant of Amar Babu, and came from Chittagong to Bashpara at the time of the Durga Puja of 1920. The accused Kshetra Mohan Shaha is the brother-in-law of Lall Mahon Babu who is a brother of Amar Babu. The accused Satish Chandra Shaha is a nephew of Amar Babu. Jotindra Mohan Das is the son of Ambika who had long worked for

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the family as a mason and was maintained by Amar Babu and his two sharers. The accused Biseswar Dey was brought by Ambika a few months before the occurrence to, work as a mason. Bidhu Bhusan Shaha, the approver, is the brother of the widow of a cousin of Amar Babu. The accused Kshetra had a tailor's shop in one of the rooms of the Shaha's house. The accused Satish and Jotindra and the approver Bidhu were students at the Chhagaluaya School. The ages of the accused are as recorded by the Sessions Judge, Biseswar 22, Jotindra 18, Kshetra 20, Satish 16 and Maharani 19. Bidhu's age is about 16 years.

Bipin Behari Shaha, whom the accused are charged with having murdered, was aged about 21 years. He was a nephew of Amar Babu and came from Amar Babu's house in Chittagong to Bashpara on the 10th March last. On the night of Sunday 12th March Jotindra, Bipin, Bidhu and Kshetra were seen playing cards at about 9 or 9-30 p.m. The following morning the corpse of Bipin was found lying on the masonry platform of a tank about 300 feet distant from the place where he and the others had been seen playing cards. The right hand was amputated and there was a wound on the throat cutting the wind pipe, gull, and carotid arteries. There were also cuts on the left and right ears. From the quantity of blood on the pavement and the marks of spurting of blood there can be no doubt that Bipin was killed near the place where his corpse was found. Information of the finding of the corpse was given to Sub-Inspector Pramatha Nath Mukherji at the Chhagaluaya Police Station at 8 a.m. and he came to the place and recorded a first information there at 9 a.m. on the 13th March. The enquiry into the case was commenced by this Sub-Inspector. The Subdivisional

Officer went to the place of occurrence accompanied by the Feni Inspector of Police Annada Charan Bandopadhyaya on the afternoon of the 13th. The Inspector personally took charge of the investigation on the 17th March. The Deputy Superintendent arrived at the place on the 16th March and supervised the investigation. Kshetra, Jotindra and Bidhu said that Bipin had played cards until about 10 or 10-30 p.m. and had left them saying he would sleep at his father's house and go to Feni the next morning to get his cycle repaired. An examination of Bipin's father's house showed that Bipin could not have slept there at any time during his visit to Bashpara. On the 20th March Amar Babu's house was searched. In this room occupied by Maharani was found a blood-stained quilt. Maharani was arrested at 8-0 or 9-0 o'clock that morning. In consequence of statements made by her, Jotindra, Kshetra, Satish and Bidhu were arrested at 8-0 or 9-0 o'clock that night. The following day Biseswar was arrested at 1-30 p.m. On the 22nd these six accused persons were sent to the Subdivisional Officer at Feni to have their confessions recorded. They were produced before him at 12-20 p.m. and on hearing that they had just arrived and had not had their meal he told the Court Sub-Inspector to feed them and give them a rest in the Court lock-up and to produce them before him at 3 p.m. They all made confessions that afternoon and were remanded to custody. For some reason that has not been disclosed Jotindra was sent to the Noakhali jail on the 26th March. While there, he admitted to the officiating Civil Surgeon who was in charge of the jail that he was present at the murder and held down the feet of the man when the Raj Mistri gave the finishing stroke. On the 2nd of May the

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hearing before the Subdivisional Officer of Feni as Committing Magistrate commenced. After the case had been opened by the Government pleader the confessions made by them on the 22nd March were read to each of the accused and each of them said: "I made this confession. It is true. I have nothing more to say." Bidhu was then tendered a pardon and examined as a prosecution witness. At the close of the day's proceeding Jotindra, Satish and Kshetra retracted their confessions. Witnesses were examined daily till the 6th May on which date the accused were again examined. Jotindra, Satish and Kshetra denied having committed any offence and said their confessions were false and made under threats and inducements. Biseswar Dey said, "I committed the offence. I have nothing more to say here." Maharani only said, "I am guilty." The following day at the commencement of the sitting of the Court Maharani said that the previous day through mistake she stated that she was guilty although she was not guilty. The trial in the Sessions Court commenced on the 6th June and when the charges were read all five accused pleaded not guilty. Bidhu the approver was examined as a prosecution witness on the 6th and 7th June. The Court did not sit on the 8th and 9th. On the 10th June he resiled and said that all he had previously said was false. When examined by the Sessions Judge at the conclusion of the trial all the male accused made statements accusing the police of ill-treatment and alleging that they were tortured to make their confessions. Maharani made a statement denying the truth of certain evidence implicating her to which her attention was drawn by the Judge but she was not asked and said nothing about her own previous admission. The story told by the accused in their confessions and by

the approver before he resiled is to the following effect: Maharani was a woman of loose character, Satish and Bidhu used to sleep in the varandah of the room where Maharani lived and carried on an intrigue with her. Jotindra became enamoured of her and threatened Satish and Bidhu with disclosure to the Babus and got them to agree to call Maharani's mother and to go and sleep elsewhere. Kshetra had also been misbehaving with Maharani at the same time as Satish and Bidhu, but Kshetra and Jotindra were fast friends and continued visiting the woman together when the deceased Bipin came. He visited Maharani on the Thursday and Friday nights. According to Jotindra it was Kshetra and according to Kshetra it was Jotindra who suggested that Bipin should be killed in order to prevent him taking the woman back to Chittagong and informing Amar Babu. Biseswar was promised Rs. 500 if he would commit the murder. Satish and Bidhu were persuaded to join the conspiracy for fear of their misconduct being revealed. On the Saturday night Kshetra, Jotindra and Bidhu got Bipin to play cards with them after supper. They stopped playing about midnight and then Jotindra took Bipin to the platform of the tank where the murder was committed. Bidhu went and woke up Satish. A *kharga* (sacrificial knife) had been placed in readiness under Satish's bed. Bidhu and Satish went with the *kharga*, there are discrepancies as to which of the two carried it, and called Biseswar. Biseswar did not get up and they started back. They met Kshetra and told him they could not wake up Biseswar and then Kshetra went and woke Biseswar by poking him with bamboo. The *kharga* was given to Biseswar and Kshetra went off to bed. Bidhu, Satish and Biseswar then went to the place where Jotindra and Bipin were sitting talking.

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Biseswar came behind Bipin and struck him on the neck. Bipin fell down and began to groan. Biseswar struck him again and Jotindra held Bipin's legs while he was writhing in agony and dragged the dead body to the water where it was found the next morning. According to Jotindra and Maharani, Kshetra and Jotindra took a blood-stained quilt to show her that her lover had been murdered but Kshetra denies that he came out of his house again that night.

The principles which should govern a Court in considering the evidential value of retracted confessions have frequently been considered by the High Courts in India. It cannot be laid down as an inflexible rule that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for its retraction. It is unsafe for a Court to rely on and act on a confession which has been retracted unless after a consideration of the whole of the evidence in the case the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated by credible independent evidence. A retracted confession should carry practically no weight as against a person other than its maker.

On a consideration of the circumstances under which these confessions were made and retracted, it is clear that the confessions made by the approver and the three accused other than Biseswar were made in the belief that they would be tendered a pardon and made King's Evidence.

Apart from other reasons this view is strongly supported by their behaviour on the 2nd May. Though these accused had adhered to their confessions in the morning, at the end of the day when they realised that Bidhu alone had been selected as an approver they retracted then alleging they had been made under threats and inducements. We do not believe the statements made by the accused at the trial as to positive ill-treatment by the police. Nor do we believe that the whole story was a concoction by the police. We think the learned Sessions Judge was misled by the falsity of a great part of the case for the defence set up before him. If the defence at the trial had been conducted with the same ability and moderation as it was before us we doubt if he would have thought it necessary to make this reference. That Maharani was threatened when the blood-stained cloth was found in her room is not unlikely and the fact is deposed to by witnesses who seem the more credible since they speak with moderation, the denial of this fact by the police witnesses who were present renders their conduct open to suspicion. What we believe to have happened was that after Maharani's arrest Jotindra, Kshetra, Bidhu and Satish were arrested on suspicion because she stated they were her lovers and because three of them were the last people with whom Bipin was seen alive. These accused were then closely questioned by the police and threatened and cajoled into making various statements. A statement made by one accused would be made the basis of future questioning of another and each would be told, when so much had been discovered, his only hope of safety lay in making a confession. Out of the facts ascertained and such admissions as were made, a theory of the crime would be constructed and this would be

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put to the accused individually. Once they had been convinced, that their best hope of safety lay in becoming King's Evidence they would be only too willing to adopt the suggestion made to them. There is no direct evidence that this was what happened in the present case but from the circumstances under which these confessions were made and retracted and from the nature of the confessions themselves we have no doubt that they were obtained in some such manner under threats and inducements which render them inadmissible under sec. 24 of the Indian Evidence Act. Apart from their confessions there is no evidence to support a conviction of any of these three accused. The evidence of Bidhu is absolutely worthless, not only on account of his denial of its truth, but apart from that the story told by him is highly improbable and there are discrepancies on important points between the evidence given by him before the Committing Magistrate and that given at the trial. The more incriminating evidence is that relating to the card party on the night of occurrence. But it is not shown that the account given the next morning by the accused as to the termination of the party is false. The learned Sessions Judge appears to have overlooked the possibility that Bipin may have given his companions a false reason for his departure. Though it is clear that Bipin did not go to his father's house that night, this does not prove that Jotindra and the other accused were not telling the truth when they said Bipin had made this statement. Other facts like the swooning of Jotindra after arrest are equally consistent with the guilt and innocence of the accused. Jotin's confession to the Civil Surgeon at Noakhali is of no more value than his first confession to the Magistrate. He may well have thought that repeating his confession would

strengthen his chance of being made an approver. When the confessions and evidence of the approver are rejected the circumstantial evidence is not sufficient to do more than raise some suspicions against these accused and this suspicion is increased by the falsity of their statements at different times. But we agree with the jury that they cannot be convicted on any of the charges framed against them.

The case of Biseswar remains to be considered. He did not as did the other three accused retract his confession on the 2nd of May after Bidhu's examination but adhered to it even on the 6th May. It may be that being unlike the others uneducated he had still hope of a pardon. There is no reason to think that he was treated differently from the others during the police investigation and this renders it difficult to act on his confession now that "it has been retracted." However that may be we are not in a position to come to unhesitating conclusion that the confession is true. The whole story of the murder is improbable. We are unable to believe that these young men would conspire in the way alleged to deliberately murder Bipin because he was carrying on an intrigue with a woman of Maharani's character. Nor can we believe that a mere promise of Rs. 500 from a man in Jotindra's position would be a sufficient inducement for the commission of a murder. We also cannot overlook the possibility that Biseswar may have been induced to make himself a scape-goat. Further we find absolutely no corroboration of his retracted confession. The retracted confessions of his co-accused would be of no evidential value against him even if we had not rejected them as against the makers and Bidhu's evidence as already stated is worthless. The learned Sessions Judge has stated in his letter of reference that foot-print found

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close to pool of blood was according to the foot-print expert the foot-print of the accused Biseswar; but we can find no such statement in the evidence given by the foot-print expert Inspector Ananta Kumar Chakravarty (P. W. No. 20). He has stated in detail the points of similarity and dissimilarity between the impression that was taken of Biseswar's foot-print and the foot-print found at the scene of the murder. But he has not stated that the prints of similarity preponderate over those of dissimilarity nor has he expressed his opinion as an expert that the two foot-prints are of one and the same person. We are told by the learned Counsel for the Crown that he did give evidence to this effect before the Committing Magistrate. But this deposition was not put in evidence at the Session trial and cannot be considered by us. In the case of Biseswar we therefore hold there are no materials on the record to justify our setting aside the unanimous verdict of the jury.

We accordingly acquit the accused on all the charges framed against them and direct that they be released.

S. C. M.

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 16 OF 1922.

C. C. GHOSE, J.

CUMING, J.

1922,

Heard, 12 and

13, July.

Judgment,

28, July.

SARAT CHANDRA

MANDAL and anr.,

Complainants,

Petitioners,

v.

RAMSASHI ROY

and ors., Accused,

Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 195, cl. 6—Application in revision if lies to the High Court when sanction has been refused both by the first and the Appellate Court—“Any sanction given or refused under the section,” meaning of

—Government of India Act of 1915, sec. 107—Civil Procedure Code (Act V of 1908), sec. 115. •

The words “any sanction given or refused under the section” in sub-sec. (6) to sec. 195 of the Criminal Procedure Code mean sanction given or refused in the first instance; that being so, one appeal or revision only is contemplated by the sub-section.

HABIBAR RAHMAN v. KHODA BUX (2) and GIRIJA SANKAR ROY v. BENOIDE SHEIK (3) not followed.

RE : RAM PRASAD MALLA (1) and HAMIJ-UDDI MONDAL v. DAMODAR GHOSE (4) approved.

Two Courts having refused sanction upon the evidence,

Held—That there was no case for interference under sec. 107 of the Government of India Act or under sec. 115 of the Civil Procedure Code.

Per CUMING, J.—Quære, whether these sections apply to the matter at all.

This was a rule granted on the 23rd May 1922 against the order of the second Additional District Judge, 24-Perganahs, dated the 16th March 1922, confirming on appeal the order of the Subordinate Judge, 3rd Court, 24-Perganahs, dated the 7th February 1922, declining to grant sanction under sec. 195, Cr. P. C., to prosecute the Opposite Party for conspiring and fabricating a *bainapatra* said to have been executed by one Alladi Dasi on 18th May 1922.

The facts of the case will appear from the judgment.

Babus Manmatha Nath Mukerji and Bimala Charan Deb for the Petitioners.

Babus Dasarathi Sanyal and Bir Bhusan Dutt for the Opposite Party.

(1) I. L. R. 37 Cal. 13 (1909).

(2) 11 C. W. N. 195: s. c. 5 C. L. J. 219 (1906).

(3) 5 C. L. J. 222 (1906).

(4) 10 C. W. N. 1026 (1906).

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The JUDGMENT OF THE COURT was as follows :—

C. C. GHOSE, J.—This rule was issued calling upon the District Magistrate of 24-Perganahs and upon the Opposite Parties to show cause why the order passed by the learned Additional Sessions Judge, dated the 16th March 1922, confirming the order of the learned Subordinate Judge should not be set aside and sanction granted to the Petitioners under sec. 195, Cr. P. C. to prosecute the Opposite Parties on various charges of perjury and forgery.

The facts which have given rise to the application on which the rule was issued are as follows :—

On the 28th October 1919, a suit was instituted being Title Suit No. 233 of 1919, in the Court of the Subordinate Judge of 24-Perganahs, 1st Court, by a company called the Chitpore Golabari Companv. Ltd., of which the Managing Agents are Messrs. Andrew Yule and Co., against three persons named Srimati Alladi Dasi, Sarat Chunder Mondal and Sasi Bhusan Mondal for specific performance of an agreement for sale of certain lands for Rs. 10,000 alleged to have been executed by Srimati Alladi Dasi on the 18th May 1919, on receipt of a sum of Rs. 1,201 by way of earnest. The suit was not contested by Srimati Alladi Dasi but the other two Defendants, who were the reversionary heirs, defended the suit on the ground that the agreement in question had not been executed by Srimati Alladi Dasi. The suit came on for hearing on the 26th July 1921, when the Opposite Parties Ramsasi Roy and Kiran Chunder Ghose gave evidence in the cause to the effect that the agreement in question was executed on the 18th May 1919, and that the sum of Rs. 1,201 was paid in Currency Notes which, amongst others, consisted in particular of two Notes bearing Nos. as follows :—

$\frac{VB}{ST}$ 14820 for Rs. 500.
 $\frac{VB}{ST}$ 68788 for Rs. 500.

It transpired however from the evidence of a witness from the Currency Office, who was subsequently examined, that the Currency Note for Rs. 500 which bore the No. $\frac{VB}{ST}$ 68788 was not in existence on the date of the said agreement and was in fact issued from the Currency Office more than two months after the said date. The suit itself was withdrawn on the 28th July 1921, on the ground that it had been prematurely instituted inasmuch as the period within which the agreement was to be performed had not expired on the date of the institution of the suit. The Petitioners thereafter applied before the learned Subordinate Judge for sanction to prosecute a number of people including the Opposite Parties under various sections of the Indian Penal Code on the allegation that the agreement in question was a false and fabricated document and brought into existence long after the date it bore and that the Opposite Parties Ramsasi Roy and Kiran Chunder Ghose were guilty of perjury when they stated in the course of their evidence that the consideration mentioned in the agreement was paid in their presence. The learned Subordinate Judge for the reasons given by him in his judgment dated the 7th February 1922, was not satisfied that the agreement in question was a forgery. He thought that apparently a wrong number was noted against the Currency Note in question and that the wrong number had been evidently taken from a hundred rupee Note which had been given to Srimati Alladi Dasi at the time of the agreement. The matter was taken by the unsuccessful Petitioners to the District Judge under the provisions of sec. 195, cl. 6, Cr. P. C., but the application to the

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District Judge did not succeed, he being of opinion that there was no reasonable ground for suspicion against the Opposite Parties on the materials placed before him.

On behalf of the Opposite Parties it has been contended that the present application to this Court is not maintainable either under the provisions of sec. 107 of the Government of India Act or under sec. 115 of the Code of Civil Procedure and further that having regard to the language used in sub-secs. 6 and 7 of sec. 195 of the Code of Criminal Procedure, only one application by way of appeal or revision against an order passed by a Court of first instance is contemplated in cases which are not covered by the provisions of sec. 439, Cr. P. C. and lastly in any event having regard to the facts of this case and having regard to the fact that two Courts have refused to grant sanction, this is not a fit and proper case for this Court to interfere.

In support of the first contention that sec. 107 of the Government of India Act does not apply to a case of this nature, our attention has been called by Mr. Sanyal to a number of cases decided in this Court and elsewhere. It is unnecessary to go through the cases. The principle, as we understand, is this that although this Court is vested with very wide powers of superintendence over the proceedings of Subordinate Courts, these powers are not to be exercised for the purpose of interfering with the order of a Subordinate Court merely on the ground of error in law or error in fact. In other words, the powers of superintendence are not applicable where the only question is whether the decision of the lower Court is against the weight of evidence. Now applying this principle to the facts of the present case, we cannot but come to the conclusion that sec. 107 of the Government of

India Act cannot be invoked in support of the present application for sanction to prosecute. Nor can we hold that this is a sustainable application under the provisions of sec. 115 of the Code of Civil Procedure. There has been no excess of jurisdiction nor failure to exercise jurisdiction; and on the facts it is difficult to say that this case can be brought within the last clause of sec. 115 [see in this connection *Re : Ram Prasad Malla* (1)].

There now remains the question whether having regard to the terms of sub-secs. 6 and 7 of sec. 195, Cr. P. C. one or more applications against an order passed by a Civil Court of first instance are contemplated in cases not covered by sec. 439, Cr. P. C. The decided cases on this point are not uniform and we think the solution of the question ought to be determined on a consideration of the terms of the sub-sections. Now reading the words of sub-sec. 6, I doubt if the words "any sanction given or refused under the section" could have been intended to mean anything else but the sanction given or refused in the first instance. If that is so, then only one appeal or rather one application in revision would appear to have been contemplated by this sub-section. Then look at the words of sub-sec. 7. It provides that for the purposes of the section every Court shall be deemed subordinate *only* to the Court to which appeals from such Court ordinarily lie. I doubt very much if the legislature intended in cases not covered by sec. 439, Cr. P. C., to allow a succession of appeals or applications in revision. However that may be, we think this application must fail on the facts. In this case, two Courts have refused to grant a sanction, because they have held that there is no clear *prima facie* case against the Opposite Parties. This is in

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accordance with the principle that a sanction given under this section is not a mere formal matter and that before sanction can be granted it is necessary for the Court to see if there is a *prima facie* case against the Opposite Parties. Further the Court will be astute to see that no abuse of the administration of Criminal Justice takes place. We think there is much to be said in favour of the view taken by the District Judge that a mistake was probably committed by the Opposite Party Ramsasi Roy in setting out the numbers of the Currency Notes. At any rate on the entire facts of this case, we are not prepared to differ from the view taken by the two Courts below.

The rule therefore fails and must be discharged.

CUMING, J.—The facts are these.

The Petitioners sought for sanction to prosecute the Opposite Party for using as genuine a certain *bainapatra* which they allege is a forgery and has been fraudulently antedated.

The learned Subordinate Judge for reasons which at present it is not necessary to specify refused the sanction. The District Judge was then moved and he also refused the sanction. The Petitioners have moved this Court and obtained this rule. The first point that has been argued is whether this Court has any power to interfere and if so under what provision of the law. The Petitioners contend that under sub-sec. (6) of sec. 195 the Subordinate Judge is a Court subordinate to the High Court and so is the District Judge. The Subordinate Judge having refused sanction, application for sanction could be made to the District Judge and he having refused sanction, application could then be made to the High Court. Sub-sec. (6) provides : "any sanction given or refused under this section may be revoked or granted by any

authority to which the authority giving or refusing it is subordinate." Sub-sec. (7) provides : "for the purpose of this section, every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say, (a) where such appeals lie to one or more Courts the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate."

Reading the plain words of the section it is quite clear that for the purposes of sec. 195 the Court of the Subordinate Judge is subordinate only to the District Judge. The use of the word "only" would seem to make this clear. The decisions on the point in this Court are somewhat conflicting.

In favour of the view which the Petitioner desires us to take there are the cases of *Habibar Rahman v. Khoda Bux* (2) and *Girija Sankar Roy v. Benode Sheik* (3). These authorities favour the view that this Court could deal with the matter under sec. 195, sub-sec. (6).

The contrary view has been taken in the case of *Hamijudi Mondal v. Damodar Ghose* (4). This ruling was followed in the case in *Re : Ram Prasad Malla* (1).

In the case of *Hamijudi Mondal v. Damodar Ghose* (4), it was held that the High Court was not an appellate authority within the meaning of sub-sec. (7). In that case the District Judge had revoked the sanction granted by the Munsif.

It is perhaps difficult to distinguish this case from the two cases of *Habibar Rahman v. Khoda Bux* (2) and *Girija Sankar Roy v. Benode Sheik* (3), though one learned Judge was a party to all three rulings.

(1) I. L. R. 37 Cal. 18 (1909).

(2) 11 C. W. N. 125; S. C. 5 C. L. J. 219 (1906).

(3) 5 C. L. J. 222 (1906).

(4) 10 C. W. N. 1026 (1906).

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In the case of *Re : Ram Prasad Malla* (1), the learned Judge followed the ruling reported in *Hamiyuddi Mondal v. Damodar Ghose* (4). Reading the plain words of the section it would seem quite clear that in the present case the Court has no jurisdiction to interfere under sec. 195 (6) and (7) and I have no hesitation in following the rulings in *Hamiyuddi Mondal v. Damodar Ghose* (4) and *Re : Ram Prasad Malla* (1).

The point then remains, is there any provision of law under which this Court can deal with the present case? In the case of *Re : Ram Prasad Malla* (1) this Court held that the matter could be dealt with under sec. 115, Civil Procedure Code. In the case of *Emperor v. Har Prasad Das* (5) the Full Court held that the Court could interfere under sec. 115 of the Civil Procedure Code or under sec. 15 of the Charter. That was a case under sec. 476 of the Criminal Procedure Code.

Speaking for myself and with great respect to the learned Judges who have held otherwise I should have great difficulty in holding that an application for sanction to prosecute could be the subject of revision under sec. 115, Civil Procedure Code.

Sec. 115 of the Civil Procedure Code obviously refers to civil matters and civil matters only. It is found in the Code of Civil Procedure and can have no application to criminal matters.

An application for sanction to prosecute is made under sec. 195 of the Criminal Procedure Code. The fact that it is made to a Civil Court seems to me immaterial. It is granted under a section of the Criminal Procedure Code and I must admit I find some difficulty in understanding how a section of the Civil Procedure Code could

be invoked to deal with a sanction granted under a section of the Criminal Procedure Code.

It has further been suggested that the Court has power under sec. 107 of the Government of India Act.

Here again speaking for myself and again with great respect I have considerable difficulty in seeing how it can come within the purview of this section. Assuming however that the matter could be dealt with either under sec. 115, C. P. C., or sec. 107, Government of India Act, we could not interfere with the findings of the lower Court. The two Courts have held after considering the evidence that the evidence would not justify granting sanction to prosecute. In doing so they may or may not have come to a wrong finding of fact but it is obviously not a case which would fall within sec. 115. It is not a question of exercise or non-exercise of jurisdiction nor is it a material irregularity or illegality.

Nor would it fall under sec. 107, Government of India Act. That power is exercised only in exceptional cases and this is clearly not an exceptional case. Here two Courts have held that on a review of the evidence they will not grant sanction. I therefore agree in discharging the rule.

S. C. M. *

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2387 of 1919.

MOOKERJEE, J.
BUCKLAND, J.
1921,
7, June.

ROMES CHANDRA DAS,
Plaintiff, Appellant,
v.
MONINDRA LAL DAS and
ors., Defendants,
Respondents.

Civil Procedure Code (Act V of 1908), Or. 41, r. 10, rejection of an appeal for failure to furnish security for costs—Sec. 104 and Or. 43, r. 1, such

(1) I. L. R. 37 Cal. 13 (1909).

(4) 10 C. W. N. 1026 (1908).

(5) I. L. R. 40 Cal. 477 : s. c. 17 C. W. N. 647 (F. B.) (1913).

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order if appealable—Sec. 2 (2), such order of rejection if comes within the definition of "Decree."

In an appeal the lower Appellate Court called upon the Appellant to furnish security for costs under Or. 41, r. 10 of the Civil Procedure Code, and the order not having been complied with dismissed the appeal. Against this order an appeal was preferred to the High Court:

Held—That an order of rejection of an appeal under Or. 41, r. 10 is not appealable either as a decree or as an order. If it is treated as an order, it is not included in the list of appealable orders set out in Or. 43, r. 1, nor is it covered by the provisions of sec. 104.

That the order further did not fall within the definition of a "Decree" contained in sec. 2 (2), because the Court did not deal with the merits of the controversy between the parties.

LEKHA v. BHANNA (1), SECRETARY OF STATE FOR INDIA IN COUNCIL v. JILLO (2) and FIROZI BEGAM v. ABDUL LATIF KHAN (3) approved and followed.

This was an appeal from a decision of W. A. Seaton, Esq., District Judge, Chittagong, dated the 25th June, 1919, affirming that of Babu Kunja Behari Biswas, Additional Sub-Judge, Chittagong, dated the 15th June 1918.

The facts will appear from the judgment.

Babu Kanaidhone Dutt for the Appellant.

Babu Chandra Sekhur Sen for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This is an appeal by the Plaintiff in a suit for recovery of possession of land upon partition. The

Court of first instance dismissed the suit after trial on the merits. The Plaintiff then appealed to the District Judge. The lower Appellate Court called upon him to furnish security for the costs of the appeal and of the original suit under sub-r. (i) of r. 10 of Or. 41 of the Code of Civil Procedure. The Plaintiff did not comply with this order. Thereupon the Court proceeded to make the order contemplated by sub-r. (ii) of r. 10 which provides that where such security is not furnished, the Court shall reject the appeal. The order of the District Judge is not accurately expressed, because it states that the appeal is dismissed and not that the appeal is rejected. This inaccuracy in expression, however, does not alter the nature of the order. The Plaintiff has now appealed to this Court.

On behalf of the Respondents, a preliminary objection has been taken that the appeal is incompetent. This raises the question whether an order under Or. 41, r. 10, sub-r. (ii) is or is not appealable. If it is treated as an order, it is clearly not appealable because it is not included in the list of appealable orders set out in Or. 43, r. 1 nor is it covered by the provisions of sec. 104. Consequently, if an appeal is to be entertained, the Appellant must satisfy us that the order of rejection is, in essence, a decree. We are of opinion that the order does not fall within the definition of a decree contained in sec. 2 which provides that "Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." The order in this case does not determine the rights of the parties with regard to all or any of the matters in controversy in the suit, inasmuch as the Court rejected the appeal and

(1) I. L. R. 18 All. 101 (F. B.) (1895).

(2) I. L. R. 21 All. 123 (1898).

(3) I. L. R. 30 All. 143 (1905).

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did not deal with the merits of the controversy between the parties. This view was adopted by a Full Bench in the case of *Lekha v. Bhanna* (1), which was mentioned with approval in *Secretary of State for India in Council v. Jillo* (2) and *Firozi Begam v. Abdul Latif Khan* (3). We observe that in the case last mentioned, it was remarked that it would be well if the legislature would consider whether it would not be advisable to embody in the Code of Civil Procedure some provision analogous to that contained in the second paragraph of sec. 381 of the Code of 1882 and thus to give a right of appeal from orders passed under sec. 541 of that Code. The legislature, however, does not appear to have taken notice of the suggestion. It may be pointed out further that sec. 2 includes in the term "Decree" an order of rejection of a plaint but not an order of rejection of an appeal. It is also worthy of note that Or. 25, r. 2 which deals with the dismissal of a suit on failure to furnish security describes the order, not as that of rejection of a suit but as that of dismissal of a suit, and such order of dismissal is made expressly appealable under Or. 43, r. 1, cl. (u). We are consequently of opinion that an order of rejection of an appeal under Or. 41, r. 10 is not appealable, either as a decree or as an order. This appeal is plainly incompetent and is accordingly dismissed with costs.

The application, filed in Court to-day with a view to have the order set aside in the exercise of our revisional jurisdiction or of our power of superintendence, is refused.

BUCKLAND, J.—I agree.

J. N. R. Appeal dismissed.

(1) I. L. R. 18 All. 101 (F. B.) (1895).

(2) I. L. R. 21 All. 133 (1898).

(3) C. L. R. 30 All. 143 (1905).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER.

No. 157 of 1920.

MOOKERJEE, J.	}	RAJA JOTE COOMAR
PANTON, J.		MUKHERJEE, Plaintiff,
1921,		Appellant,
28, July.		"v.
		JADUNATH BOSE and
		anr., Defendants,
		Respondents.

Evidence Act (I of 1872), secs. 92 and 98, parole evidence to explain an unambiguous word in a lease, admissibility of—Civil Procedure Code (Act V of 1908), Or. 41, rr. 27 (1) (a), 28, 29, reversal of decrees for improper exclusion of evidence and remand of suit by Appellate Court, legality of.

The right of fishery in a tank was let out for a term of 9 years by a lease which specified the period to be 1316 to 1324 San. The lessor having instituted a suit for ejectment on the ground of expiry of the period of the lease, the Defendant stated that the year in respect of jalkars begins from the commencement of the rains, i.e., from Ashar, and the term of yearly settlement subsists till then, so that the term of the aforesaid settlement did not expire before Ashar 1325. The Court of first instance held that the expression used in the contract was unambiguous and that oral evidence was not admissible to show that the expression San meant not the Bengali year which ends on the last day of Chaitra, but another period which ends in Ashar:

Held—That it is well-settled that various words in written documents which *primâ facie* present no ambiguity may be interpreted by extrinsic evidence of usage, and their peculiar meaning, when found in connection with the subject-matter of the transaction, fixed by parole testimony.

Therefore evidence was admissible to show that the term San did not signify the Bengali year, but a different period specially applicable to jalkar tenancies.

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-GRANT v. MADDOX (1), RE : ANON (2) and R. v. NEWSTEAD (3) and other cases referred to.

Held further—That the circumstance that evidence had been improperly excluded by the trial Court did not justify a reversal of the decree and a remand of the suit. Under the provisions of Or. 41, rr. 27, 28 and 29, it was open to the Appellate Court either to take the evidence itself or to direct the primary Court to take the evidence and to send it to the Appellate Court for consideration.

This was an appeal against the order of Babu Lal Behari Chatterjee, Subordinate Judge, 2nd Court of Zillah Hooghly, dated the 10th of March 1920, reversing the order of Moulvi Abdul Khaleque, Munsif, 2nd Court at that place, dated the 30th April 1919 and remanding the suit to his Court for fresh trial.

The facts will appear from the judgment.

Babu Rupendra Kumar Mitra for the Appellant.

No one appeared for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal from an order of remand made by the lower Appellate Court in a suit for ejectment and mesne profits. The subject-matter of the litigation is the right of fishery in a tank let out by the Plaintiff to the Defendants on an yearly rent of Rs. 18. The *kabuliyat* executed by the tenants stated that the tenancy would last for a term of 9 years from 1316 to 1324 (সন) (*San*). The Plaintiff instituted this suit on the allegation that the tenancy had terminated and yet the Defendants were in occupation. The Court of first instance decreed the

suit. Upon appeal the Subordinate Judge has reversed that decision on the ground that evidence legally admissible had been erroneously excluded by the trial Court. It appears that in the sixth paragraph of the written statement the Defendants alleged that the year in respect of *jalkars* begins from the commencement of the rains, that is, from the month of Ashar, that the term of yearly settlement subsists till then, that old fishes are caught till that time and there is right to catch and take the same; and that according to this practice, settlement of the disputed *jalkar* was taken in Sraban 1316, so that the term of the said settlement did not expire before Ashar 1325. The Court of first instance held that the expression used in the contract was unambiguous and that oral evidence was not admissible to show that the expression (সন) (*San*) meant, not the Bengali year which commences on the first day of Baisakh and ends on the last day of Chaitra, but another period which commences in Sraban and ends in Ashar. The Subordinate Judge has held that evidence was admissible to show that the term সন (*San*) has, by custom and usage, a special meaning in connection with tenancies of fisheries. In our opinion, the view taken by the Subordinate Judge on this point is correct, and is supported by sec. 98 of the Indian Evidence Act.

It is well-settled that various words in written documents which *prima facie* present no ambiguity may be interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connection with the subject-matter of the transaction, has been fixed, by parole testimony of the sense in which they were usually received, when employed in cases similar to that under investigation. As an illustration of this principle, reference may be made to the decision in the case

(1) 15 M. & W. 787; 71 R. R. 315 (1846).

(2) [1575] 3 Dyer. 345a, pl. 5.

(3) [1769] Burr. 699.

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of *Grant v. Maddox* (1). In that case, the Plaintiff by a written contract, agreed to perform at the Defendant's theatre and the Defendant agreed to engage her for three years and to pay her a salary of £5, £6 and £7 per week in those years respectively. It was ruled that parole evidence was admissible to show that according to the uniform usage of the theatrical profession, the Plaintiff was to be paid only during the theatrical season, that is, during the term that the theatre was open for performance in each of those years. It was argued that the word "year" was unambiguous, signifying the calendar year which commences on the first day of January and terminates on the last day of December, and that consequently the Defendant was bound to pay to the Plaintiff at the agreed rate for the 52 weeks included in the year between its commencement and its termination. This contention was overruled. Similar illustrations are afforded by the decisions in *Re : Anon* (2), *R. v. Newstead* (3), *R. v. Sayer* (4) and *Myer v. Sarl* (5). In

our opinion evidence was admissible in this case to show that the term (সন) (*San*) did not signify the Bengali year which commences on the first day of Baisakh and ends on the last day of Chaitra but a different period specially applicable to *jalkar* tenancies as stated in the written statement.

But although the view taken by the Subordinate Judge upon the question of admissibility of evidence is correct, we are of opinion that the order of remand made by him cannot be supported. The circumstance that evidence has been improperly excluded by the trial Court does not justify a reversal of the decree made by that Court. The Code of Civil Procedure provides the method to be followed in a case of this description, Or. 41, rr. 27 (1) (a), 28, 29; it is open to the Judge either to take the evidence himself or to direct the primary Court to take the evidence and to send it to the Appellate Court for consideration.

The result is that this appeal is allowed, the order of the Subordinate Judge set aside and the case remitted to him to be dealt with in accordance with law.* As the appeal has not been opposed, there will be no order for costs in this Court.

J. N. R.

Appeal allowed.

(1) 15 M. & W. 727; 71 R. R. 815 (1846).

(2) [1875] 3 Dyer. 345a, pl. 5.

(3) [1789] Burr. 688.

(4) 10 B. & C. 498 (1830).

(5) 3 M. & M. 308; 122 R. R. 710 (1860).

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REPORTS (See Index.)

The Long Vacation in the East and West.

The Calcutta High Court re-opened after the Long Vacation on Friday last. The legal new year in Bengal practically synchronises with the legal new year in England. Both in these Eastern and Western seats of culture, the autumn has from the distant past been observed as a general time of recess. While the autumn, in the East, which follows the monsoons, is associated with a clear azure sky pouring down a deluge of bright sunshine and plentiful fields rejuvenated with fresh green life, the autumn in the West shrouds the departing days of the summer in sombre hues and ushers in a dark, dull and dreary winter, mercilessly robbing nature of all her charms of foliage yet not without its tribute of bounty to mankind. In England the autumn, following as it does the charming days of the summer, is the time for reaping. It is for such reason, in the old days, that the seats of learning, be it the Universities or the Law Courts, all used to close their portals for furnishing facilities for harvesting. Times have now changed and men and their occupations also. Lawyers in England have of late been bitterly complaining about the length of the Long Vacation, as during these ten weeks they are deprived of the opportunity of continually fleecing their fellow beings. We are not aware that the litigant public have much to complain. Most of them know that they will reap as they have sown and the Long Vacation does as a matter of fact afford them a temporary relief. We have little sympathy with those who are keen on getting their pound of flesh with as much expedition as possible. Except in cases of fraud or bad faith human

sympathy is always on the side of those whose misfortunes are exploited by their more fortunate brethren. If people would be reasonable and lawyers no less, many of the contentious cases for which they would often stake all that they have in the world, may be settled out of Court. The Autumn Vacation in Bengal is crowded with religious festivals peculiar to Bengal, and the most remarkable of these is the peace-celebration day of the *Dushera* (the *Bijoya*) when all are expected to forget and forgive all past wrongs and to embrace even one's enemy with good-will and amity. It is therefore very appropriate that the Law-Courts in Bengal should re-open after this unique ceremony for the chastening of the human soul. Thus it is in a spirit of love and charity that we meet again to-day and such spirit is the key-note to the doing of justice in all affairs of men.

The re-opening of the Calcutta High Court.

The reopening of the High Court is not marked by anything similar to the Lord Mayor's show in London. The Bench and Bar resume business after a ceremonial exchange of civilities. We have enough of pageants during the celebration of *pujas* in these provinces. The *dewali* marks the advent of a new year and the feast of light with which the dark night preceding the new moon is made resplendent is meant to dispel the dark forces of nature. It is an agreeable coincidence that the Court commenced business this year by the solemn observance of silence for two minutes in commemoration of the day of armistice on which the most devastating war that the world has ever seen came to a close. Has the world been in peace since? War still continues in the near East. The embers of civil war are smouldering still within an integral part of the United Kingdom. The pan-Islamic fire is still adding fuel to Indian unrest. The ideal of world-peace will never be accomplished till peace is restored

in the Near and the Far East. It will tax the resources of the best brains of the world to lay the spirit of universal unrest that is now threatening to throw society out of gear. But we are great believers in the good sense of the East and if these temporary ebullitions of the human mind are treated with tact, judgment and sympathy, society will eventually settle down to its normal activities. On the judiciary rests a grave responsibility at the present moment. It is for them to maintain law and order but they must always be prepared to make allowances for the abnormal conditions of the present time and temper justice with mercy.

Mr. Justice Bepin Behari Ghosh.

We offer our congratulations to Mr. Justice Bepin Behari Ghosh on his elevation to the Bench. He was a prominent member of the Vakil Bar and is well known for his legal attainments and scholarly habit. We wish him success in the discharge of the onerous duties of his office.

The departed.

On the re-opening of the Courts, we are greatly grieved to miss from amongst us two familiar figures at the Bar, Mr. P. K. Ray Chaudhuri who died just before the Commencement of the Long Vacation and Mr. J. N. Roy who passed away during the close holidays. Both made themselves very popular by the amiability of their character and their self-sacrificing zeal in every public cause. Mr. P. K. Ray Chaudhuri joined the Calcutta Bar exactly twenty two years before his death. He began his career as a promising junior and his devotion to his duties met with much appreciation from the leaders with whom he worked. He was also for sometime on the staff of this journal and many of the cases reported by him in these columns testify to the thoroughness with which he used to do his work. But he was one of those who gradually cut himself adrift from the profession and devoted a great deal of his time in serving the public. He was for some years the Honorary Secretary to the Bar Library. The industrial development and the political advancement of the country engaged a good deal of his time since the days of the Bengal Partition. Latterly he identified himself with the labour movement and helped in the organisation of the Press and Taxi Cab Unions. Although he warmly advocated legitimate labour grievances

he was averse to promoting strikes and always threw the weight of his influence in bringing about a reasonable compromise. His premature death is a great loss to the Bar and the public.

The death of J. N. Roy was equally unexpected. He was senior to Mr. Ray Chaudhuri by only a year, having been called to the Bar of England in June 1898 and enrolled in the High Court of Calcutta in December of the same year. He was a man of brilliant parts. His studies with a view to enter the Indian Civil Service greatly stimulated his intellectual faculties. He possessed literary talent, strong imagination and deep and generous emotions. He made his mark at the Bar quite at an early part of his career. To men of his temperament the practice of criminal law offers a peculiar fascination. His brilliant parts enabled him to get up a large criminal practice. But a man of his generous impulses can never make money-making at the Bar the sole aim and end of his life. He always took an active interest in Indian politics. During the Partition and the consequent unrest and repression in Bengal, he took a prominent part in the defence of political prisoners, mostly as a labour of love, and conducted the cases with an amount of zeal and earnestness which love of gain can seldom inspire. He was one of the first to offer his services for the defence of the political prisoners during the administration of the martial law in the Punjab. It has been the proud privilege of the English Bar to protect the rights and liberties of the subject and in this respect he was always staunch in maintaining the best traditions of the Bar to which he belonged. He had very pronounced sympathy with all democratic movements of the present age and latterly made the cause of the Bengal peasantry his own. It was hard work in connection with the now notorious Munition case, that undermined his health, which was never strong. The Bar has been a grave to many a men of literary promise and but for his choice of the legal profession he would have, like his talented cousin, the late poet Rajani Sen, been also a worshipper of the muse. He was in the prime of life and his untimely and unexpected death, which took place on the 11th October last, has been a great shock to his numerous friends and a very serious loss to the Bar and the country.

LONDON LETTER.

The list of business for the Michaelmas Sittings of the Judicial Committee of the Privy Council contains 47 Appeals. The Sittings commenced on the 18th October and Prize Appeals and Appeals from Crown Colonies were the first to be heard.

Indian Appeals are to be taken next, but at the time of writing it has not been decided whether one or two Courts shall sit simultaneously to hear them.

The inconveniences to Counsel of two Courts are obvious, and it is somewhat of a hardship on the litigant if, in the final Court of Appeal, the Counsel whom he has retained is unable to give his whole attention to a case.

The argument *contra* is that—the litigant benefits by having his case heard with greater despatch.

There are 26 Indian cases in the list, the majority coming from Madras, 6 from Bengal and 5 from Patna.

Sir Lawrence Jenkins will once more take his place on the Board during this term.

In the Kings Bench Division, Rowlatt, J., has delivered judgment in *Reader v. S. E. and C. Ry.* and *L. and N. W. Ry.* and in a number of similar cases brought against Railway Companies for the value of goods sold by the Companies during the Railway Strike of 1919.

When the Strike broke out the goods were in transit and it became impossible to forward them or to communicate with the senders. The goods consisted of apples and margarine and were thereupon sold by the Food Controller as being perishable, with the concurrence of the Railway Companies.

The actions were brought by the consignors who contended that the goods were not perishable, and that the Railway Companies had not proved that the Food Controller had authority to take and sell the goods.

In the case of the apples they had been booked through from Kent to the North of England over the S. E. and C. Ry. and L. and N. W. Ry. Companies' lines, one consignment was still in the custody of the S. E. and C. Ry. at the time of the Strike, the other had gone into the custody of the L. and N. W. Ry. Judgment was given for the Railway Companies. It was held by his Lordship that "in a commercial sense" the goods were "perishable" although in particular circumstances they might have lasted for weeks or even months.

In respect of the consignment of apples sold

from the custody of the L. and N. W. Ry., the S. E. and C. Ry., the other Company was not liable owing to a condition on the back of the consignment note confining their liability to the limits of their own system.

The S. E. and C. Ry. were held to be not liable on the other consignment on the ground that the consignor had sufficient notice of and was bound by the Company's general conditions which were displayed in the Company's stations and to which reference was made on the back of the consignment note. The Food Controller was held to have taken the goods under his statutory powers and not as agent of the Railway Companies and the charge made by him for his services was disallowed.

The learned Judge in particular draws a distinction between the amount of notice required by a consignor carrying on a settled business with the Railway Co. and a mere passenger or depositor of luggage in a cloak room.

G. D. M.

THE HINDU LAW OF REVERSIONS AND REVERSIONERS.

(Continued from 25 C. W. N., p. clxxxiv.)

Priyambada's case, just cited, illustrates two things :

Firstly, that a "life estate" can, of course, be created *independently of (the Hindu law of) Inheritance*, that is to say, *by act of the parties*, as in the case of *Meda v. Mitta*, where a member of an undivided Hindu family granted to his deceased brother's widow the share her husband would have been entitled to on partition.

Secondly, that this is the usual type of reversion under the English law, which is, of course, always a *vested* one, that is to say, it remains *vested* in the grantor, subject to the particular estate granted—the grantor, (or his heir), in virtue of his present estate, *is ready at any moment to receive possession* of the fee simple back, so soon as the particular estate, or, if there be more than one, all the particular estates shall fail or determine. In other words, the right of ownership, subject to the particular estate granted, whether for life or for years, or even in tail, remains *vested* in the grantor, which is, accordingly, descendible to, and transferable by, his heirs.

This *distinguishes* a reversion under Hindu law, which, unlike the English one, is always *future, uncertain, and contingent on survivor-*

ship to the widow, or other limited owner in possession, in the line of succession and non-interposition of any nearer heirs (but the possibility of the contingency ceasing by such limited owner forfeiting, or voluntarily giving up or surrendering the estate *inter vivos* is another matter), such only of the surviving reversionary heirs taking the estate after her as would have been the heirs of the last male owner had the latter lived up to and died at the moment her death. Therefore the reversioners of a Hindu 'widow'—a convenient term descriptive of all like limited owners, that is, all female takers with qualified estates of inheritance—have not, during the life of the 'widow,' it is so stated in *Mustt. Bhagbutte Thakur v. Chowdry Bholanath Thakur* (1), "a vested remainder" according to the language of English law, "but merely a contingent one."

Such contingent reversioners cannot be better described than in the language of their Lordships of the Privy Council in *Bahadur Singh v. Mohan Singh* (2), viz., "expectant heirs with a *spes successionis*," (i.e., a naked chance, or bare possibility of succeeding).

"None of these reversioners, strictly speaking," it was accordingly observed by a Madras Full Bench—*vide* the case of *Chiruvolu Punnamma v. Chiruvolu Perrazu* (3)—"can be said individually to possess any certain or tangible interest in the reversion, for the person who will get it is only he (i) who shall actually survive the qualified proprietor and (ii) who shall occupy at her death the position of heir to the last full owner, and who that will be, it is, of course, impossible before hand to say." In short, these would-be claimants under the Hindu law to a future, contingent reversionary estate, are quite unlike the owners of reversions as known to the system of law from which the term has been borrowed, for the obvious reason that, while the right of such owners is *indefeasible*, that of these so-called reversioners of a Hindu widow is *defeasible* either by their death in the life-time of the qualified owner, or by the adoption of a child, or by the birth of a nearer heir than themselves in the line of succession. What interest these contingent reversioners possess in the reversion merely amounts to what the Privy Council has termed a *spes successionis* or bare

possibility of succeeding. This from the very nature of the case is so with reference to every such reversioner irrespective of the proximity or remoteness of his relationship to the last male owner.

What is then the true character of the position of a reversioner under Hindu law? The answer is: "His interest involves nothing of a present proprietary nature. His right (e.g., to safe-guard the reversion by challenging acts of alienation and spoliation by a qualified owner), no doubt, is a consequence of the doctrine of reverter incident to the qualified estate of females taking as heirs of a deceased Hindu" male owner (1).

In other words, according to the language of the English law, the "widow"—the type, in general, of all limited owners (2) as the "husband" is, of all full owners—"holds an estate of inheritance to herself and the heirs of her husband. Until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs of her husband. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death;" (3) for it is always to the heirs of the last full owner that inheritance is traced by Hindu law. For instance, in cases, as pointed out by Mookerjee, J., in *Abinash Chandra Mazumdar v. Harinath Shaha* (4),—where "upon the death of a full owner, the estate successively passes through the hands of a series of female heirs, who take only a qualified estate before the property vests in another full owner, they may rightly be regarded in the aggregate as the holder of a limited interest which intervenes between the full ownership of the original," (i.e., the immediate prior male owner), and the ultimate "absolute" "taker;" and the estate would, on the death of the last of these female takers, devolve on those who would have been the heirs of the last full owner if he had lived up to and died at the moment of her death.

N. MUKERJEE, M.A., B.L.,
Barrister-at-law.

(To be continued.)

(1) *Chiruvolu v. Chiruvolu*, I. L. R. 29 Mad. [1936] 391 (401), F. B.

(2) *Nobin Chunder Chuckerbutty v. Iswar Chunder Chuckerbutty*, 9 W. R. [1868] 505 (509). "I have spoken of a widow in many parts of this judgment, but the remarks which I have made apply equally to other female heirs, such as mothers, daughters and the like."—*Per* Peacock, C. J.

(3) I. L. R. 4 Cal. [1878] 744, P. C.

(4) I. L. R. 32 Cal. [1904] 62 (66).

(1) I. L. R. 2 I. A. [1876] 256 (261).

(2) I. L. R. 29 I. A. at p. 9—I. L. R. 24 All. [1901] 94 (107) P. C.; See also *Janaki Ammal v. Narayan Sami Aiyar*, 14 All. L. J. [1916] 997 (1002) P. C.

(3) I. L. R. 29 Mad. [1906] 391 (401) F. B.

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Separation of Judicial and Executive functions.

We understand that a Committee appointed by the Bengal Legislative Council is now sitting for framing a scheme for the separation of the executive from the judicial functions in this Presidency. The Committee is presided over by Mr. Justice Greaves who is noted for his progressive and liberal views. The principle of the separation has been repeatedly recognised by the Government of India and was recently affirmed by the Bengal Council and the Indian Legislature. The Reform has so far been postponed on the ground that such separation would make administration more costly. In reviewing Mr. R. C. Dutt's proposal we showed some years ago that the separation may be brought about in a manner which need not add to the cost of administration at all (4 C. W. N. clxxii (182)). Having regard to the present conditions of the Provincial Finance, the Committee in putting forward any scheme must take care to cut their coat according to their cloth. Accepting an amendment proposed by the member for the Rajshahye and Chittagang Division to a resolution relating to such separation, moved at the last Sessions of the Legislative Assembly, Sir William Vincent said that the Government of India would be glad to undertake any legislation that may be required to give effect to the provincial recommendations in this behalf but the Central Government

was not in a position to give any financial assistance to any provincial Government for carrying on any scheme for such separation. The Bengal Government will have to make provision for a deficit of nearly a crore and a half at their forthcoming budget. So to put forward any scheme that would make administration more costly would be to postpone the reform indefinitely. We may mention that a similar resolution was adopted by the Madras Legislative Council some months ago and we have been told that it had to be turned down from financial considerations. We hope that Bengal will be able to lead the way in this matter and show to the rest of India that the reforms may be carried out without any fresh financial burden.

We shall offer a few suggestions as to how the reforms may be carried out without adding to the cost of the administration. We shall in the first place relieve the District Magistrates in Bengal of all judicial functions. At present they do very little of judicial work. Only occasionally they hear a few criminal appeals from Subordinate Magistrates. Formerly they used to hold Courts, entertain complaints and distribute work amongst the Subordinate Magistrates. But they have long discontinued doing such work in Bengal. They now occupy themselves chiefly with administrative and revenue work. Now that the local bodies have been made independent of the Magistrate, he has also been relieved of a great deal of administrative work in their connection. As Collector of the district he has to do a certain amount of revenue work. The Magistrate in Bengal cannot also properly speaking be said to be the head of the Police in his own district. The Police are no doubt under his orders but he cannot exercise any disciplinary powers over them. We would make him the head of the District Police in every sense and confer on him the powers of a Commissioner of Police

in Calcutta. But he should have nothing to do with the trial of cases. If the Magistrate is made the head of the Police, we do not see the necessity of continuing the present office of the District Superintendents of Police. It is well known that these offices are more or less sinecure and the real work is done by the inspectors and sub-inspectors of Police. In other words the office of the District Magistrate and Superintendent of Police may be combined. For disciplinary and other administrative work in connection with the Police, he may be assisted by an officer of the rank of the Deputy Superintendent of Police who may be styled Deputy Commissioner of Police and the Magistrate the Commissioner.

Then we would further suggest that the office of the Divisional Commissioners should be abolished. With the expansion of the scope of local self-government and the transfer of local matters to the portfolios of ministers, there is no longer any necessity of retaining these highly paid officials. Their functions may be split up and distributed amongst the Collector of the District, the Board of Revenue, the members of the Executive Council and the Ministers. Whatever justification there might have been for the existence of the office of Divisional Commissioners when Bengal, Behar, Orissa were under one administration and there were no ministers and members of the Executive Council, there can be no excuse for their continuance at present. If the office of the Divisional Commissioners are dispensed with, then the present nomenclature of the District Magistrates may be changed into District Commissioners and their assistants may be called Deputy Commissioners. The designation of Magistrates should be limited to officers presiding over criminal Courts. This will require some legislative changes both in the nomenclature and the powers and functions of such officers. But that would not present any difficulty. It will result in very substantial saving in the cost of Provincial administration and having regard to the financial difficulties of the provinces, the pruning knife should be used without any hesitation for lopping off all surpluses.

As regards the administration of law and justice in the provinces, we would entrust the work entirely to the members of the Provincial Services. We would do away

with the distinction between the provincial, judicial and executive services and place the members exercising judicial functions on an equal footing in every respect. They may be required to do civil and criminal work alternately at different periods of their service. In the Districts the Courts may be called Civil Courts and Magisterial Courts and officers presiding over them, Civil Judges and Magistrates and ranked first, second and so on in accordance with the Courts over which they preside. The District and Sessions Judge should be the head of the District Judiciary. The Magistrates and Civil Judges should all be under the administrative supervision of the District Judge and under the superintendence and guidance of the High Court as the Provincial Judicial Service is at present. These are the broad outlines of our scheme and we believe that it is possible to give effect to it not only without throwing any additional burden on the province but by effecting a saving in the cost of administration. It might be said that our scheme would interfere with vested interests. But that is a matter of secondary consideration. Essential administrative reforms cannot be put off from such considerations. When the Government of India is unable to come to the help of Bengal it is the obvious right of the Provincial Government to reduce the cost of administration by any legitimate means available to it.

LONDON NOTES.

(FROM OUR OWN CORRESPONDENT.)

The Privy Council commenced the hearing of Indian Appeals on Monday last, the 24th instant.

The first case heard was *Bhaidas Shindas v. Bai Gulab & anr.*, an appeal from the High Court of Bombay regarding the construction of a will drawn in Guzrati. The case had already been before the Board on a preliminary question of procedure which their Lordships decided in favour of the Appellant on the 11th February 1921.

The will was made by one Nathoo Moolji who left a widow and two daughters. He appointed his widow "*waras*" and "*malik*" of his estate and directed that after her death she should give "whatever property may remain either by will or other writing" to the Testator's two daughters.

The main question for the decision of the Board was whether according to the terms of the will the widow took an absolute estate or

whether her estate was subject to a trust in favour of the daughters, so as to give the objects of the trust a vested estate in default of its exercise.

DeGruyther, K. C. (with him *Parikh*) argued in favour of the Trust.

Sir G. R. Lowndes, K. C. (with him *Raikes*), argued *contra* for the Respondent.

The judgment of the Board consisting of Lords Buckmaster, Atkinson, Carson and Sir John Edge was delivered on the 25th at the conclusion of the argument. Their Lordships dismissed the appeal and found in favour of the Respondent's contention. Reference was made to the following authorities.

Horwood v. West, 1 Siman and Stuart 387; 4 Ch. D. 96, *Parnall v. Parnall*, 35 I. A. 17; 34 I. A. 93 and 11 I. A. 89, Mayne, secs. 614 and 615.

The judgment was delivered orally and will be reported when the printed judgment is available.

The same Board strengthened by the addition of Sir L. Jenkins are hearing the case of *Nalam Pattabhirama Rao & ors. v. Mandarilli Narayanamoorthy & ors.*; in which the Respondent is claiming a share of the joint family property of the Appellants. The suit was dismissed by the first Court but this decision was reversed by the High Court. The Respondent is not represented before the Board and the question seems to be mainly one of fact.

A judgment which has caused considerable agitation in the press was delivered by the *House of Lords* yesterday in the case of *Sulters v. Briggs*. In effect their Lordships held that money paid by cheque in settlement of a betting or other gambling transaction could be reclaimed by the loser, his heirs, executors, or trustees. It is anticipated by a section of the press that the Courts will be inundated with suits by both backers and book-makers asking for the repayment of money paid by them in the settlement of bets. The agitation would appear to be ill-founded. Though the provisions of the gaming act are well-known, it is seldom that this defence is pleaded, owing to the recognition by public opinion that there is a strong moral obligation on a loser to discharge his gambling debts, and the real sanction is the fear of being posted as a defaulter. On the other hand, it is probable that a certain

amount of litigation will ensue owing to the efforts of trustees, in bankruptcy and otherwise, to recover on behalf of their estates moneys that have been paid away for bets.

G. D. M.

LONDON,
26-10-21.

THE HINDU LAW OF REVERSIONS AND REVERSIONERS.

(Continued from p. iii.)

Accordingly, as observed in *Rooder Chunder Chowdry v. Shonibhoo Chunder Chowdry*, (1) "property which had devolved on the widow by the death of her husband goes at her death to the heirs of her husband, and their right begins to accrue from the date of the death of the widow, and not from the date of the death of the husband."

In *Gobind Monee Dassce v. Sham Lall Bysack* (2) the right of succession of nephews (sister's sons), whether born before or after the death of their maternal uncle, was similarly held to accrue to them, *not on the death of the maternal uncle, but on the death of his widow*.

Any way, as pertinently put by Peacock, C. J., in *Nabin Chunder Chukrabarti v. Iswar Chunder Chukrabarti* (3), "it is a very anomalous position that a person should take as heir and that his right to take should be determined according to a state of facts, *not existing at the time of the death of the ancestor, but caused by events which may have occurred many years after his death*."

This points to an important distinction in the nature of a woman's estate under Hindu law. The distinctive feature of the estate is that at her death it does not go to her heirs as such, but *reverts* to the heirs of the last male owner. "Generally, if not always, the heirs of the female holder and the heirs of the last male owner are different;" but if ever any of her heirs takes the estate it is *not as heir of her*, but as heir of the immediate, prior male owner to whom she herself succeeded as heir. In other words, she *lacks full proprietorship* and *does not* (1) (except in Bombay if she is a daughter, sister, niece, or grand-niece), *become a fresh stock of descent* (2).

On the other hand, when a male owner of

(1) Sel. Rep. [1821] 106 (109)

(2) W. R. [1864] 153.

(3) 9 W. R. C. R. 505.

(4) Tagore Law Lectures, 1879, [1881, Ed.].

(5) Mayne's *Hindu Law and Usage*, 8th Ed., p. 697.

property dies, his heirs, and not the heirs of any previous holder of the property, succeed to it. In other words, every male owner is full proprietor and can become a fresh stock of descent. This distinction in the nature of a Hindu woman's estate is put more fully in *Abinash Chundar Mazumdar v. Harinath Shaha*, cited above, as follows: "Each of these recipients" (in this case there were several female holders in succession)—"of the limited interest has three common characteristics, namely, first, each possesses only a qualified right of alienation; secondly, not one of them can transmit the property to her own heirs as such, but it passes upon her death to the heir for the time being of the last full owner; and thirdly, none of them can," (apart from legal necessity), "alienate the estate absolutely, even with the consent of the next female reversionary heir, for where the next reversionary heir is herself a female who only takes a 'life-estate,' her consent will not bind the next reversioner who takes an absolute estate," for the simple reason that such consent cannot invest the alienation with "a character of greater validity than it would have possessed if it had been made by herself." The 'widow'—(using the expression generally for any limited female holder)—has a qualified power to dispose of her husband's estate—(using the expression 'husband,' again, for a fully capacitated owner)—"the limits of which," it was observed by a Bengal Full Bench in the leading case of *Casseenath Bysack v. Hursoondree Dassee* (1), "it is difficult, if not impossible, to define further than by saying that the propriety of any particular exercise of that power must depend upon circumstances under which it is made, and must be consistent with the general principles of the Hindu law regarding such dispositions."

N. MUKERJEE, M.A., B.L.

Bar-at-Law.

(To be continued.)

Reviews.

BOOKS RECEIVED.

Willis's Contract of Sale, 2nd edn.

Cockle's Leading Cases in Common Law.

Kelly's Famous Advocates & Their Speeches.

(1) South. F. B. Rulings.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before NEWBOULD, J. CIV. RULE No. 297 of 1921. MAINADDIN BEPARI and ors., Defendants, Petitioners v. SM. RADHARANI DASSYA, Plaintiff, Opposite Party. The 18th November 1921.

Suit for money—Existing debt whether consideration of a money bond.

In a suit on a bond for the repayment of money alleged to have been paid in cash, the Defendants pleaded that no consideration passed but the bond was executed for the satisfaction of a decree which had already been paid off. The Court below found that the bond was executed in settlement of the said decree and the money only changed hands to make the sureties liable:

Held—That there was no such variation between the pleadings and the findings as would justify the dismissal of the suit, having regard to the fact that it is customary in India when a bond is given in consideration of an existing debt to describe the consideration as ready money received. *Hukum Chand v. Hira Lal*, 3 Bom. 159, followed.

Babu Rajendra Chandra Guha for the Petitioners.

Dr. D. N. Mittler and Babu Satis Ch. Chaudhury for the Opposite Party.

S. C. C. Rule discharged with costs.

THE

[No. 3.

NOTES

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We are glad to note that before long the British Government is likely to come to as satisfactory an arrangement with the Angora and Turkish Governments as has been arrived at with Afghanistan. When we say satisfactory, we mean that the terms of the Sevres Treaty should be so modified as would restore not only friendly relationship between the British Government and the Mahomedan powers concerned but would restore confidence and goodwill towards the British Government in the minds of our Mahomedan fellow subjects. The present Indian unrest is very largely due to the chagrin of the followers of Islam at the disintegration of the Turkish Empire that followed the great European War. But Egypt is now on a fair way to regain her independence. There is also every prospect of the British Government arriving at a perfectly satisfactory settlement with regard to the Turkish treaty. In that event, we anticipate, that the present unrest amongst our Mahomedan fellow subjects will cease. They do not seem to be very keen about the *swaraj* movement in India. They are still too much engrossed in their own communal integrity to look with equanimity on any democratic form of Government which would level down all distinctions based on class, communal or sectarian basis. Before we can establish a thoroughly democratic form of government, we must inculcate the democratic spirit amongst the different sections of the community. So far as our Moslem brethren are concerned they are

We do not understand what advantage is to be gained by letting loose the forces of disorder amongst us. *Swaraj* or full self-government cannot, surely, be obtained by promoting ill-will or feelings of enmity between the different sections of the community in India. Any form of national Government must be based on national good-will. The Indian nationality does not comprise people of any particular religion, sect, creed or coterie but to be worthy of its name, it must comprise all and all of them must regard India as their common motherland and must be prepared to sink their differences for her common weal. Difference of views amongst different classes of people is bound to exist in a progressive community. The higher they are in the scale of civilization, they settle these differences by appeal to reason, and the lower they are, they resort to *argumentum ad hominem*. Even civilized people may at times be unreasonable and then force may have to be resorted to

for vindication of one's right and liberties. Even when nations fall out and decide to settle their differences by resort to force they weigh their relative strength very carefully beforehand, also the pros and cons of such methods of settlement and would not have recourse to force except when they have exhausted all other methods of amicable settlement. After the bitter lessons of the last war, all the great powers are busy devising means for the maintenance of peace without resort to arms.

We are sorry that the present national movement is drifting towards the rousing of passions and prejudices of the people against those who happen to differ from them as also against the constituted authority. Their attention has been diverted altogether from the reformed constitution. We never come across any criticism of its defects and short-comings as may have been disclosed in its practical working. Those who have studied the reformed constitution are well aware that it has conferred very large powers on the representatives of the people. They have furnished a platform for fighting the people's battle in a peaceful manner. If control can be secured over the reserved subject, it is bound to lead on to the attainment of *swaraj*. It is a law of nature that forces follow the path of least resistance. This is equally true of human actions. No sensible man will prefer a perilous path which is beset with pit-falls at every step to one attended with less risk. There are two paths by which *swaraj* may be attained. Either by steady progress along constitutional lines or by resort to revolutionary methods. The latter is the more risky, uncertain and leads on to a chaotic end. Every Government worthy of its name is for this reason alone, if for no other, bound to combat every revolutionary movement. It is a fundamental principle of constitutional law that all manifestations of physical force against the State must be repelled by force. We believe that the progress of India will be indefinitely postponed by calling into being forces of destruction. A nation can only be great by bringing into play its forces of construction. It is not by rousing blind passions and prejudices but by appealing to the eternal moral laws and by patient industry, hard work, devotion, and knowledge that we can work out our salvation.

The Anglo-Afghan treaty.

It is gratifying to note that a satisfactory arrangement with Afghanistan has at last been

come to. It is real statesmanship and sound foreign policy to maintain friendly relations with a neighbouring State and the Government of India is to be congratulated on this diplomatic success which fittingly marks the administration of one who has acquired a world-wide fame by his diplomatic services during the Great War. Looking at it from the point of view of the Afghan Government the record of its development is unique. The installation of Amir Abdur Rahman by the British is not a matter of ancient history and it was only in the reign of the late King Edward VII that the Amir of Afghanistan was recognised as a King and was designated His Majesty. After the Dane Mission the ruler of Afghanistan gained in status and His Afghan Majesty has advanced his status to that of an international sovereign on the present occasion. The enemies of law and order perhaps built many a fond hope on the possible breakdown in the long protracted negotiations now brought to a successful termination, to the satisfaction of both parties primarily concerned. The menace to India by the contemplated establishment of Soviet consulates in important places on the border line has been swept away by the assurances given by the Afghan Government. In the treaty itself provision is made for establishment of British consulates in Kandahar and Jelalabad. It can fairly be expected that the renewal of the traditional friendship between the two countries will be conducive to the welfare of both. The agencies which tried to seduce Afghanistan away from the path it has so long followed in its dealings with the British Government must have now realised to their discomfiture that the shrewd Afghan people have intelligence enough to see through the game. By the treaty just now concluded the British Government agrees that a Minister from His Majesty the Amir of Afghanistan shall be received at the Royal Court of London, like the envoys of all other powers and permits the establishment of an Afghan Legation in London and the Government of Afghanistan likewise agrees to receive in Kabul a Minister from His Britannic Majesty, the Emperor of India and to permit the establishment of a British Legation at Kabul. This will now enable the Amir of Afghanistan to occupy the place he desires to hold among the rulers of the world.

The treaty further provides for the carrying on of trade between Afghanistan and India on a sound basis and as regards the frontier tribes

it is stipulated that the parties to the treaty will inform each other in future of any military operation of major importance which may appear necessary for the maintenance of peace and order before the commencement of such operations. The treaty is drafted throughout in a spirit of cordiality and solicitude for the welfare of both parties concerned. It is no doubt a tremendous blow to the revolutionary movement in Central Asia and with His Excellency the Viceroy at the helm of foreign affairs, we hope that it will mark an era of renewed and ever increasing friendship between Afghanistan and Great Britain to the mutual advantage of both.

LONDON NOTES.

(FROM OUR OWN CORRESPONDENT.)

The following cases have been heard by the Privy Council during the past week:—

From Madras.

NALAM PATTABHIRAMA RAO & ORS.

v.

MANDAVILLI NARAYANAMOORTHY.

C. A. V.

From Central Provinces.

PANDURANG KRISHNAJI

v.

MARKANDEYA TUKARAM & ORS.

Appeal allowed.

From Patna.

MUSAMMAT SASIMAN CHOWDHURAIN & ORS.

v.

SHIB NARAYAN CHOWDHURY.

C. A. V.

From Bengal.

K. S. BONNERJI

v.

SITANATH DAS & ANOR.

Appeal allowed.

The first case was noted last week. The case of *Pandurang Krishnaji v. Markandeya Tukaram & ors.*, was a claim to recover possession of land. The Plaintiff was the purchaser and his claim was resisted on the ground, that his Vendor had no title. The facts are briefly as follows:—

The members of a joint Hindu family had agreed that P. should be manager of certain family property on the terms contained in a registered deed. The deed provided that, if there were losses on the property, and if the

other co-sharers failed to pay on demand their proportion of the losses, they should be held under the deed to have lost their shares. Losses occurred and the co-sharers K. & V. failed to pay up and passed a letter to P. acknowledging their inability to pay. The letter was not registered—K. & V. later purported to sell their shares to the predecessor in title of the Plaintiff.

The District Judge dismissed the suit, but this judgment was reversed on appeal by the Judicial Commissioner. It was argued for the Appellant that P. obtained his title from the registered deed. For the Respondent the arguments taken in the lower Court were advanced, namely, (1) that P's title could only come from the letter, this was invalid as not being registered and (2) that P. having attested the sale deed of the Plaintiff's predecessor was estopped from denying the latter's title.

The judgment of the Board consisting of Lords Buckmaster & Carson, Sir J. Edge, & Sir Lawrence Jenkins, was delivered by Lord Buckmaster allowing the appeal. The Board pointed out that mere attestation of a deed did not imply any knowledge of its contents and could not raise an estoppel as suggested by the Court below.

The appeal from Patna, *Sasiram Chowdhurain v. Shib Narayan Chowdhury*, raises very much the same point over the construction of a will as was raised in the case of *Bhaidas Shirdas v. Bai Gulab & anr.*, which was decided by the Board last week. Their Lordships after hearing arguments have reserved judgment.

Judgment was delivered to-day (November 1st) in the case of *K. S. Bonnerji v. Sitanath Das & Anor.*

In this case property at Tallah was settled by Padmabati on herself and her eldest son Protap Chandra Ghoshia upon trust for certain religious purposes.

Bhupendra Shri Ghoshia, Protap's son purporting to act on behalf of his father executed a permanent lease in favour of the Respondents. Bhupen's authority to make the lease was called in question in the appeal and the Board in giving judgment for the Appellant, who was Receiver in charge of the property, held that Bhupen could not have had such authority, and that even if such authority had been proved it would have been a delegation by Protap of his fiduciary powers which was not permissible.

An application was made to the Board this morning in the case of :—

Soni Reddi v. The King-Emperor (Madras) for special leave to appeal against a conviction for murder. In refusing leave Lord Buckmaster said that Criminal appeals to the Board should not be brought on the ground that the evidence could bear a different construction to that placed upon it by the Courts below.

Special leave to appeal was granted by the Board in the case of *Ghulam Rasul Khan v. The Secretary of State for India in Council*.

The suit was for a declaration that the Plaintiff was a Rajput by caste and as such entitled to hold land. Leave had been refused by the Lahore Court on the ground that the suit was not of the value of Rs. 10,000. For the Applicant it was argued that this was a case in which it was impossible to define in money value the character of the dispute and reference was made to *Radhakrishna Ayyar v. Swaminatha Ayyar*, L. R. 48 Indian Appeals 31.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before NEWBOULD, J. CIVIL RULE NO. 310 OF 1921. DURGAGATI BANERJI, Defendant, Petitioner *v.* MAHARAJA-DHIRAJ SIBUJOY CHAND MAHA-TAP, Plaintiff, Opposite Party. The 18th November 1921.

Bengal Tenancy Act (VIII of 1885), s. 153—District Judge, if has jurisdiction to reverse decision of Munsif empowered under sec. 153, on a point of law—Jurisdiction.

The point for determination in this Rule was whether the District Judge had jurisdiction under sec. 153 of the Bengal Tenancy Act to reverse the decision of the Munsif empowered under that section on the ground that an error of law had been committed.

Held—That the District Judge had no such jurisdiction, and the decree of the learned District Judge was set aside and that of the Munsif restored.

Held, further—That the powers of revision under the proviso to sec. 153 of the Bengal

Tenancy Act are practically the same as those contained in sec. 115 of the Civil Procedure Code.

Raranunda Banerji v. Ananta, 9 C. W. N. 192, *Sheo Prasad Bangsidhur v. Chunder Haribuk*, I. L. R. 41 Cal. 323 referred to.

Dr. Jadunath Kanjilal with Babu Binodlal Mukerji for the Petitioner.

Babu Sarat Kumar Mitra for the Opposite Party.

H. C. S.

Rule made absolute.

CRIMINAL REVISIONAL JURISDICTION. Before NEWBOULD AND C. C. GHOSE, JJ. CRIM. REV. NO. 848 OF 1921. HAJARI SONAR, Accused, Petitioner *v.* THE KING-EMPEROR on the Complaint of RAM LAKHAN SONAR. The 8th November 1921.

Charge under sec. 379, Indian Penal Code failing, accused convicted under sec. 457—Amendment of charge if necessary.

The accused Petitioner was tried on a charge of breaking open the *khirki* door of the complainant to commit theft of property when he was caught, red-handed. The trying magistrate and the Appellate Court both held that the prosecution had failed to establish that theft was the object with which the accused entered into complainant's house. They both held that he came to complainant's house to carry on an intrigue with his wife and convicted him under sec. 456, I. P. C.

Held—That when a charge had been definitely framed in which theft was alleged the accused could not be convicted of house trespass with some other object without an amendment of the original charge unless the Court was satisfied that he had not been prejudiced in his defence by the omission to amend the charge 16 C. W. N. 606 and 41 Cal. 743 followed. There is no finding by the Courts below on this point.

Babu Narendra Kumar Bose for the Petitioner.

S. C. C.

Rule made absolute.

THE Calcutta Weekly Notes.

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[No. 4.]

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REPORTS (See Index.)

Sex disqualification for the Bar in India.

The application of *Miss Sudhangku Baia Hazra, B. L.*, in the Patna High Court for permission to practise as a lawyer was rejected by the Hon'ble Judges on the 28th of November last. Their Lordships in rejecting the application followed the reasoning and decision of the Calcutta High Court in a similar application by the late *Miss Regina Guha* reported in 21 C. W. N. 74.

Women and the Bar in England.

Since the sex disqualification for the legal profession has been removed in England, women in England have been distinguishing themselves at the Bar examinations. We note that seven ladies gained a first class at the recent Michaelmas examinations, one in the Final, one in Constitutional Law and Legal History and five in Criminal Law and Procedure. The examination results also show that not only in qualitative but also in quantitative test they have scored a fairer success than even men. Altogether 29 ladies succeeded at the various stages of the Bar examination: four in the Final, ten in Criminal Law and Procedure, six in Real Property and Conveyancing, five in Constitutional Law and Legal History and four in Roman Law.

Miss Ivy Williams who is the first woman who has taken first class honours at the Bar Final was also the first to obtain the B. A. degree at Oxford. Ladies were allowed to sit for and pass the University examinations at Oxford but it is only recently that the University has decided to confer degrees to women. At Cambridge they are not admitted to degrees. Oxford, though believed to be more conservative, keeps herself more abreast of the times. Miss Ivy Williams has also obtained the master's degree and the B. C. L. from there. Although this lady has passed her Bar final,

she does not get called to the Bar before April next as she has yet to keep four more terms of which two will be excused for having taken first class honours. In Ireland, the ladies have forestalled their English sisters. Three lady graduates of the Dublin University have already been admitted to the Irish Bar after passing the Bar examination. Miss Frances Christian Kyle of Belfast has carried off the John Brook Scholarship, which is the highest award in law, after beating all her male competitors.

In intellectual qualities, especially in their youth, women are in no way inferior to men and are perhaps quicker in acquiring knowledge than men. But in the race of life they are apt to lag behind. It is because they are differently constituted by nature and are hampered by encumbrances from which men are free. In America women have long enjoyed the privilege of practising at the Bar, but the Bar in America is certainly not crowded by women. We understand from our contemporary of the *English Law Journal* that Miss Ivy Williams who won such high distinction at the Michaelmas examinations has announced that she does not intend to practise at the Bar, but desires to fill the role of a law lecturer at one of the Universities. This would surely be a more congenial occupation for a lady lawyer. Of the rest we are sure many of them would much more prefer to enter into legal partnerships of a more congenial character, whether with lawyer or layman, than the profession of law can ever offer to a feminine soul.

LONDON NOTES.

(FROM OUR OWN CORRESPONDENT.)

The Judicial Committee have spent the past week in the consideration of the following cases—

Secretary of State v. Rajah of Vizianagram and Venkata Row v. Tuljaram Row & others.

Both were appeals from Madras—

The former (*Secretary of State v. Rajah of Vizianagram*) is a most important case, and the Board have reversed the judgment of the Court below. The facts are comparatively simple, and

relate to an alluvial formation which appeared in the River Godavari. A portion of the land formed in this manner was claimed by the Government, the Rajah refused to admit the claim, and Government thereupon imposed a penal assessment on the property and the Rajah brought his suit asking for a declaration of his title to the alluvial land. Both the Madras Courts had found in favour of the Plaintiff on the ground that the land in suit was an accretion to the Plaintiff's pre-existing lands.

For the Government it was argued *inter alia* that the formation of the land was not "gradual, slow, and imperceptible," so as to bring it under the English law of accretion, and that the lower Courts were not justified in adopting American principles as the basis of their decision.

The case of *Venkata Row v. Tuljaram Row & others*, raises a question of Hindu law relating to the rights of after-born sons of a Hindu governed by the Mitakshara law. Venkata Row, the grand-father of the present Appellant and his four sons formed a joint Hindu family. Venkata Row died in 1871 and his sons survived him. In 1881 there was a dissolution of the joint family, and a division of part of the joint estate leaving the bulk of it undivided and in the hands of Tuljaram Row who was the Manager of the family. In 1897 under a decree for partition of the family property Tuljaram was liable to his brother Rajaram Row and the son of the latter (*viz.* the Plaintiff-Appellant Venkata Row *alias* Ganesha Row) in a sum of Rs. 86,000 and cross-appeals were pending against that decree. Rajaram, who was the guardian *ad litem* of his son, entered, without the leave of the Court, into an arrangement of compromise in pursuance of which he entered up satisfaction of the said amount due from Tuljaram and the latter withdrew his appeal. The son Venkata when he came of age repudiated the compromise and instituted the present suit against his uncle Tuljaram joining Rajaram as a Defendant. He stated the relevant facts in his plaint and prayed for a decree for the said sum of Rs. 86,000 and interest.

In 1913 the Judicial Committee held that the said compromise was not binding on Venkata and remitted the suit to the Madras High Court for the disposal of other questions arising between the parties. That judgment is reported in L. R. 40 I. A. 132.

When the suit came on remand to the High

Court, two after-born sons of Rajaram, aged 6 and 3 years respectively, were added, represented by their father as guardian *ad litem*, and put forward their rights as co-parceners in the fund in dispute.

The judgment of the Board composed of LORDS BUCKMASTER, CARSON, SIR JOHN EDGE, SIR LAWRENCE JENKINS and MR. AMEER ALI was delivered by Lord Buckmaster at the conclusion of the arguments. They held that the compromise was not binding on any of the parties but had failed altogether, that Tuljaram could go on with his appeal, and the cross-appeals might be prosecuted. It had been argued for Tuljaram that although the Privy Council had held the compromise as not binding on the infant Venkata, yet that Rajaram had bound himself and the after-born children by it.

LONDON,
9-11-21.

G. D. M.

RIGHT TO PETITION.

The resolution moved in the Council of State by Sir M. B. Dadabhoy of the Central Provinces on the 15th September last to the effect "that this Council be authorised, if necessary, by statute to receive from the public, petitions on all matters relating to public wrong, grievance or disability or to any act or acts of public servants or to public policy, to investigate that complaint and make a report to this Council and that a Committee be constituted on public petitions with power to examine witnesses and record evidence," raises a question of considerable constitutional importance. In resisting it, Mr. Craik put the Government case fairly and squarely but stated that they were prepared to refer the question to a small committee of experts. Sir B. C. Mitter's opposition went upon historical grounds only, and not upon legal grounds nor upon grounds of practical politics though we had a right to know the views of perhaps the ablest lawyer in the Council on this supremely important question. Such being the case, it is necessary that the question should be considered in the light of constitutional law and procedure which it was the object of the resolution to establish.

Sir Maneckjee's resolution meant to introduce an almost effete and obsolete principle of English Constitutional law into Indian parliamentary procedure that is in the making. He, however, erred upon the vital point in that he moved for "this Council," namely, the Coun-

cil of State to be invested with the authority. If it is our intention to follow closely upon the heels of English constitutional principles the error appears to reside in the fact that the Council of State, which admittedly is no more than a revising Chamber, like the House of Lords, should be invested with an authority which legitimately belongs to the popular House, and which the Peer's Chamber at no period of its long history possessed even in a shadowy form, to the exclusion of the Lower Chamber. Sir Maneckjee's resolution suffered from this fundamental defect. But a still greater blunder appears to lie on the face of the resolution which purported to recognise the right to petition without recognising the right of assembly. These two are inseparable under the English law, the basic principles of which do not permit any abridgment of the right of the people peaceably to assemble and to petition the Government for a redress of grievances. Two rights are protected by this provision: the right of the people to assemble themselves together, and the right of petition.

When the term *the people* is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the Government through being clothed with popular elective franchise. Thus, the people elect delegates to a constitutional convention, and determine by their votes whether the completed work of the convention shall or shall not be adopted; the people choose the officers under the constitution and so on. For these and similar purposes the electors, though constituting but a small minority of the whole body of the community, nevertheless act for all, and as being for the time the representatives of sovereignty, they are considered and spoken of as the sovereign people. But in all the enumerations and guarantees of rights the whole people are intended, because the rights of all are equal, and are meant to be equally protected. In this case therefore, the right to assemble is preserved to all the people.

The right of assembly, however, always was, and still is, subject to reasonable regulation by law. Parliament has sometimes been compelled to interpose strict regulations, when a great and tumultuous body of people threatened to appear at its doors to present a demand for a change in the law.

The right of petition though inseparable from, is not co-extensive with the right to assemble; for in its nature it can have no place in merely social affairs, though it has a limited

range in religious and industrial organisations. Petition is for the redress or prevention of grievances, and is addressed to some person or body having, in respect of the matter in hand, superior authority. It is a generic term, however, and applies to all recommendations to office or public position or privilege, as well as to remonstrances against them, and to appeals of every sort, and for every purpose, made to the judgment, discretion, or favour of the person or body having authority in the premises.

A petition is, nevertheless, merely a privileged publication, and the right to be heard by means of it may be so abused as to take away the privilege. One must not resort to it for the purpose of visiting his malice upon others, through the publication of false charges; but when the occasion is proper for petition, good motives in presenting it will be presumed, and the fact that it contains false and injurious aspersions of character will not make out a right of action, but malice in the Petitioner must be established also. The petition must be for something within the authority of the person or body addressed to grant, or must in good faith be supposed to be; and when it is, it will be protected while circulating for signatures as well as after it has been presented. But if a false charge is merely put in the form of a petition, without the intent to present it, it is not within the privilege.

So much about the principle of the right of petition but the right of the Commons to receive petitions is as old as Edward II. "The Commons first of all demand to be informed of the petitions that flowed in from the most various sources" writes Professor Gneist. And again "as early as 3 Edward II. we meet with 'receivers of petitions' also in the Commons. After the manner of the *Magnum Concillum*, in 12 Edward III, there was also conceded them a share in the appointment of the reporters, although they have no right of decision and no participation in the resolutions of the Great Council. Their altered position became also gradually apparent in the phraseology of the time." For we see that under Richard II, the *humbles pauvres communes* were called the right wise, "right honourable, worthy and discreet Commons" and the Petitioners came to address their requests to "the Right Honourable the House of Commons" itself. But it is not really till the succeeding reign of Henry IV, that we have the custom of presenting petitions to the

Commons House direct, firmly established, even though they are directed sometimes to the King, sometimes to the King in Council, sometimes to the King, Lords and Commons, at times to the Lords and Commons but more often to the Commons alone with the request "to use their good offices with the King and Council." Prof. Gneist elsewhere, in discussing the right of the Commons to receive and entertain petitions direct, observes that "the answer to the complaints was generally made known at the close of the proceedings, that is, after the votes of money supplies." To those who are acquainted with British constitutional principles and practice, it is a conclusive evidence of the fact that the right to entertain petitions belongs exclusively to the Commons.

A. K. GHOSE,
Bar, Calcutta.

(To be continued.)

Review.

FAMOUS ADVOCATES AND THEIR SPEECHES.
By B. W. Kelly, Messrs. Sweet and Maxwell, Ltd. London.

The Bar in England has played no small part in building up the noble edifice of personal liberty and constitutional freedom which has been the model of the civilized world. The constitutional battles at which the Bar scored such singular victories all raged round the law Courts since the peaceful revolution of 1688. It was only in 1695 that persons accused of high treason were first allowed to be defended by counsel. Be it at treason or state trials, the attitude of even eminent counsel was then apologetic, necessarily to the prejudice of the accused. It was almost a century afterwards on the eve of the American war of Independence and the French Revolution that the struggle for constitutional liberty in England also began. During the reign of terror in France the Government in England through panic decided to prosecute some of the English sympathisers of the French Revolution. Many eminent persons known as "Friends of the People" were arrested. Charges of high treason were brought against Thomas Hardy, Horne Tooke and ten other persons. The Attorney-General, Sir John Scott (afterwards Lord Eldon) in an address for nine hours decried much that told most seriously against Thomas Hardy. Thomas Erskine, who has been rightly called the Demosthenes of the Eng-

lish Bar, defended the prisoners. "Himself of noble extraction—son of the tenth Earl of Buchan—his early years had been spent as an officer in the Navy and afterwards in the Army as a preliminary to assuming the forensic toga." His speech in defence of Hardy, as is the case with the most effective orators, combined the hard logic of facts with close reasoning and force and elegance of language seldom surpassed in the annals of advocacy. He convinced the Court and the jury that the opinions of the accused, however objectionable they might be regarded by the authorities, were all directed towards bringing about reforms in the constitution and not revolution. Hardy was acquitted amidst transports of tumultuous joy. His counsel became the idol of people. But Erskine was no demagogue. After this historic victory within the precincts of the law Courts, he felt that its glory would be gone if it was followed by any public disorder outside. He came out of Court and, in an impassioned address to the seething multitude who had besieged the Courts, reminded them that the laws of England were, after all, the best guardians of public liberty and that any outrage or unseemly demonstration on the occasion could only terminate in throwing discredit on a righteous cause. The appreciative crowd soon melted away and Old Bailey, where the trial had taken place, soon became deserted. This short account of the memorable trial we have culled from the pages of this very interesting and instructive little book. The biographical sketches of the stalwarts of the English Bar as also the extracts from their speeches given in this volume are very pleasant reading. Lord Thurlow, the Great Chancellor, of whom Fox said "no one ever was as wise as Thurlow looked," who used to browbeat the Lords and Bishops, was the most potent force in the council of George III. How eventually this Goliath of the Bar met his David in youthful Pitt, the "heaven born" Minister, is depicted in its true light both in the pictorial and biographical sketch given in this volume. How the passion for distributing patronage by the talented Lord Westbury amongst his own favourites contributed to his ultimate downfall is not without its morals even to-day. The remarkable career of Daniel O'Connell, the Tribune of the Irish people, both at the Bar and in public life, is very sympathetically reviewed. The book is of fascinating interest and both the busy practitioner and the student will find in its pages enjoyment and inspiration.

THE Calcutta Weekly Notes.

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[No. 5.]

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Lord Sinha's retirement.

It is very unfortunate that Lord Sinha had to retire from the Governorship of Behar and Orissa owing to a break-down in his health brought about by the strains of his office. Amongst Indians as also amongst the members of the legal profession in this country he was the first to be appointed to such a high office under the British rule. Even in the Dominions and the self-governing Colonies it is contrary to practice to appoint any native of such Colonies to provincial Governorships. But during the better part of the Mogul rule all high offices, be it civil or military, were open to Hindus and Mahomedans alike. So Lord Sinha's appointment was quite in accordance with pre-British precedents. Lord Sinha's career has been conspicuous for his being singled out as the first recipient of every high office that has for the first time been thrown open to an Indian. Lord Sinha had a very successful career at the Bar. He has excellent qualities both of the heart and mind and has always been a thorough gentleman. But he has seldom taken any active interest in politics and a political career was practically thrust upon him by Government. So in every high office he has filled, he has felt somewhat out of his element. He has not been wanting in tact and judgment but the constant strain and tension of the head of a provincial executive especially in the present troublesome times brought on nervous prostration. He is not unique in this respect. President Wilson, a great scholar and a life-long politician also broke down from the strains of after-war peace negotiations in his attempt to reconcile the views of the European Allies with those of his own country-men. We hope Lord Sinha will

soon be restored to health and we wish him a long and a happy life.

Political trial and trials in Camera.

We have never been in love with repressive laws. We have always expressed the view that putting such laws into operation precipitates the mischief which they are intended to suppress. So long as force is not used, it is always wise to allow the people to give free vent to their opinions and feelings. We consider it very unfortunate that arrests should have been made on such a large scale amongst men who had been going about wearing or selling homespun cloth, even if some amongst them asked people to close their shops on the next Christmas Eve. If these people had been left alone and the Government had confined its activities to taking only precautionary measures, no shopkeeper with the prospect of making a brisk business on that day would have taken serious notice of any such request. But the arrests have had the very contrary effect. From the newspaper reports we gather that these men have not only not used any violence but have not even suggested by words or conduct any use of force. Many of them are not members of any organisation which have been proclaimed under Part II of the Criminal Law Amendment Act. We and the public are absolutely in the dark on what evidence, under what procedure and provisions of the law, the persons arrested are being convicted and sentenced to long terms of imprisonment.

We do not understand why the trial of these men are being held in camera and in jails. It is reported to us that even lawyers interested in the trial of such prisoners are unable to get any information about the place and time of their trial. May we ask if this is how the police, the magistracy and the local Government are displaying their regard for the often repeated announcement of the

Viceroy that justice shall be the watch-word of his policy in India? We fail to understand also why the trial of Mr. J. L. Banerjee for sedition in the Court of the Chief Presidency Magistrate of Calcutta was held in camera. The Court was not invested by crowds, there was no disturbance or demonstration during the trial and we can find no justification for holding the trial in camera. It is of the greatest importance that state trials should not be held in camera and Star Chamber procedure followed in the trial of political prisoners in India so late in the day. The Government of this country are surely aware that only cases of incest are heard in camera in England. The Presidency Magistrate will do well to look up the dictum of Lord Shaw with regard to trials in camera and hold trials before the public gaze and in broad day-light. We earnestly invite the attention of the Government and the High Court to this question of supreme constitutional importance.

Free State of Ireland.

We are glad to note that the Irish question has after all been settled to the mutual satisfaction of the Sinn Féin party and the British Government. Ireland is henceforth to be known as the Irish Free State and is to have the constitutional status of a Dominion. Ireland is to have her own Parliament with full powers of making laws for the peace, order and good government of Ireland. The position of the Irish Free State in relation to the Imperial Parliament is to be similar to that of the Dominion of Canada and the representative of the British Crown in Ireland is to be appointed in the same manner as the Governor-General of Canada. The members of the Irish Parliament are to take oath of true faith and allegiance to the constitution of the Irish Free State and solemnly swear to be faithful to H. M. King George V, His Heirs and Successors and acknowledge the common citizenship of Ireland with Great Britain in the British Commonwealth of Nations. The Ulster Parliament is to be given a month's time after the ratification of the above terms to decide whether she desires to be excluded. If she does, the constitution and powers of the Ulster Parliament is to continue as at present and then the frontiers of North and South Ireland are to be demarcated by a special commission. It is, however, hoped that the North and South will both be included in the new Irish Free State. Then it will be seen

that Ireland after fighting for freedom for centuries has accepted the Dominion status within the British Commonwealth. It has secured for Ireland perfect freedom with regard to her own affairs and has given her the security of being a member of a Federated British Empire. This leads us to a hope that India may at no very distant date secure a similar status by quite constitutional means.

RIGHT TO PETITION.

(Continued from p. xvi.)

On the same principle the Canadian House of Commons has adopted the right to entertain petitions to the exclusion of the Senate. Commons Standing Order 19 under the British North America Act 1867, lays down the routine of business (in the Commons) to be (1) Presenting petitions, (2) Reading and receiving petitions, (3) Presenting reports by Standing and Select Committees and (4) Motions. After the routine business come questions, notices of Motions, Private Bills, Government Orders, and Public Bills but the order in which these matters are taken varies.

In the beginning of the last century all petitions had to be read to the House by the members presenting them, giving rise often to lengthy and sometimes to endless discussions. The result was a huge waste of time and the fear of frequent arrivals at Westminster of large bodies of Petitioners. The inconvenience to the progress of public business felt was great. These huge gatherings sometimes led to riots. The entrance of the House of Commons was completely blocked by a great crowd of women in 1641. Immortalised by Butler in his "Hudibras"

"The oyster women locked their fish up

"And trudged away to cry 'No Bishop'!". They were led by a certain Mrs. Anne Stagg, a gentlewoman and Brewer's wife, and their object was to present a petition directed against the Popish bishops. They were spoken fair and sent away by the Sergeant of the Parliamentary Guard. Two years later a large crowd of "mean women" wearing white ribbons in their hats invaded Westminster with another petition, crying out "Peace! Peace! Give us those traitors that are against peace that we may tear them to pieces! Give us the dog Pym!" The conduct of these women became so violent that to maintain peace the king's infantry had to be called out and order to fire on the mob had eventually to be given

in justification of which a contemporary historian states that "when the gentle sex can so flagrantly renounce their character, and make such formidable attacks on the men, they certainly forfeit the polite treatment due to them as women." Evidently the "gentle sex" forgot themselves but their forgetfulness cost them several lives. In still more recent times female deputations in favour of Women's Suffrage, accompanied by a mob of inquisitive sight-seers and a section of the criminal classes, had besieged the Palace of Westminster in a vain attempt to gain admittance to the House of Commons. Half a century ago a mob of match makers marched to Westminster to protest against a tax on matches but were dispersed by the Police—rather a gloomy outlook for Mr. Hailey when he was holding forth his Budget at Delhi last March. But all these inspire of the One Mile Act of George III under the provisions of which no assembly of Petitioners or public meeting can be permitted within a mile of the Palace of Westminster.

Let us examine for a moment how petitions are dealt with by the House of Commons itself. They are dealt with in a summary manner which does not admit of any time being wasted. The House of Commons allows no debate to be raised on the subject of petitions and the mode of their presentation which is nothing but rigorously formal has given place to a more satisfactory, if somewhat perfunctory, procedure in dealing with them. This is best recorded by Harry Graham, a most popular exponent of Parliament at work. "Behind the Speaker's Chair," writes the historian, "hangs a large bag. In this a petition may be placed, at any time during a sitting, by the member in charge of it. Thence it is sent to the Committee on Public Petitions, and presumably never heard of again. Petitions sometime contain so many signatures, and are consequently so bulky, that no earthly bag could possibly contain them. In 1890, for instance, a petition eight miles in length, in favour of Local Taxation Bill, was presented to Parliament, and in 1908 another, almost as voluminous, provided a material protest against the Licensing Bill. Petition of such properties are carried into the House on the shoulders of stout officials, and, after reposing for a brief space upon the floor, are presently borne away to be no more seen or remembered."

Such are the privileges of the House of

Commons under the English constitution as well as under a constitution modelled upon that of England. Must the popular chamber (by that I mean the popular chamber in the making) in India give up a valued right, if it is to be had recourse to at all, in favour of the Council of State, which is admittedly a revising Chamber and by virtue of its composition is likely in times to come to shape its policy not always in sympathy with the more popular and democratic limb of the legislature.

But after all we in India seem to have a sneaking affection for things which are hopelessly out of date in England. There are constitutional difficulties in the way of either House of Legislature entertaining petitions without full responsible Government to which Mr. Craik in his speech in opposition to Sir M. Dadabhoi's motion alluded. Even if we brushed all that aside for the moment the fact remains that in these days of easily accessible Courts of Justice, a free press and a free platform and activities of news-vendors and correspondents, the need of petitions is not nearly as great as when the voice of the people obtained but an inadequate hearing. Newspapers are never known to be reluctant to lend their columns to the ventilation of grievances, personal, communal or national, sometimes real, at others imaginary, and politicians are only too eager to make capital of any individual injustice, oppression and even discourtesy.

A. K. GHOSE,

Bar-at-law.

(Concluded.)

Review.

LEADING CASES ON THE COMMON LAW. With Notes, explanatory and connective. By the late Ernest Cockle and W. Nembhard Hibbert, LL.D. (Lond.), London: Sweet and Maxwell, Ltd., 3 Chancery Lane, W. C. 2. 1921.

This is a very welcome addition to the Students' Library, and will be greatly appreciated also by the practitioner, because whilst on the one hand it is not too voluminous for the former, it is, on the other, not too brief for use as a book of reference for purposes of practice, at the same time that in the interest of both it more than makes good the claim of the compiler that it presents a systematic view of the whole subject. It naturally

covers a fairly wide field. The cases and the connecting and explanatory notes are classified under three heads (I) Law of things, (II) Law of Persons and (III) Conflict of Laws. The first is divided into three sections, viz., Contracts, Torts and Damages in Contracts and Torts. The part dealing with the Law of Persons treats of from the Sovereign down to Trade Unions. The selection of the leading cases and the extracts from the judgments therein appear on the whole to be made with excellent judgment, and the connecting and explanatory notes show careful study and are, what they should be, instructive. It would be obviously unfair to criticise the selection and the notes because they are not at all points what the critic if he had been the author would have liked to embody in the book. For ourselves, we would have liked to see one or two recent cases in which *Salto Mayor v. DeBarros*, L. R. 3 P. D. 1 has been considered and to a considerable extent modified and these cases should at any rate have been dealt with in the notes. We would also perhaps have liked to put in one or two recent cases on frustration of contracts. But we feel that it would be hypercritical to lay emphasis on these differences in points of view rather than defects in execution and we gladly express our appreciation of the thousand pages of really solid readable matter which has been presented for the benefit of both students and practitioners. In the preface Dr. Hibbert expresses his indebtedness for a considerable amount of material and method to the late Mr. Cockle whose death he rightly laments as a very special loss to the literary branch of the law, whilst he takes full responsibility for the classification of the topics, the notes to the cases and all cases from 1908 onward. Very wisely he has not left doctrines of equity altogether out of consideration where they have materially modified the rules of common law. We think, we can safely assure him that his expectation that the present work will achieve a success equal to Mr. Cockle's "Leading Cases on Evidence" will not be disappointed.

TRIAL OF CASES. By F. B. Taylor: Third Edition, by P. C. Sarkar. Catholic Orphan Press. Rs. 4 annas 8.

The new edition of this useful book is very welcome as there is clearly room for a workman-like guide to the Civil and Criminal Court-

work of lawyers and judges. Junior lawyers, after they have been through a course of the theories of law, often feel the need of a book giving the chief points of practice and procedure from a practical point of view; and Magistrates, who, in India, very often come to their duties without previous training in judicial work, feel seriously handicapped by their ignorance of the regular methods of procedure. The little book under review will be of immense help to both these classes of persons. It is a clearly-composed summary from which a man of affairs could get a fair knowledge of the fundamentals of Court procedure. Two new chapters on Criminal Courts have been added in this edition which enhance the usefulness of the book.

GHOSH'S LAWYER'S DIARY FOR 1922. Compiled by J. N. Ghosh and published by Messrs. M. C. Sarkar and sons. Price Re. 1 as. 4.

Ghosh's Diaries hardly need any introduction. They are too well-known to the public. These diaries are published in different varieties. The one that we have before us is generally intended for the legal profession and we have not the slightest doubt that they will be accorded the same treatment this year as in previous years. As usual Mr. Ghosh has spared no pains to make the Diary acceptable to his customers. There is a decided improvement this year in the paper used and a very large amount of valuable information legal and otherwise has been given, so as to make the diary well worth the price.

THE DECENIAL DIGEST OF INDIAN DECISIONS, 1911-1920. By R. Narayanaswami Iyer, B. A. B. L. Vakil High Court. Published by The Madras Law Journal Office, Mylapore, Madras. Volume III.

We had occasion to review the first two volumes of this very useful digest and we have no hesitation in saying that the same standard of efficiency has been fully maintained in the present volume which reaches up to "Light and Air." We expect the early publication of the other volumes.

THE Calcutta Weekly Notes.

Vol. XXVI.]

MONDAY, DECEMBER 19, 1921.

[No. 6.]

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Proclamation under the Criminal Law Amendment Act and trials thereunder.

We are glad to be able to announce that in pursuance of our representation the Government has given directions that the trials of the volunteers and others charged with sedition and other political offences held in the Presidency Magistrate's Court will be in open Court and not in *camera*. The members of the Bar and the public may attend the trials up to the limit of the capacity of the Court. Since last Thursday the principle that all trials political or otherwise should be held before the eyes of the public is being observed in the Police Court. We congratulate the Government for directing the attention of the Presidency Magistrate to this matter and also the members of the general public whose conduct in and about the Courts during these trials has been exemplary.

We think that the Government of Bengal have committed a grave error of judgment in bringing into requisition the Criminal Law Amendment Act, Part II, to cope with the present situation. We have always maintained the view that the ordinary law of this country clothes the executive with sufficient power to prevent breaches of the law or order even on extraordinary occasions. We shall illustrate that by a reference to recent events in Calcutta. In justification of the promulgation of the Criminal Law Amendment Act for proscribing volunteer associations as being of an unlawful nature, it has been said that the *Khelafat* and the Congress Volunteers used intimidation and violence on the 17th of November last in order to close down shops and businesses, and stop all vehicular traffic, and

that they did actually resort to force, coercion and threat on those who were of a contrary view and who very legitimately felt that their personal liberties were most unjustifiably interfered with. On the 17th of November last if the rights of such people to transact business or go about freely in their carriages had been interfered with by any individual or body of men, it was quite open to the Government to arrest those persons who resorted to either threat, intimidation, violence, coercion or obstruction and prosecute them and get them punished either under the Police Act or under the Indian Penal Code. If the Government had done that no one could have legitimately brought any charge of oppression and repression against such a course and such action would have been a sufficient warning against its repetition on the 24th December next.

But instead of taking this quite legitimate course under the ordinary law the Government has been so ill-advised as to take action under the Criminal Law Amendment Act. Under this Act it has proclaimed certain volunteer associations as unlawful. Thereupon the leading members of the non-co-operation party in Bengal, evidently by way of protest against the Government proclamation, have taken to enlisting volunteers, enjoining upon them not to resort to violence of any kind. These men, as we have already said, had been going about the streets of Calcutta offering for sale homespun cloth, dressed in similar cloth, and were requesting people quite peacefully not to open their shops on the 24th of December next with a view, when H. R. H. the Prince of Wales arrives in Calcutta, to impress upon the Prince the idea that the people of India are not satisfied with the bureaucratic powers of the executive in this country. We presume that no one will have the hardihood to say that by so doing they have infringed the spirit or even the letter of any law, including the Criminal Law Amendment Act.

We shall take the Criminal Law Amendment Act itself. The object of the Act, as it appears from sec. 15 (2) (a), read with sec. 16, is to empower the Governor-General in Council (now also the Governor in Council) to proscribe unlawful associations. An "unlawful association" in sec. 15 (2) (a) is said to mean "an association which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such act." It is evident that the volunteers as above described cannot possibly come under the above section. Sub-cl. (2) of the above section no doubt says that an association is unlawful if it has been so declared by the Governor-General (or Governor) in Council. Sec. 16 further says that they may declare any association unlawful if they are of opinion that such association "interferes or has for its object interference with the administration of the law or with the maintenance of law or order or that it constitutes a danger to the public peace." It would be too absurd to suppose that the Government may at their pleasure and for no good or sufficient reason declare any association or "body of persons" as unlawful. According to the ordinary canons of construction of statutes, the sections referred to contemplate that the Governor-General or Governor in Council would only be justified in proclaiming an association as unlawful if its object and acts are such as would bring them within the scope and description of sec. 15 (2) (a) and sec. 16. An illustration will make our meaning clear. A Bar Association or a Vakils' Association may displease the executive, and individual member of it may commit, promote, aid or abet breaches of the peace, violence or intimidation. Such individual member may be arrested and punished under the ordinary law but surely that would be no justification for proclaiming such associations unlawful. Similarly with regard to the voluntary associations which have been proclaimed, their avowed object as also the conduct of the persons belonging to such associations have to be taken into consideration and it cannot surely be said that these bodies come within the contemplated scope of sec. 15 or sec. 16. To punish persons simply for being members of such associations with imprisonment or fine under sec. 17 amounts to punishing people not for any offence known to law but at the command of the executive. We publish a letter from a leading member of the Mofussil Bar which will show that the same view prevails

all over the country. The Government has blundered and now finds itself in a difficult position. It would be wise to withdraw the proclamation and take to conciliation.

CHAMPERTOUS AGREEMENTS WHETHER SHOULD BE MADE ILLEGAL IN INDIA.

We cannot conceive what really it was that induced Dr. Gour to introduce his bill to amend the Indian Contract Act, which, if passed into law, will make agreements to furnish any information or assistance in consideration of receiving a share in the proceeds of a litigation unenforceable in this country as subject to certain well-defined exceptions, they are in England. Such agreements are called in English legal terminology champertous agreements. A champertous agreement may or may not, as between the parties to it, be unconscionable. If it is unconscionable, it is, under the law now in force in this country, unenforceable not because it is champertous but because it has been induced by means or influences reprobated by the law as embodied in one or other of the relevant sections of the Indian Contract Act. Dr. Gour would apparently go further; he would have all agreements of this description declared illegal merely because they involve a division of the proceeds of litigation between the claimant and a stranger, however just or fair intrinsically they may otherwise be.

But who are the people whom Dr. Gour specially expects to benefit by this law? Not the claimant, if he is poor and unable to meet the expenses of the litigation which he must commence and fight to the finish if he is to have his own—expenses which in existing conditions seldom bear a reasonable proportion to the matter at stake and which tend to increase indefinitely with the means and resources of the opponent. Given therefore a powerful desseisor (and it is but seldom that any other dares to act in violation of other people's rights), the claimant, if he is poor, must seek the assistance of another who has the necessary resources to fight his opponent on more equal terms. We are not aware that this or any other country breeds philanthropists who will lend this assistance without stipulating for a substantial return. Considering the well-known uncertainties of litigation, we shall also not be surprised if the stranger who is induced to risk money on other people's

litigations should, in striking his bargain, specially remember the adage: "a bird in the hand is worth two in the bush." But provided it is not an unconscionable bargain, it is to the interest of the claimant that it should be enforced, even if it be a hard one. To make all such bargains unenforceable would be to deprive the claimant of this assistance altogether, and owing to it, of all access to the Courts, to the immense advantage of the dispossessor. The proposed law, if passed, will thus put a premium upon unlawful dispossession of the poor by the rich and upon dishonest denial by the latter of the former's rights. This, we conceive, can hardly be what Dr. Gour is desirous of achieving by his Bill. In *Ramcoomar Coondoo v. Chunder Canto Mookerjee*, 11 L. R. 2 Cal. 233, the leading case upon the question of the application in India of the law of champerty and maintenance, the Judicial Committee observed: "A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. Indeed cases may be easily supposed in which it would be in furtherance of right and justice and necessary to resist oppression that a suitor who had a just title to property and no means except the property itself, should be assisted in this manner." What, one wonders, has happened since 1876, to provoke Dr. Gour to fly directly in the face of these very wise observations in a judgment which was delivered by Sir Montague Smith with the concurrence of Sir Barnes Peacock and Sir R.P. Collier?

No doubt, in that judgment, their Lordships observe further that "agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the bonâ fide object of assisting a claim believed to be just, but for improper objects as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them." "Gambling in suits" is a figurative expression. If every transaction in which an element of speculation enters is to be stigmatised as gambling, then no agreement to divide the proceeds of a litigation by a stranger with the claimant can possibly escape that designation. Their Lordships, it is therefore clear, did not wish to condemn all gambling in litigation, understood in

this sense, but only gambling in unrighteous litigation knowing it to be such. That this was so appears from the judgment of the Judicial Committee delivered by Sir Arthur Wilson in *Bhagwat Doyal Singh v. Debi Doyal Sahu*, 1 L. R. 35 Cal. 420 (1908). The agreement in question in that case was concurrently declared by the Courts in India to be "one opposed to public policy as fostering and promoting gambling in litigation, and hence void." It is clear from the judgment that, in the opinion of the Judicial Committee in 1908, an agreement, being champertous, which cannot be questioned as champertous, cannot also be questioned on substantially the same ground, by being called a gamble in litigation.

The law as it stands sufficiently protects the person who has made not merely an improvident, but also an unconscionable bargain with the champertor. It was also laid down in *Ram Coomar Coondoo's* case, following English precedents, that a stranger to the agreement who by reason of it has been subjected to a malicious and causeless action and has suffered damage in consequence has his remedy in an action for damages. We do not really see at what points and in whose interest this law needs further stiffening. Dr. Gour, in his statement of Objects and Reasons, speaks vaguely of "abuses," "the time for checking which is ripe." The time, in our view, is ripe for earnestly appealing to all private members to put a check upon this growing misuse of their privilege, *viz.*, in putting forward proposals for legislation from considerations of a more or less academic character, which cannot even be remotely connected with any of the claimant necessities of the hour, and which needlessly take up the time not merely of the Government and the Legislative Assembly but of the various public bodies to whom they are necessarily referred for opinion.

In his statement of Objects and Reasons, Dr. Gour refers all who may seek to probe beneath the surface of his Bill, to a somewhat lengthy discussion of the topic contained in one of his own books. This discussion does not offer any light on just that one topic which properly illuminated would have enabled his readers to test his Bill. *e.g.*, the history of the law of champerty. The statutes which hit at champerty and maintenance—to the extent indeed of making them indictable offences—originated in the reign of Edward I. In the framing of these statutes, the Commons who had yet to find their feet, could have had no real part or

share, and they were laws as the Feudal Barons chose to make them. It was just the time when the high-handed violence of the powerful feudal lords was beginning to be tempered by the skilful utilisation of the law and the law Courts by others less endowed with force than wile. Instead of backing the victims of an obnoxious baron's oppression by armed force, they took to backing them by pecuniary and other aids in the law Courts. The bluff old school of physical force, with their rough and ready methods, very naturally regarded this insidious undermining by the slow processes of law, as a nuisance, and being all-powerful in the Councils of the King, made haste to suppress it by declaring champerty and maintenance to be indictable offences and actionable as civil wrongs. These laws were framed to prevent poor people who had suffered at the hands of the governing class from seeking redress in Courts of Law with the (to them) indispensable aid of strangers. It may interest Dr. Gour to learn that as originally framed, they were understood to exclude lawyers from the precincts of Courts and witnesses from the box. They were impossible laws and were defied with impunity, and became tolerable by reason only of numerous exceptions and qualifications, statutory and otherwise, which nearly ended in eviscerating the law. The criminal law of champerty and maintenance has fallen in England into practical desuetude. No wonder, the Privy Council, with its finer sense of historic perspective wherein Dr. Gour is so entirely lacking, made haste to repudiate the law for India, lock stock and barrel. Why is Dr. Gour so anxious, in this the latter end of 21st year of the Nineteenth Century, A. D., to tie this age-worn Medieval halter round India's neck?

N. G.

Correspondence.

THE EDITOR, "CALCUTTA WEEKLY NOTES."
DEAR SIR,

The Governor has been pleased to proclaim the volunteer associations unlawful obviously under cl. (b) (2) of sec. 15 of the Act read with sec. 16. The Governor says that these associations interfere or have for their objects interference with the administration of the law, or with the maintenance of law and order. It is well-known that the Criminal

Law Amendment Act was an emergent legislation enacted under extraordinary circumstances for the suppression of associations dangerous to the public peace, as the statement of objects and reasons of the Act will show. The volunteer organisations in the country can by no means be accused of having for their object the commission of any act of violence or intimidation, for this simple reason that their object is exactly the reverse of it, *viz.*, to carry on their propaganda on strictly non-violent lines, by moral persuasion and not by intimidation. If any particular member of the organisation was actually found guilty of any violence (though I think there is no such record) it only showed that that member was guilty of violating the principle enjoined by the leaders of these associations. Particular instances might be dealt with according to the existing laws. If then the object is not the commission of violence or intimidation, is the Governor in Council justified in issuing the proclamation? In other words does the Act authorise the Governor to suppress any association he chooses, if only he dislikes it? The action of the Government has brought on a grave crisis. Is not the time come for persons of all shades of opinion to combine and protest? Will you kindly consider the legal aspect of the question and enter your protest in the columns of the C. W. N. if you agree that the proclamation is unjustifiable.

Yours, etc.,

Member, Mofussil Bar.

DINAJPUR,
15-12-21.

Review.

POLLOCK AND MULLA'S INDIAN CONTRACT ACT. Student's edition. By Dinshah Fardanji Mulla and J. S. Khargamvalu. Bombay. Messrs. N. M. Tripathi & Co. Book-sellers and Publishers. 1921.

This is an abridged edition of Messrs Pollock and Mulla's Commentary on the Indian Contract Act adapted to the use of students. The increasing bulk of the parent work made it unsuitable for such use. We have no doubt the book will serve the purpose for which it has been prepared. It gives all that a student needs to obtain an insight into the principles of the English law of contract and the manner in which they have been adapted or altered in the Indian Code.

THE Calcutta Weekly Notes.

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Separation of Executive and Judicial Functions.

The following communique issued by the Government of India on the 10th of December last, unless explained by reference to the debate on the question in the Legislative Assembly on the 20th of September last, is likely to create a misapprehension in public mind that the Government of India is not favourable to the question of separation of the executive and judicial functions. The communique, we refer to, is in the following terms :—

The Governor General in Council has expressed his inability to accept the resolution of the Legislative Assembly adopted during the last Simla Session regarding the separation of Judicial and Executive functions on the same grounds as stated in the debate by the Home Member in opposing the motion. At the same time he desires to reiterate that if any Province decides on the separation of Judicial and Executive functions and makes proposals to that end, and Government of India will facilitate the passing of such Legislation as may be required for carrying them into effect.

The facts are that Rai Taraprasanna Mukerjee Bahadur moved a resolution recommending the separation and the appointment of a Committee by the Governor-General in Council for preparing a scheme for the purpose. Sir William Vincent while accepting the principle of the separation pointed out that it was for the Provinces who are autonomous in such matters to frame their own scheme and submit it to the Government of India for necessary legislation. Mr. J. Chaudhuri thereupon moved an amendment to the effect that when the Provincial schemes are received the Government of India should appoint a Committee to give effect to the scheme. Sir William Vincent accepted this amendment with the qualification that although the Government of India was quite prepared to undertake the necessary legislation for giving

effect to the scheme, yet they were not in a position to assist the Provinces with funds. Mr. Chaudhuri then entered his protest with regard to the financial adjustment between the Imperial and Provincial Governments, and accepting Sir William Vincent's assurance with regard to legislation, he withdrew his amendment to which the House assented without a division. Rai Taraprasanna Mukerjee Bahadur, however, pressed his original resolution to a division and as the first portion of it affirmed the principle of the separation, the majority of the House including the mover of the amendment voted in its favour. But when we look at the debate as a whole we find that the Government accepted the principle of separation and also Mr. Chaudhuri's amendment that when the Provinces submitted schemes for separation the Government of India would come to their assistance for giving legislative effect to it. Thus, it will be seen, that the Government of India communique only follows the net result of the debate and in no way trenches upon the assurance given by the Home member in the course of the debate. A Committee presided over by Mr. Justice Greaves is now sitting to frame a scheme of separation for Bengal. A scheme was presented in our columns (*ante*, pp. v and vi) for effecting a separation without throwing any additional burden on the provincial finance. The Editor of this journal was examined by the Committee in relation to the scheme.

SEPARATION OF JUDICIAL AND EXECUTIVE FUNCTIONS.

(DEBATE IN THE LEGISLATIVE ASSEMBLY.)

Rai T. P. Mukerjee Bahadur.—Mr. President, the Resolution which I beg to move before this House runs as follows :—

'This Assembly recommends to the Governor General in Council that Judicial and Executive functions should be separated and steps should be taken to appoint a committee consisting of officials and non-officials for preparing a scheme for the purpose at an early date.'

The Honourable Sir William Vincent.—This subject is mainly a Provincial subject and we cannot get over that fact. Honourable Members of this Assembly cannot have it both ways; at times they speak of Provincial auto-

nomy in regard to their own Province, but when they want anything done by the Government of India, then all principles of Provincial autonomy vanish, and, as in the present case, the Government of India is asked to interfere in what is definitely a Provincial subject, namely, the administration of justice and land-revenue administration. These are the two branches of administration which are mainly affected by the present proposal. At the same time, this question of separation does also affect the Central Government, and it was for this reason I did not attempt to get the Resolution disallowed, indeed, I am very glad to have this opportunity of stating what the intentions of Government are in regard to this matter. But I can only really repeat to this Assembly what I said last year in the Council of State, namely, that the subject is a Provincial one, but if any Local Government decides to take up the question—and the matter is one for them—the Government of India will proceed to make such legislative changes as may be necessary in order to give effect to the proposals of the Local Government, but we are not prepared to interfere with the discretion of the Local Governments in a matter which is mainly one of Provincial administration.

Now let us look at the position at the present moment. Two Local Governments have already appointed Committees to inquire into this matter, one being the Government of the United Provinces and the other the Government of Bengal. The Committee appointed in Bengal will be presided over by an eminent Judge of the Calcutta High Court. I ask the Assembly, does it now seek to interfere in what is a Provincial subject and thus duplicate the steps already taken by two Provinces to inquire into it and to investigate a matter which will probably be made the subject of inquiry by other Provinces? It would be unreasonable to interfere in the matter. Non-officials have a majority in the Provincial Councils, and they can see to it that the matter is taken up at once. Hitherto, I imagine, the difficulty has been largely a financial one. We have been told, for instance, that in Bengal they have a deficit of 2½ crores, that was the last figure I heard, but I do not know whether it will affect them in taking up this question. In any case, it is not right for this Assembly to be guilty of vicarious generosity and to force Local Governments to take up schemes which they may not have the funds to finance.

Let any Local Government come up and say

that they want this change made and we are prepared to do our best to give effect to their recommendations, but we do not want to force our views on them.

In one Province I know the question was considered last year and for good reasons or bad reasons—I was told at the time they were very bad reasons—the proposal was turned down. That was in Madras. All I do want to ask this Assembly to do, is not to ask the Government of India to appoint a Committee on a matter which is already being inquired into by two Provincial Committees which is a Provincial matter and which this Assembly generally ought not really to attempt to control.

* * * * *

Mr. J. Chaudhuri.—Sir, I have given notice of an amendment which will obviate the difficulties that have been pointed out by the Honourable Home Member. May I move it now? My amendment is in the following terms:—

'The Provincial Governments be asked to submit schemes for such separation in their respective Provinces in consultation with the Provincial Legislative Councils, and the schemes when received be submitted to a Committee consisting of Members of the Indian Legislature composed of two-thirds non-official and one-third official members to consider and recommend measures necessary for effecting such separation.'

The object of my amendment is this, that although schemes of separation may be formulated by the Provincial Governments, the Central Government will have to introduce legislation to give effect to them. Besides, that, a scheme that will suit Bengal will not necessarily suit the United Provinces or Sind or Madras or Bombay. So, each Provincial Government should be left to itself to formulate its own scheme, and when those schemes are received by the Government of India, we may have a Committee to consider these schemes and consider what legislation will be necessary for giving effect to these schemes. It may require amendment of the Code of Criminal Procedure and in certain respects the revenue and the civil law as well. I do not wish to go into the history of this question, but I must mention that the Executive Government have opposed this scheme on the ground that it will be found financially to be much too expensive. But we are prepared in Bengal to present a scheme by which we can effect the separation without increasing the expenditure. Since a Committee has been appointed, I am not going to fasten any suggestions of my own on that Committee. I have pointed out that

legislation by the Central Government may be necessary, and further, assuming that the giving effect to this scheme involves additional expenditure on any Provincial Government, the question of finding the necessary money for carrying out the reforms will have to be considered between the Provincial Government and the Imperial Government.

The Honourable Sir William Vincent has referred to the particular grievances of Bengal in this respect. We have been running the province with a deficit of $2\frac{1}{2}$ crores. This question may be brought up before this Assembly in another connection, but in passing I must observe that the financial adjustment that has been made by the late Finance Minister of the Government of India with the Provinces is pressing hard against every Province, and it is very unjust to the Provincial Governments. I shall only mention here that we in Bengal are merely revenue farmers on behalf of the Government of India. We raise nearly seven crores on income-tax for the Government of India and we do not get a pice.....

Rao Bahadur T. Rangachariar.—I rise to a point of order, Sir.

Mr. J. Chaudhuri.—I have only mentioned this point to indicate the injustice of the adjustment. I will not refer to it in detail. But I say this, that even my friend Mr. Rangachariar will admit that it is the unprogressive revenues that have been allotted to the provinces. For instance, we have to rely on land revenue and excise.....

Mr. President.—Order, order. The Honourable Member is breaking his own undertaking.

Mr. J. Chaudhuri.—I was mentioning those facts because occasion may arise when the Provinces may have to come up to the Government of India not only for legislation, but also for helping them with assignments on a more equitable basis for carrying out the necessary reforms. I need not dilate upon the grievances of the Provinces at the present moment. But I invite the attention of the House to them only to show that in this matter the Provinces are not the final authority on this question, and there will soon be occasion for the Provincial Governments to come up to the Government of India not only for legislation, but to appeal to them to come to their rescue with necessary allotment of funds. That is sufficient for me to explain the scope of my amendment. I say in the last part of my amendment: 'to consider and recommend measures necessary for effecting such separa-

tion.' Sir, my object in placing these facts before this House is that it will be necessary for the Central Government not only to take up the necessary measure of legislation, but it may also be necessary to go into the question of finance. I, therefore, beg to move my amendment, and I am sure that it will meet with the acceptance of this House. The Committee need not be committed to any definite scheme. My amendment is wide enough to meet any contingency that may arise. With these words, Sir, I beg to move my amendment.

The Honourable Sir William Vincent.—I think I can go some way to meet the Honourable Mover of this Amendment, though I cannot by any means accept all the proposals. I think I may guarantee that when proposals for separation are received by the Government of India, we shall be ready to appoint such a Committee as Mr. Chaudhuri proposes to ascertain what would be the best method of giving effect to the proposals. I agree with a great deal of what he said as to conditions varying in different provinces, and it seemed to me that, if that view be accepted, it was a convincing and a very cogent argument against the appointment of an All-India Committee. Surely, if conditions differ in different provinces, then the matter is one for the provinces to consider. I have no doubt also that legislation will be necessary finally and the assistance of members of this Assembly, official and non-official, will be readily accepted by the Government of India in framing that legislation. When, however, the Honourable Member suggests that the Government of India are to make assignments or give doles to the Government of Bengal or any other Government for a purpose of this kind, then I must say quite definitely that I can hold out no hopes of that being done, and indeed I hope that it will never be done, because this system of doles has proved in the past a very evil one.....

Mr. J. Chaudhuri.—I did not expect any dole. I simply suggested :.....

Mr. President.—Order, order.

The Honourable Sir William Vincent.—The Honourable Member did not use the word 'dole,' but he used the word 'assignment:' whatever be his word for monetary assistance, whether it is subsidy, dole, or assignment—none of these things will the Government of India, if I know anything about them, give the Provincial Government of Bengal for carrying out the separation of executive and judicial

functions. But if it is a question of appointing such a Committee, as the Honourable member suggests to consider the legislation necessary to give effect to schemes of separation, I think I can meet him. On the other hand, I am not prepared to ask the Local Governments to submit such schemes. Indeed, I think it is really an insult to a large Provincial Government like Bengal, Bombay or the United Provinces, to suggest to them that they have not considered this matter and that we seek to control them in a provincial matter of this kind. As soon as we do get schemes from them, or when we have even two or three schemes, I am quite ready to take steps for the constitution of such a Committee as the Honourable Member proposes.

Dr. H. S. Gour.—I move that the question be now put.

Mr. J. Chaudhuri.—In view of the assurance given by the Honourable Sir William Vincent I do not press my amendment. I only want to correct certain misapprehensions in his mind. I did not say that we want any dole from the Government of India. What I meant was that Lord Meston's assignment as between the Provinces and the Central Government is considered unjust all over India, and the day is not far distant when this Assembly will have to take up the question of a fairer apportionment of the revenues between the Government of India and the Provincial Governments and pass a final judgment on Lord Meston's award. That is all that I meant.

LONDON NOTES.

(FROM OUR OWN CORRESPONDENT.)

24-11-21.

The Board suspended the hearing of Indian Appeals during the past week, and it is said that there will be two Courts hearing them next week.

Lords Buckmaster and Carson, with Sir Lawrence Jenkins, Sir John Edge and Mr. Ameer Ali have been sitting to hear most of the Indian Appeals so far.

The following cases have been heard.

(1) *Mohammed Hafiz v. Mirza Mohammed Zakariya.*

(2) *Sabz Ali Khan v. Khair Mohammed Khan.*

(3) *Naba Kishore Mandal v. Upendra Kishore Mandal.*

In the 1st case—A hypothecation bond contained a clause enabling the creditor to sue

either for interest alone or for principal and interest. A suit was brought for interest alone and the decree obtained was satisfied. The creditor then brought a further suit for the principal sum and interest accrued since the previous decree. The Board upheld the judgment of the Allahabad High Court, and dismissed the Appeal on the ground that the suit was not maintainable owing to the provisions of Or. II, r. 2 of the Code of Civil Procedure.

2. The parties in the second case are Bugti Bilochis, and the claim by the Plaintiff-Appellant was for possession by pre-emption as a collateral of the alleged vendors of the land in suit.

The suit was decreed by the District Judge of Dera Ghazi Khan. This decree was reversed by the Punjab Chief Court and the Privy Council after hearing an *ex parte* argument have reserved judgment.

3. In the third case, an Appeal from Bengal, the Board upheld the judgment of N. R. Chatterjee and Smither, J.J., delivered on the 5th August 1918. On the question, whether a Hindu widow was justified in making an alienation.

They held that a permanent lease executed by a Hindu widow had not been shown to be for legal necessity nor for the benefit of the estate, and therefore was not binding on the reversioners. The reversioners were similarly not bound by a sale of certain property which the widow had purported to convey, and which was held to be in reality accretions to her husband's property.

Reserved judgment was delivered by the Board during the week in the case of *Nalam Pattabhirama Rao v. Mandavalli Narayana Moorthy* allowing an *ex parte* appeal from Madras.

The suit was brought by the Plaintiff who claimed to have an interest in a Hindu joint family business, alleging that the joint family had agreed to take in as partner the person through whom the Plaintiff was claiming.

The Sub-Judge of Rajahmundry found that the arrangement had not been proved and dismissed the suit.

On appeal to the High Court at Madras this judgment was reversed and the present appeal to His Majesty in Council was lodged by the family and it was allowed.

G. D. M.

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REPORTS (See Index.)

The late Lord Halsbury.

By the death of the right Hon'ble Lord Halsbury the world has been deprived of one of its greatest lawyers. He could rightly be called the grand old man of law who wonderfully retained his mental powers up to the end which took place at the age of ninety-eight. Age seemed to have no influence on him and he often sat on the bench to help the Judges in cases involving difficult questions of law at an age of life which the average man is seldom found to reach, not to speak of working in any responsible capacity. The decisions of Lord Halsbury which have been regarded as leading cases are very many and confining ourselves to cases from this country, it may not be out of place to mention that it was he who delivered the famous judgment in the case of *Subramanya Ayer* in which he laid down that the disregard of an express provision of law as to a mode of trial in a criminal case is not a mere irregularity but an illegality vitiating the whole trial.

Lord Halsbury was called to the bar in 1850 and at the time of his death he was perhaps the seniormost lawyer living on the face of the earth.

New year's day honours.

Amongst the recipients of honours on the occasion of the New Year's day we are glad to notice the name of Mr. Justice Richardson on whom a knighthood has been very fittingly conferred. Our heartiest congratulations to his Lordship.

American Colonial Administration.

In the October number of *The Journal of Comparative Legislation and International*

Law, there are two contributions, by José P. Melencio, Esq., (of the Philippine Bar) and R. T. Clark, Esq., respectively, upon "The Constitution of the Philippine Islands" the "The Constitution of Esthonia." Mr. Melencio is not sure that it is correct to talk of a "constitution" of the Philippine Islands, since it is only the expression of the popular will, framed by representatives of the people and deriving its force from the people, that can be properly called the constitution of that people. The term in this sense is more appropriately applicable to the Constitution of Esthonia. The constitution of the Philippine Islands is derived by grant from the United States Congress. "By virtue of the Act of Congress, 29th August 1916," says Mr. Melencio, "the Philippine Government to-day is practically autonomous. Broad powers have been delegated to it by the Congress of the United States. This is in keeping with the intention of the United States to grant independence to the Philippine Islands as soon as a stable Government has been established therein. In fact, the Act is preparatory to the withdrawal of American sovereignty as soon as that stable Government is established." The form of the Government, Mr. Melencio proceeds, "is democratic in the sense that there is a Government by the representatives of the people chosen by the people. It is thus a Government of laws, and not of men. The majority rules, as in the case of the United States. The principle of Governmental division of powers which is characteristic of the United States system is maintained. The separation of powers is complete as in every other Government founded on that principle." The Governmental relationship between the United States and the Philippines, according to Mr. Melencio, is much like that maintained between England and her self-governing Dominions. The control which the former exercises over the latter, he notes, is exercised through five channels: (1) Through the Governor-General, the Executive head appointed by the President of United States. (2) Through the veto power of the Governor-General. (3) Through the veto power of the Congress of the United States. (4) Through the control of foreign rela-

tions by the United States, (5) Through the provision for appeal from the Supreme Court of the Philippine Islands to the Supreme Court of the United States in certain cases. "With the exception of the third item, substantially the same modes of control are" in Mr. Melencio's opinion, "exercised by Great Britain over the affairs of her dominions."

So far as can be judged from the details which follow this general description, we are unable to see that the former really bear out the latter. The constitution of the Philippine Islands is certainly more advanced than the constitution of the Crown Colonies of the British Dominions, because the Legislature is undoubtedly representative of the people. But it is very far removed indeed from the constitution of the self-governing Dominions, which Mr. Melencio had apparently in mind when he spoke of the control exercised by the United States over the Philippines being substantially the same as that exercised by Great Britain over the affairs of her Dominions. The following passages from Mr. Melencio's article dealing with the "Executive Power" will make this clear. "He (the Governor-General) is granted extraordinary powers in case of rebellion or invasion, and, when the public safety requires it, he may suspend the privilege of the writ of *habeas corpus* and place the islands or any part of them under martial law. . . . He has the exclusive power to grant pardons and reprieves, and to remit fines and forfeitures. . . . He can veto any legislation enacted by the Philippine Legislature. . . . In the exercise of his executive power, he is assisted by six departments and several bureaux of the Philippine Government. . . . Each department is headed by a Secretary assisted by an under-secretary. . . . The secretaries of departments, together with the President of the Senate, and the Speaker of the House of Representatives constitute the Council of State. . . . The Council of State is not a constitutional body, inasmuch as it was created by the executive order of the last Governor-General. Succeeding Governor-Generals are not bound to recognise it. If, however, a Governor desires to form another advisory body, the act would be justified because of precedent." The Philippine Cabinet as Mr. Melencio calls this body, is thus composed virtually of appointees of the Executive and not of the Legislature. It is more like the Executive Councils of the few British

Crown Colonies which still possess a representative legislature, but the executive power of which is vested in nominees of the Governor-General or of the Home Government. The form of Government in the Philippines is thus inferior both to the Home Federal Government and the Government of the self-governing Dominions of the British Empire, though it is superior to that of the Crown Colonies of that Empire without representative legislatures.

Upon the character of American Colonial administration it was stated in the Tagore Law Lectures for 1918: "Looking at it from outside, the organisation of the American Colonies appears to be a close copy of that of the Home Federal Administration. . . . (But) the fact that the Governor is a person appointed from Washington and so necessarily pledged to carry out the policy of the Home Government, whilst the Legislature which makes laws and votes supplies is freely elected by the people of the localities, makes the administration of the colonies fundamentally different in character from the Home Administration. In fact the United States Colonial Administration is in its essential features similar to that of non-self-governing British Colonies, possessing representative legislatures. To prevent deadlocks, inseparable from such an arrangement, it is generally provided (as in the constitutions of the British Crown Colonies, to which they bear the nearest resemblance) that colonial laws may be vetoed by the Governor and, if passed over his veto, by the President and finally by the Congress (e.g., in the Constitution of the Philippine Islands, as amended in 1916). Acts of Congress, moreover, may and often do impose important limitations on the "legislative power of colonial legislatures" (Ghose's Comparative Administrative Law, p. 271).

LONDON NOTES.

(FROM OUR OWN CORRESPONDENT.)

30-11-21.

No Indian Appeals have been heard during the past week. It is probable that two Boards will sit to hear them next week.

[APPEAL FROM EAST AFRICA.]

Stephens v. Allen.

The Appellants, a firm of builders entered into contracts with a Company. Disputes arose which went to arbitration. The Respondent was retained as Solicitor for the Appellants.

An award was made by the arbitrator in favour of the Appellants but in 1914 this was set aside by the High Court at the instance of the Company on the ground that the agreement to refer to arbitration was not under the Company's seal. In 1916 the Respondent sued the Appellants for Rs. 4,000 odd for professional services rendered. The Appellant paid into Court Rs. 772 for matters for which he admitted liability and denied the balance. The Respondent thereupon under r. 377 of the Rules of Civil Procedure (which seems to resemble very closely Or. XXIV of the Indian Civil Procedure Code) took out the amount paid in and sent a notice to the Registrar that it was accepted in full satisfaction of the claim. The Appellants subsequently filed the present suit against the Respondent claiming damages for his neglect in not seeing that the Company's seal was affixed to the reference to arbitration.

The Appellants contended that since the Respondent had withdrawn the money paid into Court in the former suit he was now estopped from disputing his negligence.

The Board held that the acceptance of the amount under the words, of the Rule as satisfaction in full of the Plaintiff's claim did not amount to an admission of the grounds of defence set up by the Defendant and the Defendant was consequently not estopped from raising in the present proceedings the plea that he was guilty of no negligence at all.

With regard to the question of negligence their Lordships held that the local Judges acquainted with local conditions were best able to decide it and they were unwilling to disturb the decision of the lower Court that the Respondent's action was reasonable.

12-12-21.

Sir Geo. Lowndes, K. C., instructed by Mr. Delgado applied to the Board for special leave to appeal against a decision of the High Court of Madras in the case of *Khan Sahib S. Chinna Saheb v. Markanda Kothan alias Markanda Royan*.

In dismissing the application Lord Buckmaster said:—

"Their Lordships have often considered these applications for special leave to appeal, and they have attempted, as far as they can, to lay down something in the nature of a guide to help practitioners in knowing what are the cases which will be properly entertained by the Board. It is not merely because it is a diffi-

cult question of law. It must be an important question of law. It must be something more than a question merely affecting the rights between two people. If it is merely that and nothing more, and unless it can be shown that it is such a question that its decision will guide and bind others in their commercial or domestic relations, it really is not a case in which their Lordships would advise His Majesty to interfere."

G. D. M.

Review.

HINDU LAW. By I. R. Gharpure, B. A., LL.B. Third Edition. Poona. Printed at the Aryabhushan Press. 1921.

This is the third edition of a book originally compiled for the benefit of students preparing for law examinations. As in the case of other similar text books, with every fresh edition there is an increase in bulk resulting from a desire to make it serve the purposes of legal practitioners as well. If this tendency is allowed to take its course, it will before long cease to be a student's book, on account of the mass of details which are being allowed to overlay the discussion of principles. The special features of the book, viz., the map shewing the local extent of the several schools of Hindu law, the notes on the principles of interpretation according to the *mimansa* and *sapinda* relationship are maintained in this edition. The book will be useful to both students and practitioners. We notice a curious omission which seems inexcusable. The provisions of the Hindu Disposition of Property Act, XV of 1916, are not noticed at all.

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CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CUMING, J. APPEAL FROM APPELLATE DECREE No. 2534 of 1919. OSMAN SHEIKH, Plaintiff, Appellant v. FAKIR MAMUD SHEIKH and others, Defendants, Respondents. Heard 23rd November 1921. Judgment 30th November 1921.

Bengal Tenancy Act, sec. 85—Permanent lease, by under-raiyat, if valid.

The suit out of which this appeal arose, was brought by the Appellant for recovery of possession on declaration of his permanent under-raiyati title to the land, the Defendant having wrongfully dispossessed him therefrom. The Plaintiff's case was that he held under a permanent under-raiyati lease granted to him by one Umesh Chackrabarty, who in his turn obtained a similar lease granted to him by one Ellae Sheikh who was a *kaimi* raiyat of the land; both leases, *viz.*, lease to Umesh and that to the Plaintiff being under-raiyati leases. The question for determination in this appeal was whether the permanent under-raiyati lease granted to the Plaintiff, an under-raiyat, by the under-raiyat Umesh was valid and operative under the provisions of sec. 85 of the Bengal Tenancy Act as against the Defendant, a wrong-doer:

Held—Reversing the decision of the lower Appellate Court, that the provisions of sec. 85, Bengal Tenancy Act do not apply to a permanent under-raiyati lease granted by one under-raiyat to another under-raiyat. There is nothing in the Tenancy Act to prevent an under-raiyat sub-letting his land.

Guru Das v. Kali Das, 18 C. W. N. 882 and *Parushulla v. Sital*, 19 C. W. N. 110, referred to.

Dr. Jadunath Kanjilal and Mr. Benode Lal Mukherjee for the Appellant.

No one appeared for the Respondents.

H. D. C.

CIVIL REVISIONAL JURISDICTION. Before SUHRAWARDY and CUMING, JJ. CIVIL RULE No. 563 OF 1921. HARI CHARAN KORANJAI, Plaintiff, Petitioner *v.* BAHAR SHEIKH, Defendant, Opposite Party. The 19th December 1921.

Civil Procedure Code (Act V of 1908), sec. 115, and Or. XLI, r. 27—Refusal to admit additional evidence by Appellate Court—High Court, if has jurisdiction to interfere under sec. 115, C. P. C.

The facts material to this report are as follows:—

Plaintiff brought this suit for recovery of money due on two unregistered bonds alleged to have been executed by the Defendant. The Defendant denied the execution of the bonds and pleaded that the suit was the outcome of enmity. The Court of first instance decreed the suit. On appeal by the Defendant the

learned Subordinate Judge allowed the appeal and dismissed the Plaintiff's suit. The learned Judge disbelieved the Plaintiff's case and held *inter alia* that the account books filed by the Plaintiff were not kept in regular course of business and there were entries which disclosed clear evidence of interpolation. On the 20th May 1921 the learned Judge heard the arguments and reserved judgment. On the 23rd May the Plaintiff filed some account books for receiving them in evidence with a view, as was stated, to clear up a misapprehension regarding the account books already exhibited in the case. On the said date the learned Judge refused to admit the account books in evidence, and recorded the following order: "Respondent filed some *khatas* to-day in order to use them in evidence." No fresh evidence can be taken now. Prayer disallowed. Return the *khatas* to the Respondent's pleader after taking receipt." On the 27th May, the learned Judge delivered judgment and allowed the appeal. Against that decision, Plaintiff moved the High Court under sec. 115 of the Civil Procedure Code and obtained the present Rule.

The ground urged on behalf of the Petitioner was that the learned Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in refusing to take in evidence the account books filed by him. On behalf of the Opposite Party it was submitted *inter alia* that under Or. XLI, r. 27 of the Civil Procedure Code, it was entirely in the discretion of the lower Appellate Court to admit additional evidence or not, and in the exercise of its discretion it having refused to admit the additional evidence, the High Court was not competent to interfere in revision under sec. 115 of the Civil Procedure Code, and the case if I. L. R. 21 Cal. 484 at p. 486 was referred to:

Held—That under Or. XLI, r. 27 of the Civil Procedure Code, the admission of additional evidence was a matter within the discretion of the lower Appellate Court, and the learned Judge in refusing to allow the account books to be put in evidence did not act with material irregularity in the exercise of his jurisdiction, and the case did not come within sec. 115 of the Civil Procedure Code.

Babu Atul Chandra Gupta for the Petitioner.

Babu Hemendra Chandra Sen for the Opposite Party.

H. C. S.

Rule discharged with costs.

THE Calcutta Weekly Notes.

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[No. 9.]

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REPORTS (See Index.)

The Recognition of the Soviet.

In a recent case, *A. M. Luther v. James Sagor & Co.*, [1921] 3 K. B. 532, which engaged the attention of the Court of Appeal in England for a number of days, the validity of the acts of the Soviet Republic was impugned by the Plaintiffs. The Plaintiffs had a factory or mill in Russia. The Soviet Republic passed a decree in June 1918 confiscating all mechanical sawmills and woodworking establishments. In pursuance of this decree the agents of the Republic seized the Plaintiffs' mill or factory and the stock of manufactured woods therein and purported to sell the quantity in dispute to the Defendants who were in England. In the present action for a declaration that they were entitled to the wood, the Plaintiffs submitted that the so-called Republican Government of Russia had no existence as a Government, that it had never been recognized by His Majesty's Government; and that the seizure of their goods was pure robbery. The Defendants contended that the Republican Government which had passed the decree nationalizing all factories was the *de facto* Government of Russia at the time, and had been recognized by the British Government as such. Roche, J., found that the British Government had not recognized the Soviet Government as the Government of a sovereign state or power and decreed the suit. Thereupon the Defendants appealed. In two letters dated in April 1921 the Secretary of State for Foreign Affairs, stated that the British Government recognized the Soviet Government as

the *de facto* Government of Russia and that the British Government also recognized the Provisional Government which was in power from March to December 1917 until dispersed by the Soviet. The Court of Appeal held that the British Government had recognized the Soviet Government as the *de facto* Government of Russia existing at a date before the confiscatory decree of June 1918 and that the validity of that decree and the sale of the wood could not, therefore, be impugned. The Defendants established a valid title derived from a recognized sovereign state which cannot be questioned in the Court of England. In the result, the judgment of Roche, J., was reversed and the suit dismissed with costs.

Vakils and their Clients—Non-payment of fees—Change of Vakil.

A question of considerable importance to the legal profession in India was recently discussed by a Bench of Judges of the Madras High Court, consisting of the Chief Justice (Sir John Wallis) and Mr. Justice Krishnan. (Vide, *Muthu Krishna Yuchundra v. Nuree*, I. L. R. 44 Mad. 978). In a probate case instituted on the Original Side of that Court, which had been ordered to be tried as a suit under sec. 85 of Act V of 1881, the caveator had engaged certain Vakils, who unlike those of Calcutta and Bombay are allowed to act as well as plead on the Original Side of the Madras High Court. It appeared that the caveator who had agreed to pay the Vakils the full amount of their fees before written statement was filed, had paid only a portion of it, whereupon the Vakils in question considered themselves justified in refusing to act further on behalf of their client. The latter then engaged another Vakil, who filed a written statement on the last day allowed by the rules, but without the consent of the former Vakils. The written statement was under the rules of the Court returned, because there had been no change of Vakils and the consent of the former

Vakils was wanting. The caveator thereupon applied for a change of Vakils, which was ordered on condition of payment of a certain sum of money to the former Vakils. The payment was made. But meanwhile the case had been posted as an undefended suit, and the application of the caveator to the Judge to treat the written statement previously filed as properly presented or if necessary to excuse the delay in presenting it was refused. On appeal by the caveator against this order, the Appellate Bench, constituted as stated above, held that the Vakils whom the caveator had first engaged but had not fully paid were not entitled on that ground to refuse to take a necessary step in the suit and at the same time to refuse their consent to a change of Vakil, and that delay in filing a written statement within the time fixed thereby in consequence of the refusal should be excused.

The Chief Justice in the course of his judgment observed: "Vakils, as regards acting, are very much in the same position as solicitors in England. Now it is, I think, well settled in England that attorneys or solicitors are not entitled to refuse to go on with an action for want of funds, unless they have given their client sufficient notice of their intention to make other arrangements. . . . It is true that on the common law side an attorney could resist a change of attorney unless his costs were paid, by which must be understood his costs for work already done, in the action, not as in the present case an agreed payment towards the general costs of the action. On the equity side a change of solicitors was allowed without insisting on the payment of costs, and this equitable rule has been held to prevail by reason of the provisions of the Judicature Act: but even the common law rule must be read in the light of the other rule already mentioned, that it is the solicitor's duty to go on if put in funds to meet out-of-pocket expenses." His Lordship then went on to observe that "the rules requiring pleadings to be filed promptly were passed to avoid delays in the disposal of the business of the Court and not as a means of enabling practitioners to obtain prompt payment of their fees . . . It is also unnecessary and undesirable that they should be used for such a purpose, as solicitors and vakils are otherwise sufficiently protected. They can insist on payment of their fees in advance, or rely on their lien on the client's papers and on the fruits of the litigation as

well as on their right to sue for their fees. They are also in a better position than barristers who cannot sue at all and than first and second grade pleaders who under the Legal Practitioners' Act cannot recover on special agreements unless they are in writing and filed in Court and then only to the extent to which they are reasonable." Krishnan, J., concurring, said: "I agree with the learned Chief Justice that the action of the Vakils was not justifiable and that the rules were not intended for the purpose of enabling the Vakils to force their clients to pay their fees at the risk of having their cases dismissed by the Court." The Court's ruling in this case is obviously confined to determining the obligation of the Vakil to continue acting for the client or consent to a change. It does not cover the question of *appearance* in Court. A Vakil fulfils the functions in part of a solicitor and in part of an advocate, and the rules governing the conduct of either solicitors or counsel in England do not furnish altogether satisfactory precedents to govern the relations of a Vakil to his client. It is a matter which should be taken up by the Vakils themselves with a view to arrive at a solution which will be just to the Vakils without being unfair to the litigants.

LONDON NOTES.

(FROM OUR OWN CORRESPONDENT.)

The following cases have been argued before the Board during the past week, (Lords Buckmaster, Atkinson, and Carson, Sir Lawrence Jenkins, and Mr. Ameer Ali).

T. B. Ramachandra Rao, Appellant v. A. N. S. Ramachandra Rao, Respondent, on appeal from Madras.

Dec. 8 and 9, 1921.

There are two main questions for determination in this appeal.

(1) Whether a Hindu lady took an absolute or a qualified estate in property given to her by her husband under a deed of gift.

The trial Court held that the deed conferred on her a widow's estate for life, the High Court held that she took an absolute estate.

(2) Whether the principle of "*res judicata*" was applicable having regard to a judgment of the High Court delivered in appeal in certain Land Acquisition proceedings which contained a finding that only a widow's estate passed.

Both lower Courts held that the principle of "*res judicata*" applied only to the portion of

the property comprised in the Land Acquisition proceedings.

DeGruyther, K. C. and *Narasimham* on behalf of the Appellant argued that only a life estate passed to the lady and that the principle of "*res judicata*" applied to the whole of property comprised in the gift.

Dubé for the Respondent was asked to confine his argument to the point of "*res judicata*" and contended that inasmuch as the earlier Land Acquisition suit was merely a question of compensation any decision therein could not operate as "*res judicata*."

Their Lordships reserved judgment and informed Mr. *Dubé* that they would hear his argument on the other point should it be necessary.

The same Board is sitting to hear the case of:—

Ramalinga Annavi v. Narayana Annavi and others and cross appeal.

Dec. 9, 12 and 13, 1921.

These were consolidated appeals from the High Court of Madras in a suit for partition of properties belonging to a joint Hindu family governed by the Mitakshara law.

The question for determination is whether certain properties belong to the joint family or to an individual member.

Lord Buckmaster unfortunately became indisposed and was unable to preside over the Board after the first day's hearing.

The following Counsel are engaged:—

Sir George Lowndes, K. C. and *Dubé* for *K. Ramalinga Annavi*.

A. M. Dunne, K. C. and *Kenworthy Brown* for *Narayana Annavi*.

DeGruyther, K. C., *Narasimham* and *Parikh* appear for other interested parties.

The argument is expected to continue for another two days.

There now remain only four Indian cases in the list and it is anticipated that the Board will sit until December 21st.

An important case on appeal from Madras was argued before a Board consisting of Lords Summer Wrenbury and Carson during last week by:—

DeGruyther, K. C. and *Harold Morris, K. C.*—*Ex parte*.

L. Oppenheim & Co. v. Hajee Md. Haneef Sahab.

The Appellant and Respondent contracted for the sale of goods and the contract contained a clause for "differences to be submitted to arbitration in London in the usual manner.

The Appellants contended (*inter alia*) that the arbitration clause provided for arbitration only in England and according to English law and that any alleged defect or misconduct in the course of the arbitration should be adjudicated upon according to the provisions of the English Arbitration Act.

Judgment has been reserved.

Dec. 13, 1921.

Now that the railways can no longer look to the State to provide their dividends, economy is a major consideration, and in conjunction with this a rigid enforcement of the rules and bye-laws. This probably accounts for an appeal which yesterday came before a Kings Bench Divisional Court consisting of *Horridge* and *Shearman, J.J.* The Great Western Railway are apparently seeking a legal definition of the term "personal luggage." Mr. *Warwick Evans*, a musician while travelling on the G. W. Ry. took with him his cello weighing something under 14 lbs. In the County Court the Railway Co. sued him unsuccessfully for 2s. 7d. for the carriage of the instrument and accordingly appealed to the Divisional Court.

Mr. Schiller, K. C. for the Railway Co. contended that the instrument was not ordinary personal luggage but was carried for the purpose of his business; a commercial traveller's samples could not be considered as personal luggage.

Mr. Harold Morris, K. C. for Mr. *Evans* contended that the only question for consideration was whether it was ordinary luggage, or not.

To consider that it ceased to be personal luggage if carried by the passenger for the purpose of his profession would prevent a barrister from carrying his wig and gown.

HORRIDGE, J. (*Shearman, J.*, concurring) gave judgment for the Railway Co. and allowed the appeal. He declined to give any definition of ordinary luggage, but held that the cello was carried by the player for the purpose of his profession and was not personal luggage.

Leave to appeal was granted.

G. D. M.

Review.

INTRODUCTION TO THE CIVIL PROCEDURE CODE. By Nagendra Nath Ghose, M.A., B.L., Vakil, Calcutta High Court, and Professor, University Law College, Calcutta. Published by the Weekly Notes Printing Works, 3, Hastings Street, Calcutta: 1922. Price Rs. 4.

To make a text-book out of a statute—out of the Civil Procedure Code, to be more precise—is the task the author of this hand-book set himself to accomplish, and he would be a carping critic indeed who would fail to recognise the ability and insight which have been brought to bear on the performance of the work. One notable feature in the curriculum of legal studies in India is the preponderance in the prescribed courses of statutory enactments; and this is unavoidable since the major portion of the law in force in this country has been framed into statutes. But how many of them really lend themselves to use as text-books? Not very many, and least of all the Civil Procedure Code. Cut up, as it has been, since the passing of the Act of 1908, into a "Body" of the Code and "Rules," even practised lawyers stumble at it, and it is only after several years' diligent study that the beginner in the practice of law (not to speak of students) learns to handle the Code with competence. If there is an Indian statute which more than others stands in need of an "Introduction" to bring it within the range of beginners, it is the Civil Procedure Code. Mr. Ghose has wisely refused to follow the arrangement in the Code, which is both artificial and unsuited to students. The chapters of his book and the topics dealt with in them follow each other in natural sequence. But the book is not just a restatement of the provisions of the Code in a different order. What makes it a real text-book is the skilful blending of the provisions of the Code and the best there is in the case law, which it presents to the reader. Some of the chapters, as for instance, those on *Res. Judicata* (Ch. VIII), Execution (Ch. IX) and Incidence of Appeal (Ch. XII) are little theses combining in themselves the qualities of lucid exposition with sound judgment and scholarship. It is a book for students and practitioners alike, if the aim of the reader is to gain insight into the Code. It is pioneer work too, ably executed, and legal education in this country would owe a great

debt to it, if, as we hope, it will induce others to bring out equally well-executed treatises on the remaining statutes which usually figure in the courses of legal studies.

Notes of Cases. CALCUTTA HIGH COURT.

[Recent decisions not yet reported]

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before SANDERSON, C. J. and CHOTZNER, J. S. A. Nos. 1777 AND 2047 OF 1919. RAJA SASI KANTA ACHARJYA BAHADUR, v. SANDHYA MONI DASIA. The 10th August 1921.

Bengal Tenancy Act (VIII of 1885, B. C.), sec. 103B (3), presumption of correctness when entry relates to land not within the scope of the Act—Sec. 102 (b), weight to be attached to entries not properly made.

The Appellant sued for *khas* possession of some lands which were recorded in the record-of-rights as *chandina* land. He, however, did not produce his papers which would have shown the origin and nature of the tenancy. The lower Court in dismissing the suit held that by *chandina* the settlement authorities meant *bazar* land not subject to the provisions of the Bengal Tenancy Act, and as such no presumption as to the correctness of the entry arose, as it was an entry which the settlement authorities had no jurisdiction to make in the record-of-rights.

Held—That the presumption arising from the entry cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the record-of-rights. The non-production of papers by the Plaintiff-Appellant coupled with the statement of the Defendant was sufficient to rebut the statement in the record-of-rights.

Babus Jogesh Chandra Dey and Gobinda Chandra Dey Roy for the Appellant.

Dr. Sarat Chandra Basak and Babu Annada Charak Karkoon for the Respondent.

J. N. R. Appeal dismissed with costs.

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REPORTS (See Index.)

Common Law of England how far applicable to India.

The Madras High Court has held that the common law of England may be applied to India except when a statute either expressly or by implication abrogates it (*Ramasami Ayyer*, 1. L. R. 44 Mad. 913). In support of the view taken reference is made to *In re Venkata Reddy*, 1. L. R. 36 Mad. 206, where the question arose in a case of defamation in connection with the statement made by the accused in a certain case. A Full Bench of the Madras High Court held that although the English doctrine of absolute privilege was not expressly recognised in sec. 499 of the Indian Penal Code which dealt with defamation it did not necessarily follow that it was the intention of the legislature to exclude its application from the law of this country and by the application of the English common law, the statement was absolutely privileged and could not be the subject of an indictment. There is considerable divergence of judicial opinion on the point, the trend of the decisions in the Madras and Bombay High Courts being one way and that of the Allahabad and Calcutta cases the other way. In the present case, the question of the applicability of the common law of England to this country arose in a case the facts of which were as follows:—On the day in question the Petitioner's attention was drawn to the misconduct of a drunken and disorderly man who was not only threatening to commit a breach of the peace but was a danger to the other villagers. The Petitioner with the help of several persons tied his hands and removed

him to the police station. For this the Petitioner was convicted on a charge of wrongful restraint. The High Court held that under the common law of England, the Petitioner was justified in doing what he did. The rule of common law invoked is thus stated by Baron Parker in *Timothey v. Simpson*, (1885) 4 L. J. (Ex.) 81. "It is clear that any person present may arrest the affrayer at the moment of the affray and detain him till his passion has cooled and his desire to break the peace has ceased and then deliver him to a police officer. And if that be so what reason can there be why he may not arrest an affrayer after the actual violence is over but whilst he shows a disposition to renew it by persisting in remaining on the spot where he had committed it. Both cases fall within the same principle which is that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it so long as his conduct shows that the public peace is likely to be endangered by his acts." The principle was approved of in *Queen v. Light*, (1857) 27 L. J. (M. C.) 1, by the Court of Crown Cases Reserved consisting of Cockburn, C. J., Erle and Williams, JJ., Martin and Channel BB. who held that there was a power not only in a constable but in all subjects of the Sovereign to apprehend a person as to whom there was reasonable ground for supposing that he was about to commit a breach of the peace. As observed by the learned Judges the power given in this matter is one which is very essential to the orderly government of society and the preservation of the peace. No doubt the magistracy and the judiciary should jealously watch any interference with the liberty of the subject and scrutinise carefully the acts of any person who alleges that in order to preserve the peace he had to interfere with the liberty of his fellow citizen. But if that necessity is once clearly established it is

not only the law but it is extremely expedient that the power of interference should be upheld.

only voidable and was binding until set aside by a competent Court, his Lordship held that the indictment of bigamy was sustainable.

Abetment of bigamy by a Hindu father.

A curious case of bigamy recently came up before the Punjab High Court, *Gajja Nand and another v. Crown*, 3 Lahore 288. The facts are these. An unfortunate dispute arose between a Hindu wife and her husband regarding the right to give their daughter in marriage. The wife left her husband's house and migrated with her minor daughter to the house of her brother and while there she married the daughter only nine years old to a man of forty. The child was practically sold to this man who paid Rs. 5,000 as the price of the girl. The father on coming to know of this unfortunate affair took the help of the Criminal Court and the girl on being produced in Court in pursuance of a warrant was handed over to him. A few months later the father solemnised the marriage of the daughter with a suitable bridegroom and this led to the prosecution of the father and the son-in-law for abetting the offence of bigamy. The conviction was upheld by the High Court and the reasons given by Shadi Lal, C. J., are as follows :—

"There can be no doubt that the marriage of a girl of nine years with a man of forty prompted as it was by the cupidity of her maternal uncle and the resentment of her mother against her husband was not in the interests of the girl; but the crucial question for determination is whether it was a void transaction and had consequently no existence in the eye of the law. Now it has been found as a fact that the mother actually celebrated the marriage and the presumption is that the usual ceremonies were performed. The law is perfectly clear that the father is the proper person to give his daughter in marriage, that unless the father has deserted his wife and daughter the mother cannot give the daughter in marriage without the consent of the father. But a Hindu marriage is a sacrament and the rule is now firmly established that a marriage which is duly solemnised and is otherwise valid is not rendered invalid because it was brought about without the consent of the guardian in marriage or even in contravention of an express order of Court." In this view and further holding that even if the first marriage was brought about by fraud it was

A Hindu father in the position disclosed by the facts of this case would naturally command the sympathy of every one but under the law as it stands, there is perhaps no answer to a criminal charge. But so far as the man who marries the girl is concerned it is absolutely necessary that it should be found against him that he had knowledge of the fact that the girl had a husband living. This is all the more necessary in a case where the girl in question has not passed the age at which marriage usually takes place and there is no reason to suspect any foul play. The judgment of the High Court no doubt affirms the conclusions arrived at by the lower Court but in a criminal case one would expect to find some indication in the judgment of the High Court showing that this very material point was taken into consideration. There is no doubt that in such cases the person who marries the girl is in a different position so far as mens rea is concerned from the person who gives away the daughter.

From the point of view of the father also cases like these ought to engage the serious attention of Hindu society, for so far as these matters are concerned the Government is totally helpless and cannot be expected to take any initiative to bring about a change of law. Without meaning to say anything derogatory to the sacrosanct character of marriage in Hindu law it seems to be repugnant to all notions of justice and common sense that a girl practically sold as a slave to a rogue under the garb of ceremony of marriage should be given up as lost for ever.

A Suggestion from the Administrator-General and Official Trustee's Office.

The Administrator-General and the Official Trustee has drawn our attention to the fact that members of the legal profession in addressing communications to him do not head those communications so as to indicate the estates or trusts to which they refer. This omission, he writes, causes a considerable amount of inconvenience and confusion in the records of the Administrator-General and the Official

Trustee, and also leads to delay in attending to communications. We think it desirable that the suggestion should in the interest of all parties concerned be followed.

A Correction.

Mr. S. Srinivasa Iyengar, Vakil, Madras High Court, writes to inform us that the Privy Council, on the 19th December last, has affirmed the decision of the Madras High Court in the appeal of the *Secretary of State for India in Council* against the *Rajah of Vizianagram*, and not reversed it as has been announced in our correspondent's London Notes published in the issue of the 5th December 1921. Our correspondent evidently recorded these notes prior to the delivery of the written judgment. The judgment delivered by the Privy Council is presumably what Mr. Iyengar says it is, and we are awaiting confirmation thereof from our correspondent.

LONDON NOTES.

(FROM OUR OWN CORRESPONDENT.)

Dec. 23, 1921.

During the past week the Board concluded the hearing of *Ramalinga Annani v. Narayana Annani*, an appeal and cross-appeal from Madras in which the argument took six days. The suit out of which these appeals arise is one for partition and the main questions that arise are (1) what are the joint family properties available for division? (2) Whether one of the Defendants is or is not to be treated as a member of the joint family entitled to a share on partition? (3) Whether the properties in the possession of Defendants 2 and 4 are their exclusive properties?

Sir Geo. Lowndes, K. C. and *Mr. Dubé* appeared for the Appellant-Defendant No. 1.

Messrs. A. M. Dunne, K. C. and *Kenworthy Brown* for the cross-Appellants.

Messrs. DeGruyther, K. C., Narasimham and *Parikh* for other members of the family with divergent interests.

The arguments were almost entirely directed to the facts.

Sarju Prasad Missir v. Maksudan Chaudhuri, an appeal from Patna was argued before the Board on the 19th and 20th December.

Messrs. DeGruyther, K. C. and *Dubé* appeared for the Appellants;

Mr. Parikh (for *Mr. Abdul Majid*) appeared for the Respondents.

The principal question for determination is whether the Appellants can challenge the purchase at an auction of the property in dispute by the predecessor of the Respondents, seeing that they had allowed the Respondents to remain in possession for 20 years and had acquiesced in a decision of the Court excluding the properties from sale and whether the suit is barred by limitation. Having heard the arguments the Board reserved judgment, but on the following day they informed counsel that they desired to have further evidence from India and would give counsel the opportunity of again addressing the Board when this evidence was received.

The last case heard by the Board consisting of Lords Buckmaster and Carson and Sir J. Edge was an *ex parte* appeal from a Full Bench decision at Patna, *Mahant Jagannath Das v. Janki Singh*.

The suit was one for the recovery of possession of certain property which has been held to be *zirat* land. The main question for decision is whether the suit is governed by the limitation provided by Art. 139 of Sch. I of the Limitation Act, 1908, or whether it is governed by the provisions of Art. (1) (A) of Sch. III of the Bengal Tenancy Act, 1885, as amended by the Bengal Council Act I of 1907.

The Chief Justice and Mullick and Roe, JJ., had held that the provisions of the Bengal Tenancy Act were applicable on the ground that the Defendant was a non-occupancy tenant (*Chapman and Jwala Prasad, JJ. contra*).

Mr. Parikh for the Appellant argued that the majority of the Full Bench were in error. At the conclusion of his argument their Lordships said that they would consider the advice that they would tender to His Majesty; and the Court rose for this term.

The next sitting begins on the 19th January and the intention at present is to commence with the hearing of Colonial appeals.

G. D. M.

Reviews.

TRIAL OF THURTELL AND HUNT. By Eric R. Watson, LL.B., *Bar-at-Law*. Butterworth & Co. (India), Ltd. 6, Hastings Street, Calcutta. Price Rs. 6-8.

This is one of the latest additions to the Notable British Trials series. It took place in the year 1824 and was almost the last famous trial to take place under the Tudor procedure, rightly described as "inquisitorial." It stands out with hardly a parallel as a murder undertaken with no other object but lucre by several persons unconnected by domestic ties. To the criminologist any case of such a nature presents itself as a rarity in the psychology of murder. Such enormity of guilt as is implied in a cold-blooded mercenary murder almost forbids the association of several for its accomplishment—the mutual confidence essential to criminal conspiracies would be lacking in men so utterly depraved.

"The final purpose of murder considered as a fine art," says DeQuincey "is precisely the same as that of tragedy . . . to cleanse the heart by means of pity and terror. Now terror there may be but how can there be any pity for one tiger destroyed by another tiger." Yet observes the master critic "The world in general are very bloody minded; and all they want in a murder is a copious effusion of blood; gaudy display in this point is enough for them." To this base love of the vulgar for the merely horripilant element in murder must be attributed the immense reputation of Thurtell as a murderer. The incident was a sensational one. At the trial the prisoners were defended by counsel like Chitty and Thesiger. It is interesting to read the report of the motion in arrest of judgment made by the former of these celebrated lawyers when he found that all his other efforts failed to save his client. The following description of what took place is quoted in the introduction to the book from a M. S. of Lord Chelmsford himself. "We were all exhausted and in a state of nervous excitement and the Judge was preparing to put on the black cap to pronounce sentence. At this awful moment Chitty, the celebrated special pleader, rose to move in arrest of judgment. He was always a confused speaker at the best of times but he was then in such a state of nervous trepidation that he was hardly articulate and in the midst of a confused jumble of words it was

with difficulty that we could understand his objection—that the trial had begun on January the sixth, the feast of the Epiphany, which was a *Dies non* like a Sunday and therefore that the whole proceeding was void. The only answer given by Mr. Justice Park was expressed in these terms. "Why Mr. Chitty, the Lord Chief Justice frequently tries cases on Good Friday" to which Chitty answered "Talking of Good Friday puts me in mind of a story" and then he told the well-known anecdote but with the omission of Pontius Pilate, the only point." The present volume like others of the series will be read with interest by laymen and lawyers alike.

THE LAW RELATING TO CONTRACT OF SALE OF GOODS. By William Wallis. Second Edition. By W. Nembhard Hibbert, LL.D. (London). Published by Sweet and Maxwell, Limited.

This carefully prepared little volume of about 200 pages consists of six lectures delivered by the author at the request of the Council of Legal Education on the law relating to the Contract of Sale of Goods. The object in delivering the lectures was to facilitate the study of the provisions of the Sale of Goods Act, 1893. In the present edition of the book which is the second, certain matters contained in the Errata of the former edition have been incorporated with the text and some few alterations necessitated by recent decisions and statutes have been set out in foot-notes. The Text of the Sale of Goods Act, 1893, has been printed in the appendix. The book which is one specially suited for students of law contains a clear exposition of the law of contract relating to the sale of goods as contained in the English statute. The printing and get up of the book are as they are always found to be in Messrs. Sweet and Maxwell's publications.

THE

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the case applied after the death of the Defendant against whom he had got a decree for execution and caused notice under Or. XXII, r. 22, C.P. C., to be served on the judgment-debtor's brother's widow as his legal representative, in spite of the fact that he was aware that the debtor had bequeathed his properties to his mistress. The High Court (Macleod, C. J. and Shah, J.) held that the debtor's mistress who was to the Plaintiff's knowledge his real legal representative was not bound by the sale which in the circumstances was void and not voidable only. The only circumstance which differentiates this case from *Malkarjun's* case is that in *Malkarjun's* case the decree-holder may be assumed to have sought to cause the wrong person to be made a party as the legal representative of the deceased judgment-debtor under a *bonâ fide* mistake. The knowledge on the part of the decree-holder of the actual state of things was no doubt relied on by the Privy Council in *Raghunath Das v. Sunder Das*, L. R. 41 L. A. 251, as a ground for differentiating that case from *Malkarjun's* case. But we fail to find what difference that circumstance makes in the application of the general principles enunciated in *Malkarjun's* case, since the making of a person a party as legal representative is in every case dependent on the adjudication of the Court. The Chief Justice in the case under notice appears to think that the difference lies in the fact that in *Malkarjun's* case there was an adjudication, and none in this case. The present case could be differentiated on the ground of fraud on the Plaintiff's part but that is not the footing upon which the judgment of the Court proceeds; and it is doubtful if even fraud would make the sale void and not voidable only.

ATTESTATION OF MORTGAGE BOND.

By MR. KSHETTRA NATH SINGH,
MUNSIF OF RANCHI.

Can the admission of a party as regards execution of a mortgage bond render valid that which is invalid?

The above point was first raised by the Hon'ble Mr. Justice Dass in *Mussammat Hira v. Ramdhan* in 2 Pat. Law Times 752 at page 754 (s. c. 1922 Pat. 42) with reference to the question of the valid attestation of a mortgage bond by at least two attesting witnesses under sec. 59 of the Transfer of Property Act. It is ruled in 35 Mad. 607 (P. C.), that attestation of a

mortgage bond must be made by witnesses signing their names after seeing the actual execution of the deed and that mere acknowledgment of signature by the executant is not sufficient. His Lordship after citing Woodroffe on Evidence and 44 Cal. 345, 22 C. W. N. 444 and 4 P. L. J. 511, as established authorities of the Calcutta and Patna High Courts for the view that the admission of execution of a mortgage bond renders it unnecessary for the Plaintiff to prove its valid attestation according to sec. 59, goes on to observe as follows:—"If the matter were *res integra*, I should doubt whether admission of a party can render valid that which is invalid. The question is—Is the rule enunciated in sec. 59 of the Transfer of Property Act a rule of law affecting the validity of the mortgage or is it a rule of evidence affecting proof of the document? My own view is that sec. 70 of the Evidence Act operates only when the mortgagee has not given any evidence at all of due execution of the document by the mortgagor, but relies on the admission by the mortgagor But the matter would stand on an entirely different footing if the mortgagee produces his evidence of the execution and that evidence establishes that the document was not attested in the manner required by sec. 59 of the Act."

The identical question arose in *Paban v. Badal*, 34 C. L. J. 498, in which the Hon'ble Justice Sir N. R. Chatterjea and the Hon'ble Mr. Justice Panton, while coming to the same conclusion, did not feel themselves bound by the rulings of 44 Cal. 345 and 22 C. W. N. 444, mentioned above, and observed as follows:—

"In those cases, however, the only question related to proof of execution of the mortgage bond. No question was raised before or decided by the Court, in either of the two cases as to the validity of the mortgage bond with reference to the provisions of sec. 59. The two questions are different, one being the question of proof of execution of a document required to be attested by calling one attesting witness under sec. 68 of the Evidence Act, which, however, is not required where the execution of the document is admitted by the executant as laid down in sec. 70 of the Evidence Act. The other question relates to the validity of the mortgage even though the document might be proved according to law." It is also interesting to observe that 2 P. L. T. 752, was decided in June 10, 1921, and that in July 26 of the same year 34 C. L. J. 498, was de-

cided obviously without reference to the former.

Another point which often comes up before the trial Courts is the stage at which the validity of a mortgage bond can be questioned. In 29 Ind. Cases 991 (Mad.), it is ruled that where in the course of the trial and not on the pleadings a Defendant raises the plea that the mortgage is invalid, because the signature of the mortgagor was not attested by two witnesses the Court should not dismiss the suit for that reason. It is only upon a distinct and supplemental issue framed on the point and after giving both the parties an opportunity to address fresh evidence on it, that the Court should find for or against the invalidity of the document for that reason. This ruling merely lays down that a plea of invalidity of the document should not be allowed to be raised by the Defendant at a late stage, without allowing the Plaintiff mortgagee an opportunity to adduce all available evidence to meet the Defendant's case: similarly in 34 C. L. J. 498, the trial Court failing to appreciate the distinction between proof of execution of the mortgage and its validity under sec. 59 of the Transfer of Property Act, held that the execution of the bond not being challenged, the necessity of its proof did not arise and overruled the other plea of one of the Defendants, viz., that the bond should not be regarded as a mortgage bond. The lower Appellate Court, however, held that the only attesting witness examined was the scribe who also executed the document on behalf of the mortgagor and, there being no other evidence, dismissed the suit, holding that sec. 59 had not been complied with. Their Lordships, however, pointed out that, unlike 23 C. W. N. 290, the scribe was not the only one of the attesting witnesses who signed their own names. Their Lordships, in the result, remanded the suit for fresh evidence on the ground that though the point was taken in the written statement, the distinction, as pointed out above, was lost sight of by the lower Courts.

The case, however, stands on a different footing when after a distinct issue has been raised and the Plaintiff has called all his available witnesses, it transpired at the cross-examination of the attesting witnesses that they did not see the executant to sign. In such a case, the only thing to do is to dismiss the suit, if a personal decree cannot be given. See 31 Ind. Cas. 706 (All.). Even if no issue is raised by the Defendant as regards the validity of the document, if the Plaintiff mortgagee

chooses to examine all his available attesting witnesses and it transpires at the cross-examination of the Plaintiff and his witnesses that the condition of sec. 59 of the Transfer of Property Act were not fulfilled, the Court has ample power to frame an issue at that stage and to decide the suit forthwith on the admission of the Plaintiff's witnesses as regards the invalidity of the mortgage. In 35 Madras 607 (P. C.), mentioned above, this was exactly what was done and there was no contention before their Lordships of the Judicial Committee that the Plaintiff had not been given sufficient opportunity to let in evidence on the new issue.

Another point which arises in connection with the question of valid attestation of a mortgage bond is, if the mortgagee fails to prove his document as a mortgage bond, is he entitled to a simple money decree? It seems in the first place that where a personal liability is reserved in the mortgage bond, a money decree may ordinarily be given, unless it is barred by limitation. In 31 Ind. Cas. 706 (All.), it is however, ruled by the Hon'ble Sir H. Richards C. J. and the Hon'ble Mr. Justice Rafique that under the circumstances of the suit, no simple money decree could be given because that would entirely change the character of the cause of action. In this case, the Defendant was the son of the executant and their Lordships ruled:—"This would be entirely a new cause of action in which there might entirely be a new defence." Their Lordships also remarked thus:—"In order to give a simple money decree, we should either amend the plaint or treat the plaint as amended." Again in 33 Ind. Cas. 111 (All.), it was ruled by the same Judges that "a Court is not bound to give a simple money decree where the Plaintiff sues to realize his debts on foot of a mortgage. A simple money decree is frequently given by the Courts but that is a matter of grace; when it does so, it should amend the plaint by adding a claim for a simple money decree. Their Lordships were inclined to give a money decree in that particular case but it transpired that the suit was instituted more than 6 years after the date of the bond for which personal liability was barred under Art. 116 of the Limitation Act. In the Calcutta High Court, it is distinctly ruled that an improperly attested document will fail of its effects but it may be used to obtain a personal decree against the executant. A different note is struck in 18 Mad. 29, which is, however, dissented from in 26 Cal. 222 and

is also disapproved in 30 Mad. 284. But if the personal covenant reserved in the document cannot be dis-entangled from the mortgage, it cannot be enforced at all and the deed then wholly fails. (See 5 Cal. 611).

The attestation of a mortgage bond within the meaning of sec. 59 of the Transfer of Property Act is a pitfall of many a money-lender in the backward parts of this country and is a source of much litigation in which the mortgagees appear to be at the mercy of much too common dishonest attesting witnesses.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CHATTERJEA and PANTON, JJ. APPEAL FROM APPELLATE DECREE No. 1396 OF 1919. SARASIBALA DASI, (Plaintiff) Appellant *v.* CHUNILAL GHOSE, (Defendant) Respondent. Heard 22nd November 1921. Judgment 23rd November 1921.

Indian Contract Act, IX of 1872, secs. 201 and 209—Limitation Act, IX of 1908, Arts. 89-120 of Sch. II—Agency conclusion of—Suit for furnishing account against agent; death of the principal Agent or Trustee.

The Appellant brought this action on 21st December 1916 against the Respondent claiming accounts for the years 1301 to 1321 B. S. and for recovery of the amount found due upon such accounts being taken.

The Defendant was the agent of the Appellant's husband, Jotindra, for collection of the rents and profits from his landed properties and for payment of the dues of the superior landlords and so forth. Jotindra died on 25th July 1912. The question in this appeal was whether the Plaintiff's claim for accounts was barred by the statute of limitation—the suit having been brought beyond three years from 25th July 1912, the date of the Plaintiff's husband's death.

The lower Appellate Court on appeal by the Respondent, found that he was the agent of the husband down to his death, *i.e.*, till 25th July 1912 and he then remained in the service of the Appellant, his widow and administratrix, till the end of 1321 (about middle of April

1915) when his services were dispensed with. The contention was that the agency having terminated on 25th July 1912 by the death of the principal and this suit not having been brought before 25th July 1915 the Appellant's claim for accounts for the period prior to (the Plaintiff's husband's) death, *i.e.*, till 25th July 1912 was barred. The said Court then holding that having regard to sec. 201 of the Indian Contract Act, Art. 89 and not Art. 120 of Sch. II of the statute of limitation applied to the case, dismissed the claim of the Plaintiff for the period prior to the date of the Plaintiff's husband's death, *viz.*, till 25th July 1912.

It was contended for the Appellant before their Lordships, that the position of the Defendant (Respondent) having been altered to that of a Trustee after the death of the Appellant's husband so far as the interest of the deceased was concerned—by operation of sec. 209, Indian Contract Act, Art. 120 applied to the case and not Art. 89 which limits the agent's liability from the conclusion of the agency. (1) *Nabin Chunder Barua v. Chundra Madhub Borua*, (1916) 44 C. I. (P. C.) and (2) *Nodhusudan v. Rakhal*, (1915) 43 C. 248 at p. 254:

Held—That the suit being one for accounts on the ground, that the Defendant-Respondent was bound to render accounts to his principal, and there being no question here of suing the Defendant for acts done by him after the death of his late principal which he might have done as Trustee, Art. 89 and not Art. 120, Sch. II of the Limitation Act applied to the case.

Dr. Sarat Chunder Bysack for the Appellant.

Mr. Monmotho Nath Ganguly for the Respondent.

H. D. C.

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REPORTS (See Index.)

Local inspection by Magistrates:

A practice has grown up of Magistrates holding local inspections in connection with cases which they are trying. There is absolutely no foundation for this in the Code of Criminal Procedure, but the practice has nevertheless been a long standing one. A distinguished criminal lawyer was once arguing a case in the High Court before Sir Henry Thobey Prinsep and in the course of his argument took strong exception to the local inspection by the Magistrate in the case in question. This evoked a prompt remark from Sir Henry, than whom no one was more competent to pronounce on questions relating to the practice of Criminal Courts, that he had done it ever since he was an Assistant Magistrate. On examining the matter the learned Judge at once agreed that the practice was wholly illegal. Judicial decisions while pointing out the unfounded nature of the practice in question have countenanced it to this extent that the Magistrate can hold a local inspection only for the purpose of understanding the evidence placed before him. The reasoning is that although our judicial system does not admit of the decision of cases in any other way than on the evidence before the Court the Magistrate if he finds himself in a situation which makes it impossible for him to understand the evidence without the aid of a local inspection may do so but the safe-guard has at the same time been laid down that he must keep a note of his inspection on the record. We very often

find that Magistrates omit to bear in mind this wholesome injunction, the result being that not only an illegal practice is resorted to but it is done in a wholly unwarranted manner which is opposed to all notions of justice and common sense. The safe-guard laid down acts as a salutary check on the Magistrate and enables the party who may be aggrieved to get the case transferred to some other Court, have the Magistrate called as a witness by the Court and then test the accuracy of the record by cross-examination. In *Athar Hus-sain v. The King-Emperor*, 1921 Pat. 27, it appears that after the close of the case for the prosecution and the defence and at the request of the prosecution the Magistrate inspected the place of occurrence and relied on his inspection in deciding the case. In his explanation the Magistrate stated that he did not import anything in the judgment which was not in the evidence and therefore did not think it necessary to write an inspection report and that there was no provision in the Code of Criminal Procedure making it obligatory on a Magistrate to do so. This is a typical case which shows the mischief of allowing an illegal practice to grow. It shows how one illegality leads to another and is resorted to as a justification for the other. His Lordship Jwala Prasad, J., very rightly disapproved of the Magistrate's action and set aside the conviction relying on the well-known case of *Babban Sheikh v. Emperor* decided by the Calcutta High Court (14 C. W. N. 422).

THE HINDU LAW OF REVERSIONS AND REVERSIONERS.

(Continued from p. viii.)

The main points of distinction in the position of Reversioners under the English and Indian Systems of Law.

In the first place the Reversioner under the English Law has always a vested interest in the reversion, which can, therefore, be dealt

with *as an actual interest in land*, and so is capable of being inherited and transferred (1).

On the other hand the Reversioner of a Hindu widow has a *future, uncertain and contingent* interest in the reversion: in other words, he has a mere *naked chance of succession to the widow, contingent on survivorship to her*, (and non-intervention of any nearer heirs than himself), for before her death it is, of course, impossible to say (i) who shall actually survive her and (ii) occupy at her death the position of heir to the last full owner (2). A mere possibility of succeeding to a reversion of this kind cannot be inherited or transferred (3) *as if it were a vested interest*, as in the case of a reversion under English law.

Secondly, the grantee of a *particular estate*, (say, a lease for a term of years, or for life, *sliced off out of a fee-simple*), of course derives his title by *grant*. Upon the determination of that estate, therefore, the tenant-in-fee, or his heir will again become tenant-in-fee-simple *in possession*.

A Hindu widow, on the other hand, *does not derive her title to her deceased husband's estate by grant from her so-called reversioners, for they themselves have no vested interest therein in the life-time of the widow to grant*.

Indeed, as put by Lord Darvev in *Bejoy Gopal Mukerji v. Krishna Maheshi Devi*, "A Hindu widow is not a tenant for life, but is owner of her husband's property, subject to certain restrictions on alienation, and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is *not*, therefore, absolutely void, but it is *primâ facie* voidable at the election of the reversionary heir."

Thirdly, the holder of a *particular estate*—a tenant for life, for instance—is not permitted by English law to deal with the estate as if he were seized in fee, and, therefore, no acts of his can, under any circumstances, defeat or destroy the *ulterior interest*, which remains

vested in the grantor during the continuance of such particular estate.

Under the Hindu Law, on the contrary, the widow, the holder of her husband's estate, can under certain circumstances give an absolute and complete title so as to defeat or destroy altogether the prospects of reversioners, (the whole estate being, for the time being, as observed in *Shivagunga* case (1), *vested* in her absolutely for some purposes, though in some respects for a qualified interest). Hence the interest of the reversioners of a Hindu widow cannot, strictly speaking, be said to be an *estate in reversion*, neither can the estate of the widow herself be rightly called a *life estate*, even according to that very system of law from which the terms themselves have been borrowed.

Fourthly, the estate of a Hindu widow cannot in any sense be said to be an *estate held in trust for the ulterior heirs*, i.e., *reversioners* (2). In other words, there is no relationship of *Cestui-que-trust* and *Trustee* between the reversioner on the one hand and the widow on the other during the continuance of her estate. The only right allowed to the reversioner by Hindu Law is the right to guard against wilful waste and unauthorized alienations by her, *no doubt a consequence of the doctrine of Reverter incident to her qualified estate*. This right relates rather to the limitations of that qualification than to the limits of her rights as *heir-at-law*, i.e., to the restraints or fetters on her power of alienation which are inseparable from the very nature of her estate and *have nothing to do with the existence or non-existence of reversionary heirs* capable of taking on her death (3); for on their failure the Crown possesses the same power which they would have of protecting its interests by impeaching any unauthorized alienation by her. Indeed, the concession of a right of suit in these cases to the reversioners, and, failing them, to the Crown as *ultimus hoeres* is allowed, as pointed out in *Chiruvolu v. Chiruvolu* (4), only for the

(1) *Williams on Real Property*, 22nd Ed. [1914] pp 337-338.
(2) *Chiruvolu v. Chiruvolu*, 1. L. R. 29 Mad. [1906] 391 (401) F. R.

(3) *Anrit Narayan Singh v. Gama Singh*, 22 C. W. N. [1917-1918] 409 (413-415) P. C.; *Janki Ammal v. Narayan Sami Aiyar*, 14 All. L. J. [1916] 997 1000 P. C.; *Sham Sunder v. Achhan Kuar*, 1. L. R. 21 All. [1899] 460, overruling *Brhadadeo v. Harjan*, 1. L. R. 25 Cal. [1898] 778; see also *Jagannath v. Dibbo*, 1. L. R. 31 All. [1908] 53 and *Nund Kishore Lal v. Kance Ram*, 1. L. R. 29 Cal. [1902] 355 (363); see also the leading case of *Amundo Mohan Roy v. Gour Mohan Mallik*, 25 C. W. N. [1920] 498, per Sir Asutosh Mookerjee, Off. C. J. and sec. 6, *Indian Transfer of Property Act* (IV of 1882).

(1) *Kabura Natchiar v. The Ra's of Shiva Gunga*, [1863] 9 Moo. I. A. 543.

(2) *Mayne's Hindu Law and Usage*, 7th Ed., p. 842; *Abinash v. Harinath*, 1. L. R. 32 Cal. [1904] 62.

(3) *The Collector of Mamulipatam v. Cavaly Venkata Narainipath*, 8 Moo. I. A. [1861] 500 (553).

(4) See *supra*, (at p. 402 of the Report); see also *Abinash Chandra Mazumdar v. Harinath Sha'a*, 1. L. R. 32 Cal. [1904] 62 66-67; *Gorind Pillai v. Thajiammal*, [1904] 57 (63), per Davies, J.; *Chotto Misser v. Temah Misser*, [1890] 1. L. R. 6 Cal. 198; s. c. 6 C. L. R. 588; see also *Behary Lal Mohurwar v. Madho Lal Shir Gyalal*, [1874] 13 B. L. R. 222; s. c. 21 South. W. R. C. B. 430.

purpose of protecting the interests of the person or persons who may eventually turn out to be the heir or heirs, and the object of the legal proceeding is really the perpetuation of testimony, which, owing to lapse of time might not be available for the heir when the succession actually opens.

Therefore, except as limited by this right of suit in favour of the reversioners, the widow cannot be said to be life-tenant or trustee for the latter. "Within the limits imposed upon her the female-holder has the most absolute power of enjoyment. She is accountable to no one, and fully represents the estate, and so long as she is alive no one has any vested interest in the succession" (1).

Accordingly it has been held, (2) "a widow is not bound to mortgage any portion of her husband's estate if that would be more prejudicial to her than sale by reducing her income to a greater extent as she does not hold the property for the benefit of the reversioner." Again, conversely, a reversioner "does not derive title from a restricted owner, (3) nor does one reversioner claim through another; but each derives his title from the last full owner (4). So, where "of several kindred of equal degree who would have jointly succeeded but for the widow, if any die in the interim between the deaths of the husband and the widow, their heirs are excluded."

For the same reason, "there is no privity of estate between one reversioner and another as such, and, consequently, an act or omission by one reversioner cannot bind another reversioner who does not claim through him" (5). There is, however, an apparent exception as regards, firstly, those cases, (e.g., suits impeaching adoptions) where there has been a virtual and constructive representation of the whole body of reversioners through one of them (6); and, secondly, as regards those cases where the

presumptive reversioner for the time being consented to an alienation by the limited female, whether or not he eventually succeeds to what remains of the reversion undisposed of, on grounds justifiable by Hindu law and, therefore, fairly raising a presumption, albeit rebuttable, of the propriety of the transaction (1).

Where, however, as in *Rangappa Naik v. Kampti Naik* (2), the actual reversioner, (i.e., the one among possible heirs, who eventually succeeds to the widow's estate participates in the consideration paid to his ancestor by the widow as the price of his assent to an alienation by her, he is estopped from impeaching the transaction, for one cannot participate in such benefit and at the same time call in question the propriety of the transaction.

As regards the class of suits, (such as those relating to adoption), where one reversioner has in a representative capacity virtually represented the whole body of reversioners for the time being, "the principle of finality of litigation, which alone would be the foundation of the rule, would apply equally to suits by remote reversioners when they are allowed to institute and carry on such suits" (3).

N. MUKERJEE, M.A., B.L.,
Bar-at-Law.

(To be continued.)

Notes of Cases CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before RICHARDSON and B. B. GHOSE, JJ. M. A. No. 81 of 1921. CHARU CHANDRA MAZUMDAR, Appellant v. FANINDRA NARAIN CHOWDHRY and others, Respondents. The 23rd January 1922.

Application for execution—Stay—Exclusion of time—Step in aid of execution.

The Appellant Charu Chandra applied for the execution of a decree against the Respondents on 28th August 1915. The decree was, during the pendency of the execution, attached under the orders of another Court on 24th January 1916 under Or. XXI, r. 53. In pur-

(1) *Mavne's Hindu Law and Usage*.

(2) *Abinash v. Harinath*, I L. R. 32 Cal. [1904] 62.

(3) *Shib Shankar Lal v. Soni Ram*, [1909] I L. R. 32 All. 33-41.

(4) *Bhagwati v. Sukhi*, [1899] I L. R. 22 All. 33; *Govind Pillai v. Thayammal*, [1904] 14 Mad. L. J. 209; s. c. I L. R. 28 Mad. 57; *Abinash v. Harinath*, [1904] I L. R. 32 Cal. 62; *Harek Chand v. Bejoy Chand*, [1905] Cal. L. J. 87 (95); *Shib Shankar Lal v. Soni Ram*, see *supra* and *Chhiddu v. Durgu Dei*, [1901] I L. R. 32 All. 382; see also recent P. C. judgment in Cal. L. J., dated 16th June 1919.

(5) I.e., unless he is heir of such reversioner in whom the estate *Bahadur Singh v. Mohor Singh*, [1901] 25 I A. s. c. I L. R. 24 All. 24; 6 Cal. W. N. 189; *Govind Pillai v. Thayammal*, [1904] I L. R. 28 Mad. 57; *Abinash v. Harinath*, I L. R. 32 Cal. [1904] 62.

(6) 26 Indian Cases, [1915] 757 (774).

(1) *Raj Lakshmi's case*, 13 Moo. I. A. [1869] 209.

(2) I L. R. 31 Mad. [1904].

(3) *Sakyahuni Ingles Rao Sahab v. Bhaynni Dozi Sahab*, I L. R. 27 Mad. [1904] 588 (590).

suance of the said order of attachment the Court stayed execution on 25th January 1916. On that very day the Appellant applied for execution of his decree under Or. XXI, r. 53, sub-r. 1, cl. (b) and the Court allowed him to proceed with the sale on condition that the money for which his decree was attached should be paid out of the sale proceeds. The sale was held on 26th January 1916 and the Appellant who purchased the property applied for and was allowed to have the purchase money set off against a part of the dues under his decree. This fact was brought to the notice of the Court by the judgment-debtor and the Court set aside the sale and directed stay of execution until further orders on 5th February 1916. On the 25th January 1917 the Court received back the records from the Appellate Court and directed the decree-holder to take steps by 31st January 1917. Nothing having been done on that date the execution case was dismissed for default. The present application for execution was filed on 22nd January 1920. The properties sought to be sold in the present execution case were different from those comprised in the execution case started on 28th August 1915. Both the Courts below held that inasmuch as the only effective stay order was made on 5th February 1916, which lasted till 25th January 1917, when the Court directed the decree-holder to take steps, the present application for execution was barred by limitation :

Held (without entering into the question whether the period between 24th January 1916 and 4th February 1916 should be excluded or not)—That the Appellant should be allowed to exclude the period from 5th February 1916 to 3rd February 1917, when the attachment order by the other Court was withdrawn and that the last step in aid of execution having been taken on the 26th January 1916, when the decree-holder applied for a set-off, the application for execution was not barred by limitation.

Babu Jatindra Nath Sanyal for the Appellant.

No one appeared for the Respondents.

J. N. S. *Appéal allowed.*

420, elements constituting an offence under—Indian Evidence Act (I of 1872), sec. 25, proving of admission before a police officer, if vitiates the conviction.

The Petitioner lodged a complaint at Alipur against one Gurupada under sec. 406, I. P. C., for his refusal to return certain instruments which he had taken from the Petitioner on hire. Thereafter the said Gurupada lodged a complaint against the Petitioner in the Chief Presidency Magistrate's Court on the allegation that the Petitioner represented to him that he had got some order from a polishing firm and took loan of a sharpening machine from him, promising to return it after a few hours, but that he did not return it. While the Petitioner's Alipur case was pending, the case against the Petitioner in the Presidency Magistrate's Court came up for hearing before a Bench of Hony. Magistrates, and the prosecution examined, amongst other witnesses, one Asst. Sub-Inspector of Police of the Tollygunge Thana to prove that the Petitioner had admitted before him that he had taken the sharpening machine and that he promised to return the same to the Thana. The Petitioner was convicted under sec. 420, I. P. C. and sentenced to three months' rigorous imprisonment and to pay a fine of Rs. 100. Against the said conviction and sentence the Petitioner moved the High Court and got the present Rule :

Held (in setting aside the conviction and sentence)—That the elements necessary to constitute an offence under sec. 420, I. P. C., had not been established and that the Hony. Magistrates acted illegally in allowing the prosecution to adduce evidence to prove the alleged admission of the Petitioner before the Asst. Sub-Inspector of Police, and the conviction passed relying thereupon was bad in law.

Mr. Chippendale (for *Babu Harendra Kumar Sarbadhikary*) for the Petitioner.

Rabus Atulya Charan Bose, Surendra Nath Ghosal and Susil Kumar Roy Choudhury for the Opposite Party.

J. N. R.

Rule made absolute.

CRIMINAL REVISIONAL JURISDICTION. Before WALMSLEY and SUTCLIFFE, JJ. REVISION No. 1009 of 1921. *HARI MOHON GHOSE*, Accused, Petitioner v. *THE KING-EMPEROR*, Opposite Party. The 17th January 1922.

Indian Penal Code (Act XLV of 1860), sec.

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Disproportionate sentences in criminal cases.

We have from time to time commented on disproportionate sentences passed in criminal cases. With the advance of the human race in intelligence and morality, in enlightenment and civilisation the criminal law has been steadily improving, subjectively and objectively both as regards the character and extent of crimes and the nature and severity of punishment and also as regards the conditions of liability and the methods of enforcing it. The question of the nature and extent of punishments is as important as difficult. The entire history of the Criminal Law shews a decided and growing decrease of severity in the punishments inflicted upon criminals. The change was to a great extent due to the greater recognition of the true object and requirements of punishment and to the greater predominance of the relative theories of deterrent and reformation—theories which distinguish modern criminal jurisprudence from the system of blind and indiscriminate severity which they have happily helped to supersede and which seemed to regard a criminal as a heinous excrescence on society to be ruthlessly extirpated, rather than as a diseased member to be rendered whole if possible. It came to be gradually admitted that it was a kind of quackery in Government and argued a want of sound judgment to apply the same universal remedy, the *ultimum supplicium*, to every case of crime; and though it was much easier to extirpate than to amend mankind yet that Magistrate must be deemed a weak and cruel surgeon who cut off every limb which through ignorance or indolence he would not attempt to cure.

In a recent case decided by the Patna

High Court (*Gossain Misser v. The King-Emperor*, 1922 Pat. 14), Bucknill, J., has delivered a very learned and instructive judgment and has clearly and forcibly laid down the circumstances in which only a deterrent sentence should be inflicted. The case in question arose out of a complaint of criminal intimidation lodged by the European manager of a certain factory against two residents of the locality. The trying Magistrate passed a sentence of three months' rigorous imprisonment, meaning to make it a deterrent punishment. His Lordship, however, reduced the sentence to one of fine. The learned Judge observed that deterrent punishments should be passed only when waves of imitative crime such as for example garroting, gang robbery and forgery of counterfeit coin or notes commence to sweep over a State or in times of public tumult when there is danger of a wide breach of the public peace or security or where a highly organised or what one may call semi-professional association of persons engineer series of offences such as swindling or burglary.

The deterrent mode of punishment is based on the propriety and feasibility of operating on the criminal will of a person and of preventing the existence of such will by furnishing sufficient motives to counteract the temptations to crime by making the crime more an object of dread than an object of desire and the repressive motives stronger than the seductive. This theory has been assailed from various points of view. It has been condemned as unjust, absurd, unnecessary and even ineffective. Humanitarians scold the notion that punishment should ever be inflicted with a view to make a public example. The advocates of the theory of the criminal's reformation respect the human being in the criminal and refuse to use him merely as a means for the preservation of the State and therefore accept punishment for the crime not so much with a view to deter persons from its commission as to preserve the criminal from a relapse. They maintain that this end is more effectively

attained by reform than by terror because while violent punishments become familiar and are despised and habitual criminals are more common in countries where the severest penalties are inflicted, mild punishments avoid stirring up hatred and the desire of revenge in the mind of the criminal and may easily tend to his reform. This mode found special favour with the Church, the chief punishment of which in the Middle Ages was penitence with a view to the improvement of the criminal; the Canon Law making the improvement the principal object of the punishment.

The proper view appears to be that while the theory of reformation alone is not adequate or correct yet whatever the mode or theory of punishment adopted the desirability of the offender's reform should not be lost sight of; and though punishments must be determined with a view to restrain and deter persons from crime they should be so inflicted as to afford the greatest possibilities for the training best calculated to help the offender's reform. A certain amount of evil or rather pain is essential to punishment without which there should be no punishment at all. Too much would make it vengeance while too little would reduce it to connivance. Between the two there is ample room for giving effect to considerations based on deterrent and reformatory theories.

The standardisation of punishments in statutes is not possible and the legislature cannot do anything more than laying down the maximum penalty for an offence leaving it to the discretion of the Court to find out what punishment will be appropriate to the circumstances of the case. The task is indeed a difficult one and even judicial officers of considerable experience are often found to fail in the discharge of their duty in this respect. It is a pity, as observed by the learned Judge, that few make a serious study of this almost un-written branch of criminal jurisprudence. It is a matter of great importance that the theory of deterrent punishment should not be loosely put into practice and the principles upon which alone a deterrent penalty should be inflicted clearly apprehended. Our Magistrates will do well to bear in mind the observations of Bucknill, J., in the case noted above.

Correspondence.

THE APPLICABILITY OF ENGLISH COMMON LAW TO BRITISH INDIA.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

DEAR SIR,

In your issue of 23rd January, you have editorially noticed the case of *Ramaswami Ayyar*, I. L. R. 44 Mad. 913, under the caption "Common Law of England how far applicable to India." In this case, the Judges (Ayling and Coutts-Trotter, JJ.) find authority in a previous decision of the Madras High Court, *In re Venkata Reddy*, I. L. R. 36 Mad. 216, for the view that "the Common Law of England may be applied to India except where a statute either expressly or by implication abrogates it." That no doubt was what was laid down in that case by a bench of three Judges (White, C. J., and Sankaran Nair and Ayling, JJ.), upon a review of previous decisions of the several High Courts, but the grounds upon which it was variously held or assumed in those decisions that the Common Law of England was or was not applicable were not freshly considered in that case. In *Venkata Reddy's* case, the actual decision was that the statement made by the accused as a witness, which was found to be defamatory within the meaning of sec. 499 of the Penal Code, was yet absolutely privileged, the doctrine of absolute privilege of witnesses not having been, in their Lordships' opinion, abrogated by the provisions of the Penal Code. In *Satish Chandra Chakravarty v. Ramdayal De*, 24 C. W. N. 982 a Full Bench of the Calcutta High Court arrived at exactly the contrary conclusion on the ground that the provisions of sec. 499 of the Penal Code embody a deliberate departure on the part of the Indian Legislature from the Common Law, and that the Courts here are bound to give effect to the intentions of the Legislature without reference to the principles of English Common Law upon a point on which there is an express enactment in the Penal Code. The general question of the applicability of the Common Law to India is adverted to in the judgment, but in the view the Court took of the express provisions of the Penal Code, it became unnecessary for the Judges to pronounce any definite opinion upon it.

Upon the general question, it should be noticed that the Common Law has been express-

ly applied to the Presidency Towns by Parliamentary Statute. But there is no such express provision so far as the rest of British India is concerned. It seems also to be generally agreed that in the absence of specific statutory provisions, the Courts in British India, in applying (as they are authorised to do by statute) the principles of justice, equity and good conscience, would be justified in applying such rules of English Common Law and Equity as may be applicable to Indian society and circumstances. (*Vide* the judgment of Mookerjee, C. J., in the case last cited). Practically the whole of the English law of torts has in this way, with slight modifications, been held to apply to British India.

There is, however, another point of view, which I have ventured to put forward in my Tagore Law Lectures on Comparative Administrative Law, *viz.*, that "every fresh accession of territory in India to the British Crown made the Common Law of England applicable, modified, in greater or less degrees, by circumstances, amongst which must be reckoned the systems of personal law prevailing in those territories and the rule, sanctioned by legislation, of justice, equity and good conscience," and modified of course by subsequent legislation (see p. 120, p. 364). Superficially, these two points of view appear to present no perceptible difference. But there is a difference, as is shown by the practical results which have followed from the application of the former rule. Sir Lawrence Jenkins, for instance, found it difficult to hold in *Legal Remembrancer v. Moti Lal Ghose*, 17 C. W. N. 1252, that contempts of Mofussil Courts which are not made offences by the Penal Code (*e.g.*, scandalising of Courts and Judges outside the Court house, unfair reports of judicial proceedings, and comments on pending cases which may prejudice fair trial) are offences under the Common Law, because the Common Law does not apply in the Mofussil. It is easy to see that no such difficulty would have been encountered if the test put forward by me had been held to apply. According to the reasoning of Sir Lawrence Jenkins in *Moti Lal Ghose's* case, the High Courts, though Courts of Record, would not have jurisdiction either summarily or upon indictment to punish contempts not covered by the Penal Code, committed outside their Original Jurisdiction, even when directed against themselves—a conclusion which militates against the expression of opinion by the Privy Council in *In re Sarbadhicary*, 11 C. W.

N. 273 (the point was not argued in that case); and by the same reasoning, attempts upon the person of the King in India would not be treason. No such anomalies arise if the view put forward by me is accepted.

I am bound to say, however, that my view has not commended itself to a well-known writer on constitutional law, Dr. A. Barriedale Keith, who, in a review of my book, published in the Royal Asiatic Society's Journal of April 1920, said: "To lay this down as a general doctrine is impossible and the needs of the situation are met by remembering the clear distinction between the Common Law as a whole and the Common Law in its application to the Crown. The existence of sovereignty carries with it the application to the whole of British India of the latter, save where expressly varied by statute law applicable to India and thus offences against the King's person are offences *pleno jure* in India, requiring no express statutory enactment. The other case which perplexes Mr. Ghose is even more simple; the fact that the High Court at Allahabad has power to punish summarily a contempt by fine or imprisonment does not depend on a very problematic extension of the Common Law to the Mofussil, but on the fact that the Court is established by letters patent under a statutory authority and that such power is an essential adjunct of such a Court and is thus derived mediately from Parliament. It need hardly be said, therefore, that it is impossible to accept the suggestion (p. 571) that the provisions of the Act of 1833 (now sec. 65 of the Act of 1915) which forbids Indian legislatures to make laws affecting any part of the constitution of the United Kingdom 'whereon may depend in any degree the allegiance of any person to the Crown' could ever have been construed so as to afford all persons in British India the guarantee of the fundamental rights of British subjects and to limit Indian legislation as the Fourteenth Amendment of the United States Constitution has limited the powers of American legislatures. The plain meaning of the statute is far limited, and nothing but confusion could have resulted from efforts to apply to India conflicting judicial theories of the Common Law rights of British subjects." With reference to sec. 65 of the Government of India Act of 1915, it is pertinent to observe that the Privy Council in *Basant v. Adv. Genl. of Madras*, 23 C. W. N. 986 and *Bugga v. Emperor*, 24 C. W. N. 650 have, since the publication of my Lectures, declined to accept the interpreta-

tion I have desired to see placed upon the section, and Dr. Keith's views may be taken to represent the opinion which finds favour with those in authority in and over the affairs of British India. But if that be the correct view of the matter, does it not amount to this, that in the field of public law, at any rate, the Common Law must be taken to extend to British India "*pleno jure*" or as "an essential adjunct" whenever it is necessary to strengthen the hands of authority, but not when it is relied on to support the claims of the subject against the State? The very high authority which may obviously be called in aid to support the view does not suffice to gloss over the faulty logic which vitiates the reasoning on which it is based.

Before I close, I should like to point out that even if the Common Law should be generally held to be applicable to British India in so far as the same has not been modified by statute, the machinery provided for enforcing it is so defective that much of it is bound to remain a dead letter. This too is adverted to in my Lectures (see pp. 633-636). In any view of the matter, a state of the law which, whenever a question of fundamental importance not clearly provided for by statute is in issue, entails references to the English Common Law on the chance of the Court being induced to apply it in the special circumstances of the case, cannot be regarded as satisfactory in the domain, at any rate, of public law which in India has a great deal of lee-way to make up. Is it not time, therefore, that the Indian Legislature took upon itself the task of defining for British India what would stand for the fundamental rights and obligations of British Indian subjects in relation to the State and to their fellow-subjects, instead of leaving these to be determined by a standard which is uncertain on all but one point, namely, that it will always magnify the State at the expense of the individual?

Yours, etc.,
NAGENDRANATH GHOSE.

VAKILS' LIBRARY,
10th February 1922.

Reviews.

THE BENGAL TENANCY ACT. By Mr. Surendra Chandra Sen, B.L. Fourth Edition. Published by Messrs. Das Gupta & Co., 54/3, College Street, Calcutta. 1922. Price Rs. 12.

Mr. Sen is not an author who suffers himself to rest on his laurels. The fact that his com-

mentary on the Bengal Tenancy Act has already taken a front rank amongst the most reputed legal publications of this side of India has merely operated on him as an incentive to further efforts towards expanding and completing his work, which in this edition has assumed the proportions of a commentary and a book of reference rolled in one. So thoroughly has this work been performed that more than was the case with former editions of this work, whoever may be in search of light, information or guidance on any point appertaining to the Act will not fail to turn for it in the first instance to Mr. Sen's book and will not go back disappointed. It goes without saying that the text of the Act and case law has been brought quite up to date, the new decisions incorporated in the notes being also subjected to critical analysis wherever called for. Considering the bulk of the case notes, the enumeration of headings and sub-headings which precede the notes, the marginal notes, and the exhaustive subject-index (which alone covers a hundred and fifty pages) are a great assistance to practitioners. Some idea of the large assortment of miscellaneous information collected in the book may be formed from the following brief reference to the contents of the appendices. They are (i) the Bengal Government Rules, (ii) Important Notifications of that Government, (iii) Notifications extending the Act, (iv) Some of the Amending Acts, (v) Registration Rules, (vi) High Court Rules, (vii) Former Chapters X and XIII A, (viii) Forms of Notices, (ix) Scale of Court-fees, (x) Miscellaneous notes on such points as "the Relationship of landlord and tenant," "*Res judicata*" and so on, (xi) price lists and (xii) mode of calculation in a suit for enhancement of rent on the ground of rise of prices of staple food crops. The present edition, even more than its immediate predecessor, will fully maintain the reputation of the work as the completest commentary and book of reference upon the Bengal Tenancy Act.

THE DECENNIAL DIGEST OF INDIAN DECISIONS, 1911-1920. By R. Narayanswami Iyer, B.A., B.L., Vakil High Court. Published by the Madras Law Journal Office. Mylapore, Madras.

The fourth volume of this excellent digest is just to hand. The same standard of efficiency has been maintained in the present volume as characterised the volumes that preceded it. The digest is now complete and will be of great use to lawyers.

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Gaps in the Law of Limitation.

The Indian Limitation Act has been amended and re-amended so often that the Legislature may justifiably feel confident that it has produced a Code which is calculated to cover and provide a just solution for every case calling for its application. The scheme of the Act is simple. It provides a table of all possible varieties of suits and applications, the period of limitation applicable to each, and fixes for each class of suits and applications the point of the time from which limitation should run. Any suit or application not specially provided for will be governed by the residuary Arts. 120 and 181, as the case may be. Part II of the Act provides exemptions and extensions to cover cases in which the circumstances require that strict adherence to the periods of limitation prescribed in the schedule should be relaxed. With reference to these last mentioned provisions, the Legislature apparently thought that all possible cases of unfairness and hardship had been so completely provided for that it proceeded to lay down expressly in sec. 9 that "when once time has begun to run, no subsequent disability or inability to sue stops it." Cases nevertheless arise of inability to sue supervening after the limitation had begun running, owing either to the union in the same person of the rights of the claimant and the person against whom the claim is alleged, or owing to a decision of a Court of Law, subsequently reversed, temporarily allowing the claim. In such cases the High Courts and the Privy Council have held that limitation is suspended, in spite of sec. 9 of the

Act. See *Surnomoyee v. Soshee Mookhee*, 12 M. I. A. 244; *Prannath v. Rookea*, 7 M. I. A. 357 and *Lakhan Chandra v. Modhu Sudan*, 35 Cal. 209 (affirmed by the Privy Council in *Nrityamai v. Lakhan*, 20 C. W. N. 522).

That there may arise other cases not covered by the principle of suspension enunciated in the above cases is borne out by the case of *Ummathu v. Pathamma*, recently reported in I. L. R. 44 Mad., p. 817. In this case, the limitation for a suit which should have been instituted before the Subordinate Judge in his ordinary jurisdiction having expired during the Christmas Holidays, it was filed on the re-opening day in the Small Cause Side of the Subordinate Judge's Court. The plaint was returned some days later and was refiled in the same Court in its ordinary jurisdiction, when the Defendant contended that the suit was barred by limitation. The High Court upheld this objection. The Plaintiff sought to get over it by relying on the principle recognised in several cases, under which the period requisite for obtaining a copy of the judgment for the purpose of appealing has been allowed to be tacked on to the period during which the Court that passed the decree appealed against was closed, if it was too late to apply for a copy on the date when the judgment was pronounced. But it was pointed out by Spicer, J., that in order that the principle should apply, it is (according to the decisions) necessary that the Appellant should have a subsisting right to appeal when he applied for the copy and that he should apply on the re-opening day. His Lordship pointed out further that it had never been held that the period which may be excluded under sec. 14 can be tacked on to the period when the Court having jurisdiction was closed under sec. 4—the reason being that the Courts are different and a Plaintiff who fails to institute his suit in the Court having jurisdiction before the limitation period expires, or on the re-opening date if the period expires during the vacation

of that Court, has no longer a valid and subsisting cause of action.

The logic of the above reasoning is unassailable. Equally incontestible is the fact that in this case the Plaintiff was put out of Court on a highly technical ground which had no relation whatever to the justice of the case. There is obviously no principle discoverable in the Act itself or outside it which could be made available to give relief to the Plaintiff in this case. The case proves the existence in the Act and in the Indian law of limitation of a serious gap or *lacuna* which must be made good, if at all, by fresh legislation.

THE HINDU LAW OF REVERSIONS AND REVERSIONERS.

(Continued from p. xlvii.)

Fifthly, the widow and the next reversioner do not, between them, (as was wrongly held in an early Calcutta case) (1), represent the whole estate, for "having regard to the series of decisions that limit the widow's powers of disposal, and those which put the reversioner's right as a mere *spes successionis*, it is difficult to hold," observed Kumar Swami Satri, J., in *Nachiappa Gownden v. Ranga Sami Gownden* (2), "that the widow and the next reversioner represent the entire inheritance and could deal with it as effectively as if the inheritance devolved on the next male heir." Indeed to do so would virtually mean investing a mere possibility of succeeding, a *spes successionis*, with a far greater degree of substantial legal character than is allowed by Hindu Law itself.

Sixthly, the actual reversioners of a Hindu widow, (i.e., those among the whole class of possible reversionary heirs, who eventually get the reversion), have been held to be her legal representatives, and not her personal heirs, for purposes of pending suits. So on the death of the restricted owner the actual reversioner takes her place in suits pending by or against her on account of the estate (3).

Seventhly, as between themselves one reversioner is not the legal representative of another reversioner, and consequently the right to carry on a suit brought by a reversioner to impeach an alienation by a qualified

owner does not survive to the next reversioner, or any other reversioner: the right is personal, to each individual reversioner (1). Not even the presumptive reversioner represents the remote reversioner (1).

Thus, "having regard to the peculiar position of reversioners who possess no more than a contingent right there would not be enough warrant to treat any one reversioner to bind others who do not join in the litigation. Consequently, whenever a reversioner sues, and there is an adjudication, such adjudication would not be binding upon every other reversioner (1)."

Eighthly, reversioners do not, but the widow does represent the estate, for, as already stated, until the termination of her estate, whether by death or otherwise, they have only a bare possibility of succeeding, a *spes successionis* as it is technically called, irrespective of the proximity or remoteness of their relationship to the last full owner. Hindu widows might be likened to tenants-in-tail representing the inheritance, and the same principle which applied in the one case would equally apply in the other (2).

Ninthly, there is a strong resemblance between reversioners of a Hindu widow and members of a Hindu co-parcenary. In the one case there is a naked chance of heirship or succession in the other, "there is co-parcenaryship and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and common possession (3)."

As to the separately acquired property of an united family the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, to take such property by survivorship fails, and his widow succeeds to such property by the Hindu Law of Inheritance to the exclusion of the co-parceners. The persons entitled to the estate on her death are not, of course, her heirs, "but the next heirs of her

(1) *Sakyahani Inglee Rao Sahib v. Bhavani Bori Sahib*, (see *supra*.)

(2) *E.g.* the succeeding heirs would be bound by a decree fairly and property obtained against the widow. See *Raja Shivagunga's case*, 9 Moo. I. A. [1863] 539 (604) P. C.; *Parthab Narain Singh v. Trilokinath*, 11 I. A. 197 (P. C.)

(3) *Per Lord Justice Turner, Katamu Natchiar v. The Rajah of Shivagunga*, 9 Moo. I. A. [1863] 589 (611).

(1) *Nobakishore v. Hariunath*, I. L. R. 10 Cal. 1102.

(2) 26 Indian Cases, [1915] 757 (774) (cited *supra*.)

(3) *Rikhai Rai v. Sheo Pujan Singh*, [1910] I. L. R. 33 All.

15; *Prenamoyi Choudhram v. Prenath Dhar*, [1896] I. L. R. 23 Cal. 636.

husband according to the Canon of Hindu Law which defines the succession to separate estate (1)." The distinction between co-parceners and reversioners may be put thus: the co-parcener has, *before succession, community of interest and unity of possession in respect of the joint estate with the deceased*, while the reversioner has neither community of interest nor unity of possession with the widow in respect of the "reversionary" estate.

According to the late Golap Chandra Sarkar Sastri (2), however, surviving co-widows (or daughters) take between them the share of the deceased co-widow (or daughter) *as the next-takers or reversionary heirs of the last male owner*. This view seems opposed to the Canon of Inheritance which allows only of one but by no means piecemeal, succession to their heir. All the co-widows (or daughters) having as a class already inherited together as *joint tenants with a power of survivorship between them*, on the death of one of them her share simply *survives over* to the others. This is not a case of death succession. If they originally took as tenants-in-common and *not as joint tenants*, something then might have been said in favour of Mr. Sastri's view. Survivorship is the general rule, and tenancy-in-common the exception under Hindu Law (3). The *Mitakshara* law, which is practically the common law of Hindu India in matters of inheritance and succession, favours the one, and the *Dayabhaga*, which is the exception to the general rule, favours the other.

Male reversioners to the estate of a qualified owner do not take like several daughters (or co-widows) as *joint tenants* with survivorship, but there seems to be one exception—the case of a *single daughter's sons*, who, by *Mitakshara* law, take their maternal grandfather's estate jointly (4), and not as tenants-in-common without survivorship.

N. MUKERJEE, M.A., B.L.,

Bar-at-Law.

(To be continued.)

(1) *Ibid.*

(2) Golap Sarkar's "Hindu Law," 4th Ed. [1910] 431.

(3) See 8 *All. Law Journal* under the heading "Hindu Law."

(4) *Raja Chelikani Venkay-yamma Garu v. Raja Chelikani Venkata Ramnay-yamma*, 29 I. A. [1902] 156 : s. c. I. L. R. 25 Mad. 678.

"This decision would not necessarily govern a case," observed Mayne in his "*Hindu Law and Usage*," 7th Ed., p. 767. "Where the sons were by different daughters and therefore of different families." See *per curiam*, I. L. R. 27 Mad. 385.

LONDON NOTES.

(FROM OUR OWN CORRESPONDENT.)

The following Indian appeals have been heard during the past week.

Nanku Prasad Singh v. Kanta Prasad Singh and ors., from Patna, which raised the question whether the Respondents as purchasers of an equity of redemption were personally liable to discharge a mortgage debt.

Mr. DeGruyther, K. C. and *Mr. Dubé* appeared for the Appellants.

Mr. E. B. Rajkes for the Respondents.

The judgment of the Board consisting of LORDS ATKINSON and PHILLIMORE, SIR JOHN EDGE and MR. AMEER ALI was delivered by LORD ATKINSON at the conclusion of the argument and the appeal was dismissed with costs.

The same Board heard arguments and reserved judgment in the case of *Sripat Singh Dugas v. Rai Hariram Goenka*, an appeal from Bengal, which raised the questions whether an application by the decree-holder for execution of the decree was duly made and was not barred by limitation and can be prosecuted against the Appellants.

Sir Geo. Lowndes, K.C.S.I., K. C. and *Mr. Kenworthy Brown* appeared for the Appellants.

Mr. A. M. Duine, K. C. and *Mr. B. Dubé* for the Respondents.

The case of *Sarada Nath Bhattacharji and others v. Srijukta Sarajubala Debi Chowdhurani and ors.* was the subject of an application to the Board and was dismissed for want of prosecution.

Rai Baij Nath Goenka v. Maharajah Sir Ravaneshwar Prasad Singh and connected appeals from a judgment and decrees of the Patna High Court were heard by the same Board.

The question for determination was whether an Order in Council determining an appeal was enforceable in the present form. Judgment has been reserved.

Mr. DeGruyther, K. C. and *Mr. Dubé* appeared for the Appellant.

Sir G. Lowndes, K. C. and *Mr. Wallach* for the Respondents.

At present Colonial appeals are being heard, but it is anticipated that these will be concluded to-morrow, and that two Boards will

sit to hear Indian appeals as from Monday January 30th.

The list does not contain many cases which are expected to last and it is possible that a supplementary list will be issued later on.

A claim was heard in the Prize Court at the end of last term which is of interest to the general public as well as to the legal profession. It concerned the capture of Turkish vessels in the Tigris during the advance on Baghdad in February 1917.

Mr. Wilfrid Lewis on behalf of Captain Nunn C. B., D. S. O., and the Officers and Crews of H. M. S. "*Tarantula*," "*Mantis*" and "*Moth*" outlined the operations resulting in the capture and claimed £7,745 on the usual basis of £5 a head on the total number of enemy persons captured.

Mr. Lilley on behalf of the Procurator General resisted the claim contending that this was a case of joint capture by the Army and Navy and that therefore no bounty was payable. He relied on the case of "*La Bellone*," 2 Dobson 343.

Mr. Lewis in reply contended that in order to withstand the claim it was not sufficient to allege a common enterprise. There must be a joint capture and that in the present instance the capture was effected by independent operations initiated by the Naval Forces.

THE PRESIDENT (SIR HENRY DUKE) gave a considered judgment awarding the amount claimed and stated that in his opinion the naval operations, although originally made in conjunction with the army eventually became separate and independent so as to justify the award of the bounty.

26-1-22.

G. D. M.

Notes of Cases.

PRIVY COUNCIL.—*Thillai Chetty v. Shanmuganathan Chetty*. Dated the 19th December 1921.

Sir George Lowndes, K. C. and Mr. K. Narasimham applied for special leave to appeal to the Board in the above case. He stated that in 1866, Thillai settled property and founded a Chatram for feeding Brahmins. Subject to this he left his property to his wife for life with remainder to his daughters.

His wife succeeded to the property, and enlarged the endowment just before her death out of her own property. The husband had provided for the management to be conducted by the direct heirs of himself and his wife.

The wife varied the management with regard to her own endowment and a question arises whether the wife has augmented the original charity or created a new one.

The High Court affirmed the decision of the Trial Judge and refused leave to appeal to the Board on the ground that although the suit value was more than Rs. 10,000 yet the appeal did not involve a substantial question of law.

[LORD BUCKMASTER.—When the Courts in India say there is no point of law it is difficult for the Board to say there is.]

There was not only one substantial question of law, but one over which the Indian Judges have differed. He referred to I. L. R. 40 Mad. 612.

Leave was refused.

G. D. M.

Leave refused.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA and PANTON, JJ. M. A. No. 416 of 1920. BEPIN BEHARY CHATTERJI, Decree-holder, Appellant v. JOGENDRA NATH BANERJI and others, Judgment-debtors, Respondents. The 5th December 1921.

Civil Procedure Code, Or. 41, rr. 11 and 31—Duty of lower Appellate Court in dismissing an appeal summarily.

The lower Appellate Court in dismissing an appeal summarily under Or. 41, r. 11, C. P. C., recorded the following judgment: "Heard pleader. The appeal is summarily dismissed." The Appellant to this Court contended that the judgment of the Court of Appeal below was defective that he was bound to write out a judgment and give reasons for the finding arrived at and that Or. 41, r. 11, C. P. C. was controlled by Or. 41, r. 31:

Held—That the lower Appellate Court was bound to comply with the provision of Or. 41, r. 31, C. P. C. and write out a judgment, however short, 25 Cal. 97, 5 C. L. J. 348; 13 C. W. N. 1031, per Richardson, J., followed 5 B. L. R. 233; 36 Bom. 116, 37 Bom. 610; 30 All. 319, referred to.

Babu Bijon Kumar Mukerji for the Appellant.
Babu Monmotha Nath Ganguly for the Respondents.

S. C. C.

Case remanded;
Appeal allowed.

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[No. 15.]

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REPORTS (See Index.)

Immunity of State from action at the in- stance of subjects.

A North Dakota statute provides that the State shall establish a bank, to be financed by sale of State bonds, to be operated by a State Administrative Commission. Provision is made in the statute for bringing civil actions against the "State, Doing Business as the Bank of North Dakota." In the circumstances, the Supreme Court of North Dakota held in a recent case [*Sargent County v. State, Doing Business as Bank of North Dakota*, 182 N. W. 270 (N. D. 1921)] that a depositor of the Bank, was entitled to garnish credits of the Bank. Commenting on this decision, a writer in the *Harvard Law Review* for January 1922 asks, "Does the mere fact that the State is engaging in a heretofore private venture make it amenable to suit?" In the writer's opinion, when the State, under legislative authority, engages in such enterprises, it does so for the benefit of the community as a whole and that "the conclusion seems inevitable that the State in the exercise of these enlarged functions, acts in none other than its sovereign capacity." The writer appears to be a thorough-going supporter of the doctrine of State immunity not on the early technical basis that the "King cannot be sued by writ, for he cannot command himself," but "on the broader ground" "that it would hamper the performance of the sovereign's public duties to subject him to suits as a matter of right." This broader ground, the writer concedes, loses much of its force when the public duty concerned is that of conducting a commercial enterprise, not necessarily incident to Government or regarded as such; he concedes further that expediency demands that in the conduct of such business parties to transactions have reciprocal remedies; so that, in view

of these considerations, it is possible to argue "that the Court should abrogate the rule in so far as the reasons underlying it are no longer persuasive."

But such action, on the part of the Court, would, in his opinion, be open to grave objections; and he concludes his comments with the following homily: "The doctrine of the immunity of a Sovereign in his own Courts is thoroughly and unqualifiedly established in our system of law. Though in particular cases, its reason may be attacked as valueless, its existence must be recognised, and for a Court to overthrow or modify it would be judicial legislation. Further, in every case, the question would arise how to determine which undertakings should and which should not subject the State to suits. Rules of law would not answer that question. An examination of the particular enterprise, considered in its relation to other State undertakings with a careful weighing of the conflicting interests and of the various considerations of expediency involved would be necessary. Such a problem is in its nature one with which legislatures rather than Courts should deal. Actually, legislatures do deal with it. When they provide for administration of State activities they explicitly declare in what manner, claims against the State may be settled and what legal proceedings, if any, may be brought against it. Such provisions are results arrived at with deliberation and unless the Courts can find therein consent expressed or implied, no suits against the State should be permitted."

British India provides the one exceptional instance of a country governed by the Anglo-Saxon system of law, where owing to the accident of the Government having in its inception been placed in the hands of a private corporation, viz., the East India Company. State immunity was abolished not by statute but through the operation of the ordinary rules of common law, and this state of things was deliberately ratified and continued by the British Parliament, when the Government of India was taken over by the Crown and departmentalised (*Vide* Ghose's Tagore Law Lectures on Comparative Administrative

Law, Lect. XIII). But that has not prevented the Courts in India from entering into fine-woven arguments directed to determining whether in entering into a particular enterprise, the Government of India was acting in the discharge of its sovereign functions or of its activities as a business corporation, and, upon the basis of such distinction, from seeking to confer immunity on the Government of India in respect of activities which appear to the Court to be governmental as distinguished from other activities which the Courts regard as purely commercial. The numerous considerations mentioned by the writer in the *Harvard Law Review* have had no effect upon the tendency of the Courts here to trench upon the province of the legislature for the purpose of restricting the liability to action of the Government of India sanctioned as it has been by the British Parliament (*Ibid*, pp. 317-326).

There does indeed seem to exist a widespread tendency in legal minds to uphold the immunity of the State from actions by its subjects. The "broad ground" of policy suggested in support of it, *viz.*, that it would otherwise hamper the performance of the Sovereign's public duties to subject him to suits as a matter of right, does not however stand examination any better than the "early technical ground," that the King cannot command himself to appear in his own Court. The fact of the matter is that no Government so far has been able to raise sufficient confidence in its capacity to conduct its affairs in a fair and business-like manner, so that it is generally presumed that its agents will bungle in so many instances that to take away its immunity from action would really be to court national bankruptcy. If this fact be admitted, it will probably also be admitted that this bungling of its operations by its agents is greatly encouraged by this very rule of Governmental immunity. Nobody, we presume, really wants that Government business should be carried on eternally in its present haphazard and unbusiness-like manner. If that be so, then the only way to get Government business performed satisfactorily is to abolish this immunity. The Government is a big corporation, a big Trust. The remedies which have been found so useful to keep Trusts and Corporations to their proper functions may admit of application, tentatively at any rate, to the biggest of Corporations and Trusts, the State, with possibly quite desirable con-

sequences. Let Courts and legislators (and we may add commentators also) take heart from the remark which a consideration of this very subject drew from the late Mr. Maitland: "It is a wholesome sight to see the Crown sued and answering for its torts."

THE HINDU LAW OF REVERSIONS AND REVERSIONERS.

(Continued from p. lv.)

The test to apply to the question of *who are, and who are not, reversioners as known to Hindu Law* is, whether the right of one claiming *as such* is or is not contingent on survivorship to the widow (1). In the case of *presumptive* heirs the right is contingent on survivorship to the widow alone, and in that of *non-presumptive* heirs, on survivorship to the widow *as well as* all prior heirs in the line of succession.

Thus, judged by this test an *adopted son* is *not* a reversioner, for his title is not contingent on survivorship to the widow; but is founded on the *factum* of adoption.

A female heir to a male, such as a daughter taking after her mother, is a reversioner because her title to succeed is contingent on survivorship to the widow.

There are two sets or classes of *possible* or *prospective* reversionary heirs known to Hindu law, that is, *possible* reversioners *before* the succession opens out by the death of the widow, namely, *proximate* and *remote*; and these classes are denoted by terms more or less expressive of comparative proximity, or remoteness of kinship to the last male owner. The first set are those who, if the widow were to die, renounce, surrender or forfeit her estate, (as the case might be), *at once*, would take the property, whether with a life-estate, or a full estate and are accordingly termed 'next,' 'nearest,' 'immediate' and—more commonly—'presumptive' reversioners. They are sometimes described—specially in the old Reports—as 'heirs apparent,' and sometimes spoken of as 'prior' in contra-distinction to 'subsequent' reversioners; but the division of such heirs into 'near' and 'remote' is a convenient, but by no means a scientific one. For reversioners, even though of equal degree, need not necessarily be co-reversioners. For example take this illustration. A and B are descendants (grandsons), of the ancestor X by his *first* wife, and C is a descendant, (grand-

(1) The term 'widow' is here used as a type of 'limited owner' of a similar legal status to the widow under Hindu Law.

son), of X through his second wife. A is the last male owner.

A, B, and C stand in the same degree of relationship, yet C, being remote through the difference of the mother, is not co-reversioner with B or A. Again, "of several persons living," to quote Mayne's *Hindu Law* (1), "one may be the next heir in the sense that if he lives he will take at her (the widow's) death in preference to any one else then in existence. But his claim may pass away by the birth or adoption of one who would be nearer than himself." Further, a Hindu widow may surrender her estate to the second class of reversioners with the consent of the first (1) and (2), and thus the two classes might change places.

The distinction between these two possible sets of reversioners of course retains its importance only during the life-time of the widow, or, to be more precise, during the continuance of her estate, for, upon its determination, whoever turns out to be the actual, (as distinguished from the possible), reversioner, takes the property with a life-estate if a female, or with a full estate if a male; and consequently, all speculation as to who shall succeed ceases, unless, of course the next-taker is herself a female, when the reversion is left open for all classes of reversioners.

Both sets are equally interested in the succession during the continuance of the widow's estate, and their reversionary right, or rather chance of heirship is founded on a common basis, viz., that of survivorship to the widow, (besides, in the case of the second set, non-intervention of reversioners of the first set). Indeed, so long as the widow lives the first set, any more than the second set, can have no interest higher than that of a *specie* succession, or a mere hope of succession to the reversion: their special right to impeach by suit alienations by the widow or other qualified owner stands on a common footing, viz., protection of the reversionary estate for whomsoever may turn out to be the actual reversioner.

Indeed, "the Hindu Law does not," as pointed out by Ramaswami, J., in *Nachiappa Gounden v. Rangaswami Gounden* (3), "make any distinction between the next and the more remote reversioners, or display any preponderating preference over another more remote.

The texts speak of the husband's kinsmen, and the words "paternal uncles" in the text of Brihaspati, where the paternal uncles of the husband of the widow are spoken of have been interpreted to mean the sapindas of her husband. Narada speaks of the husband's kin being the guardians of the widow. The rule laid down in *Bajangi Singh v. Manokarnika Baksh Singh* (1), that the assent by the next reversioners is enough is only a practical working rule and cannot be construed to mean that the consent given by remote reversioners has no legal effect, even though the immediate reversioner is the alienee, and his assent as evidence of necessity is of no value."

N. MUKERJEE, M.A., B.L.,
Bar-at-Law.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Canadian Appeals occupied the attention of the Board during the latter part of the past week, and on Monday the 30th January two Boards were constituted to hear Indian Appeals.

The case of *Panna Lal v. Nihal Chand*, an appeal from Lahore was heard by LORDS HALDANE and PHILLIMORE and MR. AMER ALI. The Respondent represented the interest of the Marwar Bank in liquidation and the question for decision was as to the construction of a contract of guarantee.

Messrs. Clauson, K. C. and Wallach appeared for the Appellants and Messrs. Langdon, K. C. and Dubé for the Respondents.

The Board delivered judgment dismissing the appeal without calling on the Respondents.

The same Court commenced the hearing of another case from Lahore, *Chajju Ram v. Neki and others*.

Sir George Lowndes and Mr. Dubé were for the Appellants *ex parte*. The subject-matter of the suit is a claim to a right of pre-emption, but a preliminary point was raised as to the powers of the Court under Or. 47 of the Civil Procedure Code. This point is to be argued before a Full Board to-morrow.

In the other Court VISCOUNT CAVE, LORDS DUNEDIN and SHAW, and SIR JOHN EDGE, commenced the hearing of an appeal from Bengal, *Khajeh Solehman Quadir and others v. Nawab Sir Salimullah Bahadur and others*.

(1) 7th Ed., p. 858, para. 638.

(2) *Pratab Chunder Roy-Chowdhry v. Sreenutty Joy Moner Debee*, 1 W. R. C. R. [1865] 99.

(3) 26 Indian Cases, [1915] 757.

(1) I. L. R. 30 All. 1; s. c. 35 I. A. 1.

Messrs. DeGruyther, K. C., Ramsay and Palat appeared for the Appellants.

Messrs. Dunne, K. C. and Kenworthy Brown for the Respondents.

The suit concerns the validity of a Waki, and a claim by the Appellants to certain allowances under an agreement. Mr. DeGruyther had not yet finished his opening when the Court rose yesterday.

Judgment was delivered on 31st January by LORD BUCKMASTER in the case of *Ramachandra Rao v. Ramachandra Rao and others* which was heard by the Board on December 8th and 9th. The decree appealed from was reversed and the decree of the Subordinate Judge restored.

The Judgment is an important one and explains the previous decisions of the Board in *Mt. Surajmani v. Rubi Nath Ojha*, (35 Ind. App. 17) and *The Rangoon Co. v. The Collector of Rangoon*, (39 I. A. 197).

2-2-22.

G. D. M.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before WALMSLEY and SUHRAWARDY, JJ. CR. REV. NO. 30 OF 1922. AMINULLA and ors., Accused, Petitioners v. THE KING-EMPEROR, Opposite Party. The 27th January 1922.

Indian Penal Code (XLV of 1860), sec. 147, out of six accused persons three found to have a common object different from that set out in the charge—Legality of conviction of any of the accused—Secs. 323 and 324, alternative charges under, legality of additional sentences under the sections—Court's duty in cases where parties want to compound.

The six Petitioners were convicted under sec. 147, I. P. C. and sentenced to 15 days' rigorous imprisonment. In addition, two of them Nur Ahmed and Aminulla were convicted under sec. 323, I. P. C. and sentenced to 15 days' rigorous imprisonment, and Faizulla under sec. 324, I. P. C. and sentenced to one month's rigorous imprisonment. In the charge the common object of the unlawful assembly was stated to be to assault Akamuddin and his son. During the pendency of the case the complainant and his son, who were near relatives of all the accused, wanted to com-

pound the case, but the Magistrate did not allow them to do so and convicted all the accused as stated above. In his judgment he found that three of the accused persons did assault Akamuddin and his son. As to the other three, he said "there is no positive evidence on the record that they took any serious part in the *marpit* or caused injury to any person, although I am perfectly satisfied that they went with the other three accused to snatch away the cattle of the complainant in common object with that of the other accused persons."

Held—That clearly there was a difference between the common object the Magistrate found in the case of the latter three persons. If the common object of Nur Ahmed, Aminulla and Faizulla was to beat Akamuddin then there were not five persons that shared in the common object and the ingredient of an offence under sec. 147 was wanting. "It is a great pity that so many Magistrates when dealing with charges under sec. 147, I. P. C. are careless in setting out the common object and in directing their attention to whether that particular common object is proved or not." On this ground the convictions under sec. 147, I. P. C. against all the Petitioners must fail. The additional sentences passed under secs. 323 and 324, I. P. C., on three of the Petitioners cannot stand with the sentences under sec. 147, I. P. C. Further, the complainant had an absolute right to compound the charge of simple hurt against Nur Ahmed and Aminulla under sec. 323, I. P. C. As to the charge under sec. 324, I. P. C., against Faizulla, the complainant had no such absolute right: his power to compound was subject to the Magistrate's approval. "It is a great pity when parties who are apparently nearly related to one another succeed in patching up their quarrels, that the Magistrate should not do what he can to restore peace and goodwill." The Petitioners Nur Ahmed and Aminulla should be acquitted of the charge under sec. 323, I. P. C., on the ground that the complainant did not wish to proceed any further against them. So far as Faizulla is concerned, taking into consideration that he has already undergone some days' rigorous imprisonment and that the complainant did not wish to proceed against him either, the conviction and sentence in his case too should be set aside. The result is that the convictions and sentences on all the Petitioners are set aside.

Babu Ramdayal De for the Petitioners.

None for the Opposite Party.

J. N. R.

Rule made absolute.

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REPORTS (See Index.)

Paramount public rights—Sentiment *versus* Civic consciousness.

The case of *Muhammad Zaman and others v. Marzur Hasan and others*, reported in 1. L. R. 43 All. at p. 692 arose out of a squabble between the Sunni and Shiah inhabitants of Aurangabad in the United Provinces, but the judgment in the case deals with a question the interest of which is by no means confined to the Sunnis and Shiabs of that town. The Shiabs in this case sought for a declaration of their right not merely to lead a religious procession (connected with the Moharrum festival) over a public road 12 feet wide—a right which was not disputed—but also their right to halt and form themselves in a circle every few yards and within that circle to perform the *matam*, a ceremony which consists in wailing and beating of the breast and crying of the names of Hasan and Hussain. It appeared that about 400 or 500 persons, if not more, took part in the procession, so that there was no question whatever that to admit this right would have had the consequence of authorising the complete blocking of the roadway for nearly as long as the procession lasted. The Court (Tudball and Sulaiman, JJ.), disposed of the case against the Shiabs on the ground that the claim would be inconsistent with the maintenance of the *paramount idea* that the right of the public on a public road is a right of passage.

Although the judgment does not make the point very clear, it may be taken for granted that the Shiah Plaintiffs must have insisted that according to their religious tenets, the performance of the

matam was an essential ingredient in the leading of the procession, so that the decision really amounted to this that particular sects or communities must submit to have practices sanctioned and enjoined by their religion regulated and even cut down in favour of the paramount right of the public as a whole to have free passage over a public road. It is not merely a question of the minority being required to hold the most powerful sentiment that can operate on the human mind under leash for the mere convenience of the majority; for, clearly, if the majority of the population of Aurangabad had been Shiabs, the Courts would have felt constrained to deliver the same opinion in order to uphold the paramount right of the public to have the roadway kept free from obstruction for purposes of traffic. The implication of the decision appears to be that claims supported by the strongest of sentiments conceivable, and backed even though they may be by the wishes of the majority must yield before certain paramount civic rights which may be unsupported by any such strongly felt sentiment and the exercise of which may for the time being at any rate concern a very few individuals.

What are these paramount civic rights? It would be instructive to have a table of such rights prepared even tentatively. According to the Judges in the case under notice, the right of free progress along public roads is such a right. But the civic consciousness of the entire community must be schooled to the habit of subordinating even their most strongly felt sentiments to the paramount claims of such bloodless public rights as free passage along public roads, if the assertion of such rights is to pass without provoking public disturbance. In Calcutta, the practice followed by the authorities is to stop traffic temporarily on well-known occasions when religious processions are taken through its streets. Such concessions to sectarian sentiment do not show that much progress has been made in even the commer-

cial capital of India towards the evolution of a paramount civic consciousness before which every consideration of a sentimental nature must yield. Are we really progressing towards it at all; even slowly? Perhaps; perhaps not. Again, if concessions must be made, in the existing state of things, to largely expressed sectarian sentiment on stated occasions according to well-established practice, should the stoppage of traffic be condoned, if not sanctioned, on occasions of largely expressed ebullitions of public feeling brought about by temporary causes?

POSITION OF AN UNRECORDED CO-TENANT IN A RENT SALE.

BY MR. KHETTRANATH SINGH,
MUNSIFF OF RANCHI.

If the landlord desires to obtain a decree good against the land under the Bengal Tenancy Act, he must ordinarily, apart from any question of representation, implead all the co-tenants including the heirs or legal representatives of a deceased co-tenant. But for the purposes of a money decree, in the absence of any express agreement to the contrary, he is free under sec. 43 of the Contract Act to sue any or all of the tenants. This is the ruling of Sir N. R. Chatterjee, J., and Richardson, J., in 22 C. W. N. 289, which is a leading case on the point. The reasoning of the above proposition is succinctly expressed in the argument of the *Vakil* for the Appellant, which may thus be quoted:—(1) If lands are let out to two or more tenants, their liability to pay rent is joint and several. (2) If lands are let out to one or more tenants, and others become entitled to the tenancy right by purchase, the liability of the purchasers is joint and several. (3) If lands are let out to one tenant or more and their rights devolve upon many by reason of succession, their liability is joint and not joint and several. (4) If a joint decree be passed against many, it can be executed against any one (8 C. L. R. 31). The principal difference between a joint liability and a joint and several liability has been pointed out by Richardson, J., at p. 295 of the Report, with reference to sec. 43 of the Contract Act.

The above distinctions have to be remembered in order to appreciate the *ratio decidendi* of each ruling, because different results flow "where the Defendants were the representatives of a single tenant and not the co-tenants who had themselves contracted with the land-

lord." Thus, obviously referring to one of the above mentioned classes of tenancies, it is ruled by Sir Ashutosh Mookerjee, C. J., in 25 C. W. N. 525 at p. 527:—"Each tenant is not plainly liable for the entire rent and cannot be sued alone. Besides the Defendants are some of the representatives of the original tenant, all of whom constitute one body liable for the whole rent. Finally the tenancy must be represented in its entirety before a decree can be made binding on the tenure." The point which arose in 22 C. W. N. 289 did not arise there.

It is ruled in 13 C. W. N. 270 at p. 272 that in the case of tenures sold for arrears of rents, there are two distinct kinds of procedure:—(1) procedure under the Rent Act, where the whole tenure passed whoever might be interested in it; (2) procedure under the Civil Procedure Code where the thing which passes to the purchaser is the interest of the person against whom the decree has been made and no more. There are, however, exceptions to the general rule and these are cases where persons are sued in their representative capacity, which term includes (a) guardians of infants and (b) *kattas* in a joint Mitakshara family. 10 Cal. 996 is an instance in point of the latter class, where though the sale was under the Civil Procedure Code, the rent decree was obtained by the sole landlord for the entire rent of the tenure and the execution proceeding shows that the tenure was proceeded against and the whole tenure was actually sold. This ruling is followed in 26 Cal. 677 and both these rulings are founded on the doctrine of representation and the principle of estoppel. In 10 C. W. N. 176 at p. 181, it is ruled that it is for the landlord to prove everything which is necessary to bring his case within the exception to the general rule as enunciated in 26 Cal. 677. The same principle is observed by Sir Ashutosh Mookerjee, J., in 26 C. W. N. 138 at p. 139. Says his Lordship:—"In order to entitle the execution purchaser to invoke the aid of the principle enunciated in the case of 26 Cal. 677, which followed the rule recognised in 10 Cal. 996, it is not sufficient to show that the landlord has chosen to obtain a decree for rent against one out of several heirs. It has to be established that the tenants have held out one of them as representative in their transactions with the landlord . . . such co-owner would be affected by the sale even though they were not parties to the decree."

As pointed out in 25 C. W. N. 525,¹ cited above, in a case in which all tenants are not made parties, nor are properly represented, the defect cannot be cured by invoking the aid of sec. 99, Civil Procedure Code, because each tenant is not liable for the entire rent and cannot be sued alone.

(To be continued.)

THE HINDU LAW OF REVERSIONS AND REVERSIONERS.

(Continued from p. lix.)

Thus a Hindu reversioner, whether of the first or of the second set, as observed by the Right Hon'ble Ameer Ali in *Amrit Narayan Singh v. Gaya Singh* (1), "has no right or interest in *presenti* in the property which the female owner holds for her life. Until it vests in him on her death should he survive her, he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes *concrete* only on her demise; until then it is mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf, or bind him by any contractual engagement in respect thereto." In default of all classes of reversionary heirs to the estate of a Hindu widow the Crown as *ultimus heres* has a right to step in and claim the estate, taking rather by escheat than by inheritance proper. Yet inasmuch as the Crown claims the same power as a reversioner would have of impeaching any unauthorized alienations by the widow it might as well be called a *quasi-reversionary* heir. "When by the Law applicable to the last owner," said their Lordships of the Privy Council in *The Collector of Masulipatam's case* (2), "there is a total failure of heirs the claim to the land ceases to be subject to any such personal law,--and there can be, legally speaking, no unowned property,—the law of escheat intervenes and prevails: *private ownership not existing*, the State must be owner as ultimate tort," to negative "the King's right," say, "to Brahminical property," (their Lordships were confronted with texts of Hindu Law making an exception in the case of Brahminical property), while, affirming "his title to the wealth of all other classes" of his subjects "in such circumstances," would be "the derogation of the

general right of the British Sovereignty." This, however, by the way.

After all, the interest of a reversioner under the Hindu Law, all said and done, is as difficult to define as a widow's estate; the one is as anomalous as the other. The right of a Hindu reversioner is a contingency dependant on no man's will, but upon the happening of an *uncertain event*, that is, upon the chance of the reversioner *surviving* the widow and occupying at her death the position of heir to the last male owner. Nevertheless, "the law as to the situation of the reversionary heirs," as observed by their Lordships of the Privy Council in *Januki Ammal v. Narayan Aiyar* (1), "is in substance quite clear; there is, as stated, no vesting at the death of the husband's death; and it follows that the questions of who is the nearest reversionary heir or what is the class of reversionary heirs fall to be settled at the date of the expiry of the ownership for life." The rule of Hindu Law with regard to the nature of the reversioner's right may have been subject to various forms of expression, but in substance it is not doubtful. A reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis*, is recognized by our Courts as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.

Thus the terms "Reversion" and "Reversioner" which, although borrowed from the English Law of Real Property where they connote different incidents, are, as used in modern Hindu Law, free from doubt, and, by their continuous employment for a century or more as technical terms, have become almost classical.

N. MUKERJEE, M.A., B.L.,
Bar-at-Law.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

On the 6th February an application was made to the Board, consisting of VISCOUNTS HALDANE and CAVE, and LORD DUNEDIN, in the case of *Lim Ho Seng v. The King*, for special leave to appeal from a decision of the Supreme Court of the Straits Settlements. The Appellant was convicted of murder and sentenced to death subject to the determina-

(1) 32 Cal. Weekly Notes, [1917-1918] 409 (413-415), (P. C.)

(2) 8 Moo. I. A. 500; s. c. 2 South, (P. C.), 59.

(1) 11 All. Law Journal, [1916] 997 (P. C.).

tion of a question of law by the Supreme Court. This question was as to whether what purported to be a voluntary confession of the prisoner, retracted by him at the trial, had been properly admitted as evidence. The Supreme Court held that although the method of taking the confession was not beyond reproach, yet in their opinion substantial justice had been done. The applicant now moved the Board for leave to appeal from this decision.

Their Lordships dismissed the application pointing out that their functions were not those of a Court of Criminal Appeal, and that inasmuch as there was evidence to go to the jury on which they could pronounce a verdict, the Board were unable to advise His Majesty to interfere with the result.

The case of *Khajeh Sulaiman Quadir v. Nawab Sir Salimullah Bahadur*, mentioned in my notes of last week, has occupied the attention of the Board since then, and still remains part-heard. This case was not heard on Tuesday (7th) owing to the absence of LORD DUNEDIN. An appeal from Allahabad, *Ram Narayan v. Harnam Das* was taken instead and heard by VISCOUNT CAVE, LORD SHAW, SIR JOHN EDGE and MR. AMER ALI. *Messrs. DeGruyther, K. C.* and *Dubé* appeared for the Appellants and *Mr. Parikh* for the Respondents. The question in dispute was one of fact as to whether the property in which the Plaintiffs, Respondents, claimed a share was joint family property or the separate property of the Appellant.

The Subordinate Judge dismissed the suit but it was decreed by the High Court on appeal. The Board upheld the decision of the High Court and dismissed the appeal without calling on the Respondents.

9-2-22.

G. D. M.

Review.

THE CODE OF CRIMINAL PROCEDURE (ACT V OF 1898) WITH NOTES AND COMMENTARIES. By G. P. Boys, B. A., LL. B. (Cantab), *Bar-at-Law*. New Edition, 1921. Printed and Published by the Pioneer Press, Allahabad.

It is refreshing to glance through this work which is marked by a methodical and systematic classification in all its details. The first volume which is very handy gives the text of the Act with a key to the annotation given in Vol. II. Vol. I not merely gives below each

section numerical reference to the paragraphs of Vol. II, where the commentary and annotations are to be found but also to the corresponding sections of the Codes earlier than 1882 to which reference may with advantage be made. The amendments since 1882 are indicated in the text of the Code of 1898 itself. Such references to the previous Codes are very useful in determining the applicability of the earlier cases to the present Code. Any one handling the Code either in a Court of law or outside knows how very perplexing it is to use the various annotated editions both large and small. It is often a great relief to refer to the bare text of the Act itself. We congratulate the author for leaving us free to read the sections by themselves unencumbered by any notes and to form our own independent judgment in the first instance; and then as to our doubts, difficulties and misgivings, for giving us just the sort of help and guidance that one would like to have from one who has made a thorough study of the Code and the case-law on the subject. The chief merits of the author's annotation consists in the systematic arrangement of his notes and commentaries preceded by a syllabus. The syllabus to each section gives in skeleton all the important and material elements of the section itself and the general scope of its applicability. Against each item of the syllabus reference to the number of the paragraph of the annotation is given which enables one to find out at once the relevant passages and the case-law on the subject. Some of the more important sections such as sec. 145 have a general and a special syllabus, the former dealing with the general procedure and scope of the section and the latter analytically dealing with the material elements of the section. The labour that the author has bestowed in dealing with the text analytically and with the case-law synthetically, has enabled him to compress his annotations and commentaries within a very reasonable compass and avoid repetitions and other redundancies. The author does not satisfy himself by merely citing the cases or presenting them in the form of an abbreviated digest but very often introduces or supplements them by observations of his own which are conducive to an intelligent appreciation of the question of law or principle involved.

The great merit of this work is that it not merely gives a real guidance to find out one's law but also to form an intelligent appreciation of it.

THE Calcutta Weekly Notes.

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MONDAY, MARCH 13, 1922.

[No. 17.]

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REPORTS (See Index.)

Rights of Railway passengers.

The Indian Railways Act contains some provisions of a penal character which are no doubt necessary for the proper administration of the Railways but it is painful to see the abuse of these sections to the prejudice of the passengers. The case noted below is an instance in point—*Ishwar Das v. King-Emperor*, 1922 Pat. 63. The Petitioner was convicted under sec. 108 of the Railways Act for having caused the train while travelling to stop by means of the alarm signal. The reason for giving the signal by pulling the chain of his compartment was said by the accused to be that the compartment had become overcrowded on account of 70 passengers having entered into it whereas the compartment was marked for 27 passengers only. He stated that the compartment in question was an Intermediate class compartment, whereas most of the passengers had only third class tickets. He further stated that at Dhanbad when his compartment became overcrowded, he complained to the Railway employees but received no attention and then when the train started he felt suffocating sensation and consequently he pulled the chain in order to stop the train. These facts were not disputed but the Magistrate found the accused guilty and convicted him as stated above evidently taking the view that there should have been a more serious case in order to entitle the accused to pull the chain, such as that stated by the guard of the train, namely, murder or fire.

One would fain credit public officers entrusted with magisterial duties in this country

with a greater sense of proportion than was apparently shown in this case, which from the point of view of the public is one of very great importance. The evidence of the Railway guard on the other hand pointed to a deplorable lack of consideration on the part of the Railway administrators for the convenience and safety of the passengers. An individual Railway servant is not to be severely blamed if he simply expressed the opinion which he must have gathered to be the prevailing opinion amongst his comrades and superiors. It is startling to think that the Railway authorities should solemnly claim in a Court of law that when a compartment labelled to carry only 27 passengers is occupied by as many as seventy, in other words, is packed to suffocation, the occasion does not entitle a passenger to stop the train by giving the alarm signal. An examination of the provisions of the Act shows that under sec. 63 of the Act, it is the bounden duty of every Railway administration to fix, subject to the approval of the Governor-General in Council, the maximum number of passengers which may be carried in each compartment of every description and under sec. 93 of the Act the Railway Company is enjoined to comply with the provisions of sec. 63 on pain of a fine of Rs. 20 per diem. A corresponding obligation has been cast under sec. 109 of the Act upon passengers to prevent the over-crowding of a compartment which already contains the maximum number of passengers.

Now what does the penal provision in question, namely, sec. 108 lay down? It says that if a passenger without reasonable and sufficient cause makes use of, or interferes with, any means provided by a Railway administration for communication between passengers and Railway servants in charge of

a train, he shall be punished. It is clear beyond doubt that the provisions of the Act noted above confer a right upon the occupants of a compartment to resist the entry of passengers in the circumstances which arose in the present case. His Lordship, Jwala Prasad, J., in setting aside the conviction delivered a very well-considered judgment and pointed out that in order to enforce this right every passenger is entitled to invoke the aid of the Railway officers in any station or of the officer in charge of the train when it is in motion or is not in any station and in the circumstances of the case the Petitioner did not act without reasonable and sufficient cause and sec. 108 of the Act consequently did not apply to the case.

This important decision on a point affecting the Railway-travelling public should be widely circulated to all Railway administrations and we invite the attention of the authorities to the following remarks of the learned Judge:—“The Railway people were guilty of negligence in not carrying out the provisions of the Act which are meant entirely for the safety and comfort of passengers and instead of thanking the Petitioner for having drawn their attention to it they prosecuted him and thus transferred their own liability to the shoulder of the Petitioner.”

POSITION OF AN UNRECORDED CO-TENANT IN A RENT SALE.

By MR. KHETTRANATH SINGH,
MUNSIF OF RANCHI.

(Continued from p. lxiii.)

In a case where a money decree was passed for arrears of rent by the trial Court against one only out of the heirs of the original tenant, it was ruled in 24 C. L. J. 371 that the entire decree could not stand inasmuch as it was not a case of a joint contract which might be enforced against any one of the joint contractors; but the Defendants became jointly interested by operation of law in a contract made by a single person. A similar question was considered in 15 C. W. N. 191 by Sir Ashutosh Mookerjee, J. At first sight, these rulings appear to conflict with the proposition of law enunciated in 22 C. W. N. 289 mentioned above but they are to be distinguishable mainly on the ground that the decree made against one only was set aside because it was inconsistent with the pleadings of that case and the

written contract of the parties. This was the argument put forward at the Bar and was supported by Sir N. R. Chatterjea, J., at page 295. At page 296, Richardson, J., did not express any opinion and merely observed as follows:—“The question was decided in both cases on the footing that different considerations arose where the Defendants were the representatives of a single tenant and not the co-tenants who had themselves contracted with the landlord.” So far as the Province under the Patna High Court is concerned, 22 C. W. N. 289 has been followed in 5 P. L. J. 32 and 1 P. L. Times 55 in which it was ruled *inter alia* that there is no reason why a money decree cannot be passed. 15 C. W. N. 191 also reported in 12 C. L. J. 642 has been followed in 25 C. W. N. 525 mentioned above.

Thus, the ruling reported in 8 B. L. R. 1 that a Zamindar is bound to sue the actual tenant when known to him, though the tenant's name has not been registered in his *sherista*, appears to be still good law though of course it is subject to several exceptions some of which have already been mentioned above. In case of *benamdar* whose name was registered in the landlord's *sherista*, it was ruled by Sir N. R. Chatterjea, J., in 23 C. W. N. 166 *notes* that a person beneficially interested is bound by the rent decree against his *benamdar*. Such a case is, of course, founded on the above-mentioned doctrine of estoppel and representation. On the same principle it was ruled in 23 C. W. N. 136 *notes* (which is a single Judge ruling of Newbould, J.) that the landlord is bound to sue only the heirs in possession of the original tenant. Full argument of the ruling does not appear from the short notes reported therein, but apart from the question of representation, the above proposition appears to be somewhat broadly stated. Possibly the learned Judge means that those heirs being admittedly in possession of the land, were liable for the rent and that they could not defeat the landlord's suit merely by showing that there were other heirs equally liable unless they went further and showed that their names have been notified as successors of the original tenants or that they had been paying the rent and getting receipts as successors. See 3 C. W. N. 371. In 23 C. W. N. 590, it was ruled by Sir N. R. Chatterjea, J., that where a landlord obtained a decree for arrears of rents of a tenure against all the tenants who were the recorded tenants except one who, after acquiring title by purchase, never got his name registered in the

landlord's *sherista*, the entire tenure passed by the sale in execution of such a decree. At page 592, his Lordship observed as follows:—

"During these seven years or more he has never asserted his rights as a tenant; and the finding is that he has never been recognised as a tenant nor was any rent realised from him."

Thus, though the landlord cannot arbitrarily choose one of the heirs of the original tenant and get a rent decree passed as distinguished from a mere money decree, he must have notice, actual or constructive, of the existence of other heirs of the original tenant. The actual notice includes the case of registration of the tenants' names in his *sherista* but its absence does not entitle any dishonest landlord to shut his eyes against the existence of actual heirs of the tenant, whose existence could have been known to him by the slightest enquiry. The position of the landlord is also not more favourable even if the name of the judgment-debtor alone was registered in the record-of-rights as the sole possessor of the rent-claimed land. This principle is deducible from 26 C. W. N. 138 at p. 140, a case which is distinguishable from 23 C. W. N. 136 notes, referred to above.

26 C. W. N. 138 is also an authority for the proposition that even omission by heirs of a tenure-holder to give the prescribed notice under sec. 15 of the Bengal Tenancy Act does not entitle the landlord to recognise one of the heirs as the representative of the tenancy. It may, usefully, be remembered that there is no corresponding provision in the same Act in regard to occupancy holdings.

Thus, it seems to me that it is to the interest of both landlord and tenant to get the names of proper heirs of the late tenant registered in the landlord's office. In some parts of the country where relations between landlord and tenant are strained, the landlord refuses to register the heirs of the deceased tenant, except upon payment of a premium, sometimes at a high rate; which the latter are unable to pay or will not pay; but it seems to me that it is the landlord who suffers in the long run more than the unrecorded tenant for obvious reasons. The latter can defeat the landlord's rent decree-affecting the land by a plea of non-joinder of parties known to the landlord. The unrecorded heir may, however, avoid this litigation by entering into a compromise with the landlord, *viz.*, by paying a reasonable premium and getting his name registered in the landlord's *sherista*.

The misunderstanding referred to above is

the source of much fruitless litigation in the Mofussil Courts and unless it is avoided amicably, it is for the Legislature to intervene and fix a rate of premium for registration of the tenant's name, or declare such a demand on the part of the landlord as illegal.

(Concluded.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

During the past week the Board have concluded the hearing of *Khajeh Sulchman Quadir v. Nawab Sir Salimullah Bahadur* and have reserved their judgment.

On the 9th February judgment was delivered in the Patna Appeal, *Rai Baijnath Goenka v. Maharajah Sir Rameshwar Prasad Singh*. Their Lordships dismissed the appeal with costs.

At present the Board are hearing the arguments in certain appeals from Madras *Sri Chidambara S. P. Sannadhiyal v. Veerama Reddi*. These are five consolidated appeals in which questions are raised under the Madras Estates Land Act. The suits were brought for ejectment. *Messrs. DeGruyther, K. C.* and *Kenworthy Brown* for the Appellant. *Messrs. Dunne, K. C.* and *Dubé* for the Respondents.

A somewhat similar question was raised in the case of *Radhakrishna Ayyar v. Sundaraswami* which was argued before the Board during the past week by *Sir G. Lowndes, K. C.* and *Mr. Kenworthy Brown* for the Appellants and *Mr. DeGruyther, K. C.* and *Mr. Parikh* for the Respondents. This appeal originally came before the Board in December 1920 and was dismissed on the ground that the subject-matter was under Rs. 10,000 and there was nothing in the certificate to show that the High Court had exercised the discretion conferred on them by sec. 109 of the Civil Procedure Code (*vide* L. R. 48 I. A. 31). A fresh certificate had been granted by the High Court and the case again came before the Board. A preliminary objection was taken by *Mr. DeGruyther* that the value of the subject-matter was below Rs. 10,000 and there was no ground for appeal to His Majesty in Council. After hearing counsel the Board intimated that they would reserve this point and hear the appeal on the merits. Judgment was eventually reserved. The Board consisted of VISCOUNT CAVE, LORD SHAW, SIR JOHN EDGE and MR. AMEER ALI.

Judgment was delivered by the Board on the 14th February in the case of *Sripat Singh Dugar v. Rai Hari Ram Goenka*, an appeal from Bengal. The Appellants are the representatives of the late Chatrapat Singh who died in 1918. In 1896 a decree was pronounced *ex parte* against Chatrapat and the questions in the appeal were whether an application by the decree-holder for execution of the decree was duly made and was not barred by limitation and could be prosecuted against the Appellants. These questions were answered by the lower Courts in the affirmative. The Board dismissed the appeal with costs, but ordered a declaration to be made saving the rights of the insolvency Receiver or Trustee.

13-2-1922.

G. D. M.

Correspondence.

DOES PAYMENT UNDER INSTALMENT DECREE REQUIRE ANY NOTICE UNDER OR. 21.

R. 1, C. P. C. ?

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

In the mofussil, there exists diversity of practice as regards notice to be given to the decree-holder, when any payment is made into Court according to instalment-decree. Some Courts do not think it necessary to serve any such notice, while others insist upon the payment of costs for service of notice along with the deposit of the instalment-money, according to Or. 21, r. 1, sub-r. (2). The latter course does not seem to be reasonable and legal. Instalments are granted to persons who are hard up in pecuniary circumstances, and in a large proportion of cases, especially in the mofussil, the amount of instalments is often small, ranging from Rupee one upwards. If notice is insisted upon every time such a paltry amount is paid into Court, the poor judgment-debtor would have to pay each time 8 as. or Re. 1 extra as notice-fee, according as the total amount of claim is Rs. 50 or upwards. Moreover, there would be incidental expenses for having the notices written out, etc. The sub-rule referred to has been introduced in the new Code of 1908. Now let us see if the intention of the Legislature was such as to put additional burden on indigent judgment-debtors at every time they come to Court with their instalment-money.

The sub-rule runs as follows:—"Where any payment is made under cl. (a) of sub-r. (1), notice of such payment shall be given to the decree-holder." According to sub-r. (1) of r. 1, "All money payable under a decree shall be paid as follows, namely,--

(a) into the Court whose duty it is to execute the decree; or

(b) out of Court to the decree-holder; or

(c) otherwise as the Court which made the decree directs."

Now when an instalment-decree is passed, the Court directs payments of the decretal amount to be made by instalments at certain periods. So long as these periodical payments are made, no Court can execute the decree, and certainly during that period "it is not the duty of any Court to do so," as cl. (a) contemplates. So it can be said that cl. (a) does not apply to such cases. Cl. (b) is clearly out of the scope of such payments. The only clause which can be applied to payments under instalment-decree is cl. (c), which contemplates cases which do not come under the purview of the other two clauses. Instalment-payments are made according to the direction of the Court which makes the decree, and not according to the method described in cl. (a) or cl. (b). But the only clause for which notice has been provided is cl. (a). Hence no notice is required for payments under instalment-decree according to cl. (c).

The intention of the Legislature in making provision for notice in r. 1 seems to be that the running of interest on the decretal amount will cease as soon as the decree-holder will come to know of the deposit. In instalment-decrees generally no question of interest can arise as long as the periodical payments are regularly made according to the direction in the decree. So the non-service of notice will not affect any right of the decree-holder. Reference may in this connection be made to 42 Mad., p. 576 (*Ramaraya Shanbogue v. Sherbott Venkataramanayya*).

Under the circumstances, it seems proper that the anomaly in the practice which at present obtains in different Courts as regards notice in connection with payments under instalment-decree should be removed, and all Courts should follow a consistent procedure by dispensing with such notices.

RAJENDRANATH SOM, B. L.,
Pleader, Howrah.

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REPORTS (See Index.)

Resignation of Mr. Montagu.

Mr. Montagu has been obliged to vacate his office as Secretary of State for India as the result of a most unfortunate Cabinet squabble. Into the merits of the point of etiquette which is the immediate cause of his resignation, we have no inclination to enter, for intrinsically they are of no importance, however large they may appear at this moment in the eyes of those immediately concerned. India, frankly, is more exercised over the severance of Mr. Montagu's connection with the India Office than the causes which have led to it. Mr. Montagu was at the helm of the affairs of India at a most critical period of her history. He was unquestionably the only Secretary of State who, fortunately for himself and India, had the opportunity (of which he fully availed himself) of acquainting himself at first hand with the manifold difficulties that beset the governance of India in a spirit of equity and justice; and we may affirm without fear of contradiction that no Secretary of State for India has shown himself more genuinely inspired by sympathy for Indian feelings and aspirations than Mr. Montagu. No Indian under his regime had the galling experience of feeling that, in the eyes of the Minister in charge, he was an inferior being; and no British statesman has done more than Mr. Montagu towards assuring to the Indian equality of status within the Empire with his other fellow-subjects. And yet Mr. Montagu was a strong man who, every Indian felt,

would never allow himself to be carried off his feet by weakly sentimentalism whether in favour of a person or of a political creed. It was his genuine sympathy for the Indian people and his real understanding of the basic problems of Indian politics that gave him this strength, and the fact that he failed to satisfy any single body of Indian opinion completely, testifies to his strength and impartiality. Thoughtful Indians, whilst they did not naturally endorse every single item that figured in his policy, yet never lost that saving confidence in him which led them to expect that he would not consciously or unconsciously swerve from what is ultimately for the benefit of India and of the Empire as a whole.

The loss to India of the services of a statesman who could be unceasingly wide-awake without being fussily interfering, sympathetic without being weak, and tactful without yielding on matters which are really essential, at a time when her destinies are being hammered into shape by forces which need the most careful guidance, is incalculable, but the loss to the Empire is even greater. Those who rejoice at his resignation do not realise the difficulties which the Government will experience, and is perhaps experiencing at this moment, in finding for him a suitable successor. We are not aware of any single British statesman whose past records are such as will entitle him to command a degree of confidence at all approaching that which Mr. Montagu enjoyed amongst almost every shade of Indian opinion, official and non-official. There is no room at the present moment for either a weak or a hectoring Secretary of State, and even men like Lord Derby whose name has been mentioned in this connection may well hesitate and take counsel before making up their mind to accept the appointment. This is not the time for governing India by party shibboleths or by the petty tricks of politicians. It needs large-hearted statesmanship and strength to defy cowardly counsel from friends and foes

alike. We earnestly hope that Mr. Montagu's passing from the India office will not mean his entire withdrawal from Indian politics and we are fully confident that nothing that has happened will stand in the way of his placing his experience, his sympathies and his commanding abilities at the disposal of India, whenever and from whatever quarter the call may come.

THE HINDU LAW OF REVERSIONS AND REVERSIONERS.

(Continued from p. lxiii.)

I.—DOCTRINES AND MODES OF ACCELERATION OF REVERSIONARY ESTATES.

\$ (i)—Acceleration by Renunciation of the World.

Not only upon the demise of a widow, or other limited heir, but upon her *renunciation of worldly affairs*, which is accounted a *species of civil death* according to Hindu Law (1), inheritance, in effect, *by anticipation as it were*, attaches upon her estate, and the rights of the nearest reversionary heir or heirs for the time being of the last full owner immediately begin to exist (2).

Thus a person—(the sex is immaterial)—who is clearly proved to have *completely and finally abandoned all worldly concerns*, as by entering

N. B.—At the end of the para. headed "*serenently*," page liv. (Vol. 26 C. W. N. No. 14) read—"All these several propositions enunciated in *Sakyahani v. Bhavani* (1 L. R. 27 Mad. 688), since overruled by *Challagundia v. Madala* (1 L. R. 41 Mad. 669, F. B.), are the logical conclusions to which the doctrine that one reversioner does not derive title from another reversioner could be pushed; but, having regard to the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, in the preservation of the reversion the right to carry on a suit brought by a reversioner to impeach an alienation by a qualified owner may on his death legitimately devolve on 'the next presumable reversioner,' (*Venkatanarayana v. Subammal*, 1 L. R. 28 Mad. 406 (411), P. C.). "Such a suit brought by the presumptive reversioner," (or, where permitted, by any other reversioner), "is in a representative capacity and on behalf of all the reversioners," (*ibid. Janaki v. Narayana Sami*, 1 L. R. 39 Mad. 684, P. C.). Therefore, the decision in such a suit, provided it has been honestly conducted, would operate as *res judicata* against the other reversioners, i.e., they would all be equally affected by the rule of *res judicata*. (*Challagundia v. Madala*, *see supra*; also *Brojo Kishore v. Sreenath*, 9 W. R. 423 (465); *Cheruvolu v. Cheruvolu*, 1 L. R. 29 Mad. 394 (401), F. B. and *Narayana v. Rama*, 1 L. R. 38 Mad. 396).

(1) *Vasistha* cited in the "*Mayukha*," iv-xi. 5 and "*Ratnakar*." They who have entered into another order, (i.e., by quitting the order of a house-holder), are excluded from shares." Macnaghten's *Hindu Law*, Vol. II. Chap. IV, case iii.

(2) *Syama Churn Sirkar's* "*Vyavastha-Chandrika*," Bk. II ("*Precedents*"), p. 37.—Note by Macnaghten.

into an order of religion, is excluded from inheritance (1). This rule *does not apply* to the sects of Hindus known as *Byragees* (2) and *Gossains* (3) because they pursue *secular occupations*, nor, apart from usage, to *Sudra* ascetics because *Sudras* are denied by the Hindu Canon Law the right to enter the order of *Yati* or *Sanyasi*. Moreover the Sanskrit texts which ordain forfeiture of secular estate or inheritance in the case of ascetics apply only to the three higher "regenerate" castes (4). In fact inheritance is the *general* rule and disinherison the *exception*, and, consequently, the burden of proving the exception may legitimately be laid upon the party who relies upon it. This is all the more reasonable since Hindu asceticism admits of *degrees*, but what degree of asceticism or renunciation does or does not work disinherison, or forfeiture of property is a question of fact to be proved by the party pleading the affirmative (5).

As early as 1852, in the case of *Radha Binode Misser v. Kripamoyee Debia and others* (6) the question was raised and answered in the affirmative as to whether one *Taramonee*, having relinquished all connection with worldly affairs by becoming *Tarik-i-dooniya* or *Teerth-basi*, was to be regarded as civilly dead. *Inter alia* the Court declared, *firstly*, no particular acts are enjoined by the Hindu religion to render a renunciation of the nature valid, and, *secondly*, as to the particular ceremonies necessary for one becoming a *Byraghin* (i.e., a *Sanyasini*), they are not so important as to render the renunciation invalid, merely for want of notice thereof.

In *Indoo Monee Debee v. Saroda Prosunno Mookerjee* (7), Jackson, J., observed: "On the occasion of a widow becoming a *Byraghin* (or *Sanyasini*) the estate would at once descend to the nearest heirs living at the time."

The authority for the proposition is the case of *Hafeezun-nissa Begum v. Radha Binode Misser* (8), which laid down that "a widow can, by adopting a certain form of religious life,

(1) "*Dayabhaga*," Chap. V, Para. II and "*Vyavahara Mayukha*," Chap. IV, Sec. XI, Para. 5.

(2) *Teduck Chunder v. Shama Churn Prakash*, 1 W. R. C. R. (1864) 209 and *Jagannath v. Bidyanand*, 10 W. R. 172.

(3) *Rambharti v. Surajbharti*, 1 L. R. 5 Bom 682.

(4) *Harish v. Atir*, 1 L. R. 40 Cal 545 547.

(5) *Costa. Badhawa v. Sohail*, [1892], Punjab Record, 7.

(6) Beng. S. D. A., Dec. for 1852, p. 503.

(7) *Bulnois' S. C. Reports*, [1856] Vol. I, p. 120 and *Syama Churn Sirkar's* "*Vyavastha-Durpan*," ("*Precedents*") p. 73 (76). See also 2 Macr. H. L., pp. 131, 233.

(8) Beng. S. D. A. [1856] 595 and *Syama Churn Sirkar's* "*Vyavastha-Durpan*," ("*Precedents*"), pp. 8, 77.

divest herself of the estate and accelerate its devolution on the next heir in her life-time."

Whether the adoption of any particular form of religious life by the widow has or has not that effect is, of course, a question of fact and must depend upon the circumstances of each case. Until the estate renounced has got legally vested in the next reversioner the widow may at any time, unless otherwise precluded from doing so, resume her own. In every such case of disputed renunciation of worldly affairs by the widow the *factum* as well as the *nature* of the renunciation should be determined by an issue framed accordingly.

N. MUKERJEE, M.A., B.L.,
Bar-at-Law.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Board continued the hearing of the appeal in *Sri Chidambara Sivaprakasa Pandara Sannadhigal v. Veerama Reddi* and connected appeals on the 16th and 17th instant, and will deliver a considered judgment.

The Madras appeal of *E. Oppenheim & Co. v. Haji Mahomed Hancef*, which was argued before LORDS SUMNER, WRENbury and CARSON on December 1st was re-argued on February 17th before VISCOUNT CAVE, LORDS SHAW and PHILLIMORE, SIR JOHN EDGE and MR. AMEER ALI. The questions raised will probably be of considerable importance to the commercial community. The contest between the parties related to the construction of the Arbitration Clause in a Contract for the sale of goods. *Messrs. DeGruyther, K. C. and Harold Morris, K. C.* appeared for the Appellants (*ex parte*). Judgment has been reserved.

Sheo Darshan Singh v. Deputy Commissioner of Partabgarh, consolidated appeals from Oudh, were argued before the Board on the 17th and 20th instant. The suits were brought by the Plaintiff-Respondent as Court of Wards on behalf of reversioners to recover possession of properties alienated by the late Raja Rampal Singh, on the ground that the latter never had more than a life estate. The suits were dismissed by the trial Court but on appeal were decreed by the Court of the Judicial Commissioner. *Mr. S. Hyam* appeared for the Appellant. *Messrs. DeGruyther, K. C. and Dubé* for the Respondent. The Board (VISCOUNT

CAVE, LORD SHAW, SIR JOHN EDGE and MR. AMEER ALI) dismissed the appeal without calling on the Respondents and intimated that they agreed entirely with the findings of the Judicial Commissioners.

Abdul Ghani v. Fakhr Jahan Begam, an appeal from Oudh dealing with the construction of an alleged deed of gift, is now part heard before the same Board. *Messrs. DeGruyther, K. C. and Kenworthy Brown* are for the Appellants and *Mr. Dubé* for the Respondents.

The Board will not sit again until the 27th instant, and will not sit on February 28th or March 1st.

22-2-1922.

G. D. M.

Notes of Cases

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CHATTERJEA and PEARSON, JJ. APPEAL FROM APPELLATE DECREE No. 2250 of 1919. *JAMINI MOHON SARCAR* and others, Plaintiffs, Appellants *v.* *CHAITANYA CHANDRA PROHORAJ* and others, Defendants, Respondents. The 9th February 1922.

Or. XXII, r. 4, C. P. C.—*Death of one of several Defendants, Respondents—Abatement.*

The Plaintiffs brought a suit against a large number of Defendants for declaration that the Defendants had no *niskar* (rent-free) right to Mouza Kataldale and for recovery of khas possession thereof. Some of the Defendants in their written statement stated *inter alia* that they were interested in specific plots of land and some of them filed a solenama in which separate boundaries were given of lands in their possession. The trial Court dismissed the suit on a preliminary ground which was found erroneous by the District Judge on appeal. But at the time of the hearing of the appeal the Defendants took the objection that the Defendant-Respondent No. 20 had died six months ago, and his heirs not having been brought on the record in time, the appeal against the heirs of the deceased Defendant had abated and therefore the whole suit should also fail. On the authority of the rulings reported in XI C. W. N. 501; XVIII Indian Cases 182; XXI Indian Cases 951 and XXII Indian Cases 829, the District Judge gave

effect to the contention and held that in the absence of anything from which the interests of the several Defendants can be discriminated the whole suit must be dismissed :

Held—That the whole suit should not be dismissed. The suit shall fail only so far as the deceased was jointly interested with the other Defendants. With regard to those plots which the Defendants held separately from the deceased the suit shall not fail. The suit shall be dismissed with regard to those plots in which the deceased had share.

Babus Panchanon Ghose and Jatindra Nath Sanyal for the Appellants.

Dr. Sarat Chandra Bysack and Babu Narendra Nath Chowdhury for the Respondents.

Appeal allowed;
Case remanded.

J. N. S.

CIVIL REVISIONAL JURISDICTION. Before RICHARDSON and GHOSE, JJ. CIVIL RULE No. 515 OF 1921. RAJ KUMAR MUKERJI, Petitioner v. W. J. GODFREY, Opposite Party. The 26th January 1922.

Act IX of 1897—Provident fund if attachable by a creditor after the member retires from service.

The Opposite Party while in service of the Eastern Bengal State Railway borrowed from the Petitioner some money for which a decree for Rs. 850 was obtained against him. In March 1921 the Opposite Party retired from service. He had a sum of Rs. 1,400 to his credit in the Provident Fund after his retirement. The Petitioner applied to attach his interest in the Provident Fund in the hands of the Chief Auditor of the Railway Co., who had the monies in the Provident Fund standing to the credit of the Opposite Party. The Small Causes Court attached this fund but on the Chief Auditor objecting that these monies could not be attached in law the attachment was withdrawn by the Small Causes Court Judge by his order against which the Petitioner moved the High Court and obtained this Rule. The Rules of the fund provided that on retirement the monies standing to the credit of a member is to be handed over to him on demand.

Babu Rupendra Kumar Mitter for the Petitioner submitted that Act IX of 1897 as amended by Act IX of 1903 has made compulsory deposits not liable to attachment. But "compulsory deposits" is defined in sec. 2 to

mean "monies . . . which are not payable on the demand of the member." R. 10 was modified by the Government which expressly recognized the right of attachment of a creditor after the member retired from service. Hence from that time the fund ceased to be compulsory deposit within the meaning of sec. 4 and was therefore attachable.

Babus D. N. Chakraverty and Surendra N. Guha as *amici curie*.

Held—That on the materials placed the fund was attachable after the member retired from service.

S. C. C.

Rule made absolute.

CRIMINAL REVISIONAL JURISDICTION. Before WALMSLEY and SUHRAWARDY, JJ. CRIMINAL REVISION No. 1006 OF 1921. MANOBILASH BANNERJEA, Petitioner v. KUSUM KAMINI DEBI. The 13th January 1922.

Criminal Procedure Code, sec. 247—Order of revival of case after acquittal, legality of.

One Kusum Kamini Debi brought a complaint in the Court of the Sub-Divisional Magistrate of Howrah against Manobilash Bannerjea under sec. 341, I. P. C. (wrongful restraint) and summons was issued accordingly. On the day fixed for hearing neither the complainant nor the accused was present and the Deputy Magistrate Mr. D. Dutt acquitted the accused under sec. 247, Cr. P. Code. On that very day the complainant made a petition for revival on the allegation that she was not aware that the case will be tried by D. Dutt, Esq. The Magistrate in charge ordered the case to be put up before Mr. F. C. Chatterjea who on the following day admitted the application and revived the case and directed issue of fresh summons on the same charge. The accused Manobilash moved the High Court on the ground that the order of revival was bad in law and neither the Sub-Divisional Magistrate nor the trying Magistrate could revive the proceedings.

Their Lordships made the rule absolute holding that the order of revival was bad in law after the order of acquittal under sec. 247, Cr. P. C. was once passed.

Babu Lalit Mohon Bannerjea (with *Babu Durga Charan Ray Chaudhuri*) for the Petitioner.

Babu Girija Prasanna Ray for the Complainant Opposite Party.

S. C. C.

THE Calcutta Weekly Notes.

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[No. 19.]

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REPORTS (See Index.)

***Bond fide* claim of right in proceeding under sec. 133, Cr. P. C., whether gusts jurisdiction of Criminal Court.**

We greatly apprehend that the Full Bench decision in *Ram Sagar Mondal v. Alek Naskar*, reported in this issue (p. 442), will go a great way towards unsettling a practice which on the whole is salutary and which has been followed without noticeable departures for several decades. There may be no difficulty in conceding (as indeed the Vakil who appeared to support this practice is said to have done) that it is putting the case too high to say that whenever a Defendant in such a proceeding sets up a claim in which he himself *bond fide* believes, the Magistrate's jurisdiction is entirely ousted. It may also be true, as suggested by Richardson, J., in his interesting *résumé* of the origin and history of the extreme doctrine of ouster of jurisdiction, that it owed its existence in England to conditions which no longer obtain in that country, and which perhaps have never prevailed in British India. It is on the other hand undoubtedly a fact, as is pointed out by Richardson, J., that the practice, as settled by a long course of decisions of the High Court, has for years been for Magistrates to desist from pursuing the procedure under Chap. X of the Criminal Procedure Code, whenever they have been satisfied that the Defendant's claim of the pathway being his private property is a *bond fide* one, irrespective of the further question whether such claim is reasonable or not; and we cannot but share

his Lordship's doubts as to the expediency of altering this practice by a decision of a Full Bench, specially as the Legislature is at this moment engaged in revising the Code. We take it, however, that his Lordship and Newbould, J. (who concurs with him), though they join with the Chief Justice and Teunon, J., in repudiating the extreme doctrine of a *bond fide* claim of right depriving the Magistrate of his jurisdiction, do not condemn the practice according to which Magistrates as a rule refrain from proceeding, except in cases of urgency, and we observe with pleasure that C. C. Ghose, J., at any rate, has expressly stated that whenever the Magistrate finds that there is a real or substantial question of right to be tried between the parties, the Magistrate *should* stay his hand, and leave the matter to be decided by the Civil Court. In his short judgment, Teunon, J., has made no attempt to disguise his view that any reference to the *bond fides* of the Defendant's claim (which finds no place in the terms of the section itself) is irrelevant, and the large reliance placed by his Lordship the Chief Justice on the rule laid down in *Bank of England v. Vagliano* (1891) A. C. 107 at p. 144, for the interpretation of consolidating and amending statutes, leaves hardly any room for doubt that his Lordship the Chief Justice inclines towards the same view. Thus, if we have understood the judgments of their Lordships correctly, the Full Bench gives no definite lead upon the question whether the practice heretofore uniformly followed of not pushing on proceedings under sec. 133, Cr. P. C., whenever a *bond fide* claim of property is set up in defence is to be henceforth discontinued altogether or only judiciously followed, and if followed, in what classes of cases. This, we consider, is unfortunate. The matter we think should be taken up by the Legislature and the uncertainty removed before the revision of the Act is completed.

THE HINDU LAW OF REVERSIONS AND REVERSIONERS.

(Continued from p. lxxi.)

* § (ii)—Acceleration by Disclaimer, Repudiation, or Voluntary Abandonment of Inheritance.

Not only upon the demise or renunciation of worldly concerns, but upon her disclaimer of an inheritance by a limited heir it vests in the next reversionary heir alive at the time.

Indeed, as observed in *Soorja v. Bhovance Deen* (1), "it would be contrary to judicial usage and precedent to allow him"—the sex does not matter—"to claim or hold for his own benefit an inheritance which he disowned and repudiated when desirous of avoiding the liabilities connected therewith."

Whatever may be the motive for such disclaimer or abdication of her rights by a Hindu widow, whether it be her inability to hold and manage the inheritance by reason of her sex and habit of seclusion, or any other cause, she is thereby divested of her estate which immediately devolves upon the nearest, reversionary heir living at the time as completely as in the case of a natural dissolution.

Of course cases of disclaimer of inheritances by widows or other limited heirs are rare, but for such a disclaimer to be effective, should it ever arise, the intention must be clear and final. The line between a disclaimer of this kind, and a refusal by a widow to assert her rights, thereby endangering the reversion, cannot be drawn in the abstract, but each case must depend upon its own peculiar circumstances. In the last-mentioned case, for instance, the immediate reversioner may have any part of her estate, suffered by her to be adversely put out of her possession, reduced to her own, or get himself put into possession of the same as receiver-manager on her behalf. Thus in the case of *Guncsh Dutt v. Lal Muttee Koor* (2), the widow refused to assert her right to possession of her husband's estate as against an adverse holder, alleging her husband was not separate, but a member of a joint family at the time of his death. The next reversioner, the daughter in this case, was put by the Court into possession of the estate as manager during the widow's life-time (3). In

cases of this kind where the reversioner himself is appointed receiver-manager by the Court, the reversion is not, it should be borne in mind, accelerated thereby. As was directed in *Adi Deo v. Dukharan* (1), the reversioner-manager must "file accounts in and pay the income to her (the widow) through such Court."

An adopted son may, it may be observed here, renounce his interest in the estate which became vested in him by virtue of his adoption, or may waive any of his rights therein (2), or he may renounce his status as an adopted son (3).

Upon such renunciation or waiver the reversioner who would take in default of adoption would succeed to the estate (4).

§ (iii)—Acceleration by surrender of the life-estate.

"The succession of females according to Hindu law," it was observed in *Gunga Pershad Kur v. Shumbhoonath Burman* (5), "is not regular succession and is not founded upon the ordinary theory of a spiritual benefit." (If they succeed at all, they do so by virtue of express texts (6) or local usage). "Therefore, if they relinquish their rights in favour of the reversioner the case is again brought back to the normal state of succession (7), the effect being to vest in him a complete title (8)."

This is technically called *Acceleration of estate by surrender, or relinquishment*. Thus, according to Hindu law, a widow in possession cùn relinquish and, by relinquishing, anticipate for the reversioners their period of succession (9). "Where a Hindu widow," to use the language of Tudball, J., in *Rup Ram v. Rewati* (10), "gives property inherited from

(1) I. L. R. 5 All. 532 (542). See also *Radha Mohan v. Rama Dass*, 24 W. R. 89.

(2) Macnaghten's *Hindu Law*, Vol. II, pp. 183-184.

(3) See *Mahudu Ganu v. Bayaji Sidu*, I. L. R. 19 Bom. [1893] 339; *Rune Bhude v. Roop Shunker Soonkerjer*, I. L. R. 2 Bom. 656 (665, 671), Trev. H. L. 151.

(4) *Ibid*.

(5) 12 W. R. 993, followed in *Noferdoss Roy v. Modhu Soondari Burmania*, I. L. R. 5 Cal. 732; s. c. 5 C. L. R. 557.

(6) "Dayabhaga," XI-VI-II. For cases see Dr. Gour's H. C., p. 921 [Footnote (4)].

(7) *Ibid* (734). See also *Moti v. Lal Dass*, I. L. R. 41 Bom. 93 (103); *Chinnaswami v. Appunswami*, I. L. R. 42 Mad. 25 and *Nachiappa v. Rangaswami*, 26 Indian Cases 767 (High Court stage).

(8) *Noferdoss v. Modhu Soondari*, I. L. R. 5 Cal. 732 (735, 736).

(9) *Protap Chunder Roy Chowdhary v. Joy Monte Dabee Chowdhary*, 1 W. R. 98.

(10) 7 All. L. J. [1910] at p. 647.

(1) See *Infra*.
(2) 17 W. R. 11. See also *Radha Mohan Dhur v. Ram Dass Dey*, 3 B. L. E. (A. C.) 362 and *Shama Soondree Chowdhary, v. Jumoona Chowdhary*, 24 W. R. 86.

(3) See also *Naulaka v. Jai Mangal*, [1885] All. W. N. 279.

her husband to a person who, if she were to die at once, would take the property whether with a life-estate, or a full estate, her gift would only be tantamount to relinquishment of her rights and acceleration of the persons next entitled to possession after her."

The term "surrender" has been grafted on to Hindu law from the British system of jurisprudence, but the principle of surrender itself is not a mangrel rule of law: it is well-recognized by all the Schools of Hindu law and is indigenous to our system.

"So far as the doctrine of surrender is concerned," observed Kīmaraswami, J., in *Nachiappa v. Rangasami* (1), there is no express authority to be found for it in the *Smritis* or in the *Mitakshara*. The text of *Katyana*, accepted by all the commentators as authoritative, expressly states that the widow is to enjoy the estate of her husband with moderation until her death, and that after her the husband's heirs should take it. An anticipation of interest involved by the theory of relinquishment (or surrender), or a discharge of ulterior interests by intermediate or premature acts on the part of the widow is hardly contemplated by the *Smritis*. As pointed out by (Golap) Sirkar, the rule probably originated from the doctrine that retirement from the world, or extinction of one's desire for property is, according to Hindu law, civil death and causes, in the same way as natural death, the extinction of her rights in property, and has the effect of accelerating the inheritance. The theory of acceleration of the estate by surrender by the widow has been evolved by the Calcutta High Court from the *Dayabhaga* of *Jimuta Vahan*."

"The only text" (on the subject), similarly observed Seshagiri Aiyar, J., in the same case [*Nachiappa v. Rangasami* (2)], "is that of the "*Dayabhaga*" (3): "Therefore," it thus runs, "those persons, who are exhibited in a passage above-cited as the next heirs, on failure of prior claimants," (i.e., nearer heirs than themselves in the line of succession)," shall, in like manner as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after her use of it upon the death of the widow in whom the succession had vested."

"The above text, as pointed out by Mookerjee, J., in *Debiprosad v. Golap Bhagat* (1), is "comprehensive enough to include not merely the case of the death of the widow, but all cases where her right ceases." "Now the aim of the text," Mr. Justice Aiyar declares, "is to enable female heirs to divest themselves of the temporal responsibility of managing an estate during their lives, and, by surrendering possession and management, to accelerate the succession of the immediate reversioner. It, therefore stands to reason that if this object is to be achieved the whole of the estate should be surrendered. The rule should not be so worked as to place in the hands of the widow a weapon—the weapon of partial surrender "by which she can attain temporal advantages to herself, and to those whom she favours at the expense of the heir on whom the succession will devolve on her death."

N. MUKERJEE, M.A., B.L.,
Bar-at-Law.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Judicial Committee on the 27th February gave judgment in the Punjab appeal *Chhajju Ram v. Neki & ors.*, which concerned a claim to a right of pre-emption and which incidentally raised the whole question of the powers of review of the Court under Or. 47, r. 1 of the Code of Civil Procedure. The judgment of the Board, consisting of VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE and MR. AMEER ALI, was delivered by VISCOUNT HALDANE. Their Lordships held that the words used in r. 1 of Or. 47 must be read as in themselves "definitive of the limits within which review to-day is permitted" and continue: "The three cases in which alone mere review is permitted are those of new material overlooked by excusable misfortune, mistake or error apparent on the face of the record, or any other sufficient reason," and they go on to interpret the words "any other sufficient reason" as meaning "a reason sufficient on grounds at least analogous to those specified immediately previously." The Board accordingly upheld the contention of the Appellants that the lower Court in setting aside on review the decision of another bench of the

(1) 26 Indian Cases [1915] 757 (771-772).

(2) *Ibid* 766-767.

(3) "*Daya-bhaga*," Chap. XI, sec. 1, *placitum* 59.

(1) I. L. R. 40 Cal. 721.

Chief Court had exceeded their powers. The appeal was argued *ex parte* by Sir George Lowndes, K. C. and Mr. B. Dubé.

The appeal from Oudh, *Abdul Ghani Khan v. Musammat Fakhr Jahan Begum* and the Allahabad appeal, *Chet Ram v. Ram Singh*, are both part-heard.

Judgment was delivered this morning in the Patna Appeal, *Khajeh Sulamian Quadir v. Nawab Sir Salimullah Bahadur*. Their Lordships allowed the appeal and directed that the judgment of the Subordinate Judge should be reserved.

Two important prize decisions were given by the Judicial Committee recently in the cases of the "*Blonde*" and "*Pellworm*." The former is a ruling which affects most of the enemy shipping seized in British Ports at the outbreak of war. The Board having taken into consideration the obligations under the Hague Convention and the Treaty of Versailles held that ships under 1600 tons which had been so seized or their appraised value if lost while under requisition by the Admiralty, should be handed over to the claimants.

2-3-22

G. D. M.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CHATTERJEE and PANTON, JJ. APPEAL FROM APPELLATE DECREE No. 2134 OF 1919. *SHEIKH SAMAN BEPARI* and others, Plaintiffs, Appellants *v.* *SHEIKH IMAMUDDIN* and others, Defendants, Respondents. The 2nd June 1921.

Suit for injunction by three out of five mutwalis of a wakf property—The other two joined as Defendants—The trust deed providing for disagreement—Is the suit maintainable?

The appeal arose out of a suit by the Plaintiffs to obtain an injunction restraining the Defendant No. 1, from raising a *pucca* building on a certain *wakf* property. There are five *mutwalis* of a *wakf* property, three of them were the Plaintiffs, the remaining two joined as Defendants. The trust deed provides that the *mutwalis* should act in unity and in case of

disagreement, the matter to be placed before the congregation at the mosque and the *mutwalis* should do what the majority of the *Panchayat* would decide. The Court of first instance dismissed the suit on two grounds. The lower Appellate Court on appeal held that the suit was not maintainable by three out of five *mutwalis*. The learned Judge held that there was disagreement between the Plaintiffs and two Defendants. The lease to Defendant No. 4 was agreed to by the *Panchayat*. The Plaintiffs disapproved the lease. An appeal was preferred to the High Court. It was urged on behalf of the Appellants that disagreement between the trustees took place at the time of granting the *mirasi* lease which was subsequent to the institution of the suit. The suit was brought in the first week of Chaitra and was decided against Defendant No. 1 who had commenced the building. Temporary injunction was issued on the 10th Chaitra and the Defendant No. 4 was granted a *mirasi* lease with the approval of the *Panchayat* by Defendant Nos. 2 and 3. On the 15th Chaitra Defendant No. 1 surrendered the holding to the *mutwalis* Defendant Nos. 2 and 3 and on 18th Chaitra executing a *kobala* in favour of Defendant No. 4 left the building. The document was alleged to be a collusive one and the Defendant No. 1 ceased to have any connection with the building. The first Court doubting the *bona fides* of the transaction found that the Defendant No. 1 had no connection with the building.

Held—That the Plaintiffs who are some of the *mutwalis* are competent to maintain the suit, having made the other trustees Defendants who by their own acts precluded themselves from being joined as Plaintiffs. The learned Judge is not right in the view he has taken. The point as to disagreement not being clear the case is sent back for further consideration.

Pyari Mohon Bose v. Kedar Nath Roy, followed.

I. L. R. 26 Cal. 409; 5 C. L. J. 527, 533; I. J. R. 11 Cal. 338; I. L. R. 8 Cal. p. 42, 11 (1879) Ch. D. 121.

Dr. Sarat Ch. Basak and Babu Ajendra Nath Dutt (for Babu Manmatha Nath Pal) for the Appellants.

None for the Respondents.

Case remanded.

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EDITORIAL NOTES—

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Bengal Act IV of 1922

REVIEWS

REPORTS (See Index.)

Court-fees, enhancement of.

The Bengal Court Fees Amendment Act which has introduced numerous changes in the scale of fees leviable upon documents to be presented or filed in Court comes into operation from the 1st of April next. Yet, it was only on the 29th March last that the Act was published in an extraordinary issue of the *Calcutta Gazette*. This, it goes without saying, will cause immense inconvenience to the litigant public and their advisers. So far as litigants and legal practitioners on the Appellate Side of the High Court are concerned, it should be observed that besides the general increase in *ad valorem* fee in suits and appeals the value of which exceeds Rs. 75, the most notable changes are the following:—(1) Applications or petitions presented to the High Court under sec. 115 of the Code of Civil Procedure for revision of an order, when the value of the suit to which it relates does not exceed Rs. 1,000, are to be charged with a duty of Rs. 5 whilst similar applications when the value of the suit exceeds Rs. 1,000 are to be charged with Rs. 10. (2) All memorandums of appeal when not directed against a decree or an order having the force of a decree and presented to the High Court must henceforth bear a stamp of Rs. 5, in other words all appeals from orders as such are chargeable with a court-fee of Rs. 5. The impression generally prevailing that all petitions in the High Court and Vakalatnamas presented in the said Court must bear enhanced court-fee stamp is erroneous. Vakalatnamas as also petitions other than revision petitions mentioned above remain chargeable with a court-fee of Rs. 2 only as formerly. The probate duty, it should be noticed, has been enhanced,

but the limit of exemption has been raised from Rs. 1,000 to Rs. 2,000. The text of the operative portion of this Act (omitting the Schedule of *ad valorem* fees) is printed in this number to facilitate reference.

Of equal interest to all branches of the profession practising in the High Court is the provision of the Bengal Stamp (Amendment) Act, 1922, amending Art. 30 of Sch. I of the Act of 1899, which runs as follows:—

Schedule I A.

30. Entry as an advocate, vakil and attorney on the rolls of any High Court in exercise of powers conferred on such Court by Letters Patent or by the Legal Practitioners Act.

(a) In the case of an advocate or vakil—seven hundred and fifty rupees.

(b) In the case of an attorney—five hundred rupees.

Exemption.

Entry of an advocate, vakil or attorney on the rolls of any High Court, when he has previously been enrolled in a High Court.

BENGAL ACT IV OF 1922.

The Bengal Court-fees (Amendment) Act, 1922.

An Act to amend the Court-fees Act, 1870, and the Presidency Small Cause Courts Act, 1882, with reference to the scale of court-fees in Bengal.

WHEREAS it is necessary to revise the scale of court-fees for Bengal, by amendment of the Court-fees Act, 1870, and the Presidency Small Cause Courts Act, 1882, in their application to Bengal, in the manner hereinafter appearing;

It is hereby enacted as follows:—

1. (1) This Act may be called the Bengal Court-fees (Amendment) Act, 1922.

(2) It extends to the whole of Bengal.

(3) It shall come into force on the first day of April, 1922.

2. The Court-fees Act, 1870, as amended by subsequent legislation, and the Presidency Small Cause Courts Act, 1882, as amended by subsequent legislation, shall be amended, in their application to Bengal, in the manner hereinafter provided.

3. In sec. 18 of the Court-fees Act, 1870, for

the words "a fee of eight annas" the words "a fee of one rupee" shall be substituted.

4. In item viii in sec. 19 of the same Act for the words "one thousand rupees" the words "two thousand rupees" shall be substituted.

5. For Art. 1 in the first schedule to the same Act the following shall be substituted, namely:—

When the amount or Six annas.

value of the subject-matter in dispute does not exceed seventy-five rupees, for every five rupees or part thereof of such amount or value,

and

when such amount or Eight annas.

value exceeds seventy-five rupees, for every five rupees or part thereof, in excess of seventy-five rupees, up to one hundred rupees,

and

when such amount or One rupee

value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one hundred and fifty rupees,

and

when such amount or One rupee

value exceeds one hundred and fifty rupees, for every ten rupees, or part thereof, up to one thousand rupees,

and

when such amount or Seven rupees

value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to seven thousand five hundred rupees,

and

when such amount or Fifteen rupees.

value exceeds seven thousand five hundred rupees, for every two hundred and fifty rupees, or part thereof, in excess of seven thousand five hundred rupees, up to ten thousand rupees,

and

when such amount or Twenty-two rupees eight annas.

value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees,

"1. *Plaint, written statement, pleading, a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.*

Plaint, etc.—contd.]

and
when such amount or Thirty-value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to fifty thousand rupees,

and
when such amount or Thirty-seven value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees:

Provided that the maximum fee leviable on a *plaint or memorandum of appeal* shall be ten thousand rupees."

6. In the third column in Art. 6 in the same schedule to the same Act,—

(a) for the words "Four annas," opposite cl. (a) in the second column, the words "Six annas" shall be substituted; and

(b) for the words "Eight annas," opposite the first item in cl. (b) in the second column, the words "Twelve annas" shall be substituted, and for the words "One rupee," opposite the second item in that clause, the words "One rupee eight annas" shall be substituted.

7. For the entries above the proviso in the second column, and for the entries in the third column in Art. 11 in the same schedule to the same Act, the following shall be substituted, namely:—

"When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two thousand rupees, but does not exceed ten thousand rupees,

and

when such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees, for the portion of such amount or value which is in excess of ten thousand rupees,

and

when such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees,

• and

when such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees

Two per centum on such amount or value.

Three per centum on such amount or value.

Four per centum on such amount or value.

Five per centum on such amount or value."

8. For the entry in the second column in Art. 12 in the same schedule to the same Act, and for

the first paragraph in the third column in the said Article, the following shall be substituted, namely:—

"When the amount or value of any debt or security specified in the certificate under section 8 of the Act exceeds one thousand rupees, but does not exceed ten thousand rupees, and

when such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees, for the portion of such amount or value which is in excess of ten thousand rupees, and

when such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees, and

when such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees.

Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

Three per centum on such amount or value and four-and-a-half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

Five per centum on such amount or value and seven-and-a-half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act."

9. For the table of rates of *ad valorem* fees leviable on the institution of suits, at the end of the same schedule to the same Act, the table set forth in the schedule to this Act shall be substituted.

10. In Art. 1 in the second schedule to the same Act—

(a) in cl. (a) after the words "Municipal Commissioner" in the third entry in the second column the words "or member of a District Board" shall be inserted;

(b) (i) for the words "One anna," opposite cl. (a) in the second column, the words "Two annas" shall be substituted;

(ii) for the words "Eight annas," opposite cl. (b) in the second column, the following shall be substituted, namely:—

"In the case of a complaint or charge of an offence presented to a criminal court one rupee, and in other cases twelve annas"; and

(iii) for the words "One rupee," opposite cl. (c) in the second column, the words "One rupee eight annas" shall be substituted.

11. For cl. (d) in the second column in Art. 1 in the same schedule to the same Act, and for the entries opposite that clause in the third column thereof, the following clause and entries shall be substituted, namely:—

"(d) (i) When presented to the High Court under sec. 115 of the Code of Civil Procedure, 1908, for revision of an order—

(a) when the value of the ... Five rupees. suit to which the order relates does not exceed Rs. 1,000;

(b) when the value of the suit ... Ten rupees. exceeds Rs. 1,000.

(ii) When presented to the ... Two rupees." High Court otherwise than under that section.

12. In the third column in Art. 10 in the same schedule to the same Act,—

(1) for the words "Eight annas," opposite cl. (a) in the second column, the words "One rupee" shall be substituted; and

(2) for the words "One rupee," opposite cl. (b) in the second column, the words "One rupee eight annas" shall be substituted.

13. For Art. 11 in the same schedule to the same Act the following shall be substituted, namely:—

(a) (i) to any revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority,	Eight annas.
(ii) to any Civil Court other than a High Court,	One rupee.
(b) to a Chief Controlling Executive or Revenue Authority,	Two rupees.
(c) to a High Court	Five rupees."

14. Above the words "Five rupees," where they occur in the third column, opposite Arts. 12 and 13 in the same schedule to the same Act, the words "Ten rupees" shall be inserted opposite Art. 12 and the bracket between Arts. 12 and 13 in the second column shall be omitted.

15. (1) The words "Ten rupees" in the third column, opposite Art. 17 in the same schedule to the same Act, and the bracket opposite that article in the second column in the same schedule shall be omitted.

(2) In the third column in the said article,—

(a) opposite entries i, ii, iv and vi, the words "Fifteen rupees" shall be inserted; and

(b) opposite entries iii and v, the words "Twenty rupees" shall be inserted.

16. In sec. 71 of the Presidency Small Cause Courts Act, 1882,—

(1) in cl. (a) for the words "five hundred rupees" the words "fifty rupees" shall be substituted;

(2) after cl. (a) the following shall be inserted, namely:—

"(b) when the amount or value of the subject-matter exceeds fifty rupees, but does not exceed five hundred rupees—the sum of six rupees four annas and three annas in the rupee on the excess of such amount or value over fifty rupees;"

(3) cl. (b) shall be renumbered as cl. (c) and in that clause as renumbered for the words "sixty-two rupees eight annas" the words "ninety rupees ten annas" shall be substituted, and after the words "one anna" the words "six pies" shall be inserted.

17. Nothing in this Act shall apply to any probate, letters of administration or certificate in respect of which the fee payable under the law for

the time being in force has been paid prior to the commencement of this Act, but which have not issued.

Review.

THE BEGINNER AT THE BAR OR A PRACTICAL GUIDE FOR THE BEGINNERS (CIVIL). By Upendra Nath Sen Gupta. Published by A. C. Mitra, B. L., Proprietor. The Cranburgh Law Publishing Press, 164, Bow Bazar Street, Calcutta, 1921. Price Rs. 4.

In this little book the author jots down notes on various points of practice, which the practitioner in the Civil Courts in the Mofussil has to labouriously pick up in the course, perhaps, of years, to make himself an efficient pleader. The sources from which the author draws his material are the Civil Procedure Code and other enactments, Rules and Circular Orders of the High Court, judicial decisions. The Provincial Insolvency Act and the rules thereunder are reproduced. A carefully prepared subject-index furnishes the key to the large amount of miscellaneous information collected in the book. The notes upon court-fees have of course become a little out of date since the passing of the recent Amendment Act by the Bengal Council. But the book was published before these amendments were put forward for consideration by the Council. We have no doubt that the book will serve the purpose for which it has been compiled.

PROVINCIAL SMALL CAUSE COURTS ACT. By S. K. Ray Choudhury, B. L. Rai M. C. Sarkar Bahadur & Sons, Law Publishers and Book-sellers, Calcutta. September 1921.

This is a handy and up-to-date annotation of the Provincial Small Cause Courts Act. The notes of cases are well digested, and they include decisions of the several High Courts as also those of the Chief Courts and Courts of Judicial Commissioners. It goes without saying that the amendments of the Act up-to-date have been duly embodied. Such a book, dealing with a Statute which needs such constant handling as the Provincial Small Cause Courts Act cannot fail to be useful.

THE INDIAN LIMITATION ACT. By Hem Chandra Mitra. Revised and brought up-to-date. By B. B. Mitra, B. L., Fifth Edn.,

1921. Rai M. C. Sarkar Bahadur & Sons. Law Book-sellers and Publishers. 90-2A, Harrison Road, Calcutta.

A new and revised edition of this handy commentary on the Limitation Act will, we have no doubt, hold its own, as its predecessors have done, inspite of the existence of more ambitious and at the same time more costly treatises on the same subject. The Act itself and the case notes have been brought up-to-date. The get-up of the book has also been improved.

THE SPECIFIC RELIEF ACT. By Rai Mahim C. Sarkar Bahadur. Fourth Edn. By Subodh Chander Sarkar. M. C. Sarkar & Sons. Law Publishers and Book-sellers. 90-2A, Harrison Road, Calcutta. 1922.

We welcome this new and revised edition of the late Mr. Sarkar's Commentary on the Specific Relief Act. The case-notes have been brought up-to-date. The edition has been attractively got up.

COURT-FEES AND SUITS VALUATION ACTS. By Jahnabi Charan Bhaumik, B. L. M. C. Sarkar & Sons. 90-2A, Harrison Road, Calcutta. 1921. Price Rs. 4.

This is a carefully prepared Commentary on the Court-fees and Suits Valuation Acts and a great deal more than a mere digest of cases. It is unfortunate from the author's point of view that the Court-fees Act should have been amended so soon after the publication of the work. But the amendments affect only the amount of fees chargeable and do not touch the principles of the Act which are ably discussed by the author. We have tested the work and found it quite reliable.

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[No. 21.]

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REPORTS (See Index.)

Proposal for doing away with racial distinction in criminal trials.

The Committee for doing away with racial distinction in criminal trials met at Delhi on the 16th of January and concluded its sittings on the 28th of February last. We understand that the Committee will meet again in Calcutta early in May to draw up the report, in view whereof we would make some suggestions for the consideration of the Committee. In the first place we do not see any reason for maintaining the present limitations on the powers of Magistrates with regard to the trial of European British subjects. There is no such restriction with regard to the trial of other Europeans and Americans. They may be tried by all Magistrates just like Indians without any restriction, the only limitations being the usual limitations with regard to the nature of the offence and their power to award adequate sentences. If European British subjects are placed on the same footing as other Europeans, Americans and Indians, the definition of High Court with special reference to the trial of European British subjects as given in sec. 4 (j) of the Code of Criminal Procedure would have to be done away with. It will also then no longer be necessary to restrict the appointment of Justices of Peace by the Government of India or the Local Governments to European British subjects as is provided for in sec. 22 of the Code. The special provisions in Chap. XXXIII with regard to Magistrates and Sessions Judges and Assistant Sessions Judges in respect of trials of European British subjects should also be repealed. The only obstacle that stands in

the way of the Indian Legislature is presented by sec. 65 of the Government of India Act which provides that the Indian Legislature is not competent to pass any law which may involve the passing of any sentence of death on a European British subject without the previous sanction of the Secretary of State for India.

Sec. 149 of the Code now provides that no Court of Sessions (other than the High Courts) is competent to pass any sentence on any European British subject other than one of imprisonment for a term exceeding one year. So for offences which cannot be adequately punished by a Sessions Judge the accused have to be committed to the High Court. This is very oppressive to the aggrieved people in the mofussil who are required to come to the Presidency towns with their witnesses from distant parts of the country. This practically places the complainant at an enormous disadvantage and the accused beyond the pale of law. Thus even in cases of murder and culpable homicide the offender can seldom be adequately punished. Sec. 65 of the Government of India Act presents to our mind no practical difficulty in removing this anomalous procedure from the Code. If the Committee would recommend the same powers on a Court of Sessions in the mofussil in respect of European British subjects, as it ordinarily exercises with regard to His Majesty's Indian subjects, and the Indian Legislature would accept such recommendations, as we have no doubt it will, the requisite sanction under sec. 65 of the Government of India Act may surely be obtained by the Government of India from the Secretary of State. Since every death-sentence has to be confirmed by the High Court, it furnishes an additional safe-guard against such sentences being lightly passed by Sessions Judges.

We presume that European British subjects would not mind it very much if the special procedure for their trial by Magistrates of

particular status and of their own nationality, with the aid of a jury of which at least one half the number must be Europeans or Americans, and further the limitations on the power of even such Magistrates to pass sentence under the ordinary provisions of the law were done away with. We believe that Indian Magistrates and Judges may be trusted to deal out criminal justice to all sections of the community in the same impartial manner as they do in civil cases irrespective of any consideration of race, creed or nationality. If, however, the European British subjects in India feel any diffidence in respect of any Magistrate or Judge, for any reasonable grounds, they may apply for a transfer, under sec. 526 of the Code and there is, no doubt, that in such cases the High Court would grant a transfer. The only bone of contention between Indian public opinion and that of the European British subjects is with regard to the provisions in the Code under which the latter may claim that in cases of jury trial before a Court of Sessions or a High Court, at least one half of the jury must consist of Europeans or Americans. Having regard to the fact that a jury always consists of an odd number of persons, this means that the majority of the jury would, as a matter of course, consist of a majority of Europeans and Americans. This is the present law and sec. 450 of the Code read with sec. 462 and sec. 276 would make it clear that if the jury is properly empanelled, Europeans need not be in any larger majority than one.

The Indian public opinion is that it is a matter of very ordinary experience that in cases where a European is an accused person and an Indian is the complainant, a failure of justice takes place owing to the European members of the jury being reluctant to return a verdict of guilty against a member of their own community. Further in view of the public opinion amongst Indians that no racial distinction should be maintained between His Majesty's Indian and European British subjects, the feeling in the country is that all distinctions in the matters of criminal trials should be abolished. The fiction of trial by one's peers is not recognised by the Common Law of England. Only a few members of the English aristocracy may claim such privilege and not any commoner. Any extension of such anomalies would be contrary to the modern spirit and doctrine of equality of all in the eye of the law. To establish that equality,

the criminal law must be uniform for Indians and Europeans alike. In deference to the privileges secured to European British subjects by sec. 450 of the Code, sec. 275 of the Code provides that an Indian may also claim in a trial before a Court of Sessions that the majority of the jury must consist of his own countrymen. We maintain that both sec. 450 and sec. 275 serve only to accentuate racial distinction between British subjects and both should be repealed. Perhaps, those who are maintaining that equal privileges should be secured to Indians and European British subjects are oblivious of sec. 275 and how under the existing law a bare majority of one's own nationality may be secured thereunder. We object on principle to such packing of the jury on a racial basis. Such distinction will also stand in the way of political fusion of the races in India. If, however, any European British subject or an Indian accused person feels want of confidence in a jury trial, a provision may be made in the Code that he may waive trial by a jury at his option. In such cases the law may provide an appeal on questions of facts as also, of law to the High Court. This will ensure equality in the matter of criminal trials, between all classes of His Majesty's subjects in India. No personal law can be claimed or is recognised in criminal law and that is a further reason why the present distinctions on racial grounds should be done away with.

THE HINDU LAW OF REVERSIONS AND REVERSIONERS.

(Continued from p. lxxv.)

The *Doctrine of Surrender* is apparently based on, or rather deduced from, that of *Renunciation*. "If the widow can accelerate the succession by *Renunciation*," observed Mitter, J., in *Nobo Kishore Sarma Roy v. Hari Nath Sarma Roy* (1), it follows as a logical consequence that she can do so by a deed of surrender without actually renouncing the world. "The right to surrender the property to the next reversioners by a deed," said Sankar Nair, J., to the same effect in *Subbiah Soshi v. Paluny Pattabin Ramayya* (2), "is based on this capacity of *Renunciation*."

On the other hand in *Rangappa v. Kamti* (3), Wallis, J., seemed to regard the *widow's*

(1) I. L. R. 10 Cal. [1884] 1102.

(2) I. L. R. 31 Mad. [1908] 446 (451).

(3) *Ibid* 366 (374) (F. B.)

power to accelerate as based on what is known in British Jurisprudence as the doctrine of merger.

Whether the Hindu law according to the texts or commentaries lends support to the doctrine or not, a female, holding a qualified estate, can, it is now definitely settled, validly surrender such an estate so as to enable the then immediate reversioner to enter upon the inheritance and, if a male, hold it absolutely as if the succession had opened by the death, natural or civil, of the qualified owner (1). In other words, the immediate reversioner, the "surrenderee," can hold the estate by surrender, and his heirs cannot be ousted by those who, but for such surrender, would have occupied at her death the position of heirs to the last full owner.

N. MUKERJEE, M.A., B.L.,
Bar-at-Law.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

8-3-1922.

The Judicial Committee have spent the whole of the past week in hearing an appeal from Madras, *Srinivasa Chariar v. Eyalappa Mudaliar*. The suit was brought by worshippers of a temple at Madhavilagam claiming that certain lands were temple property and not the property of the *Dharmakarta*. They also alleged that the *Dharmakarta* had failed to keep proper accounts and had wrongly interfered in the temple ceremonies and prayed for his removal and for the framing of a scheme. The Subordinate Judge of Chingleput held that the properties did not belong to the temple but ordered the removal of the *Dharmakarta* on the ground that the accounts were unsatisfactory. On appeal the High Court reversed the orders of the Subordinate Judge and held that though his accounts were unsatisfactory the *Dharmakarta* had expended his private funds on the temple and was a fit person to retain his office.

Sir George Lowndes, K. C. and Mr. E. B. Raikes appeared for the Appellants.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Respondents.

On March 7th judgments were given by the

Board in the cases of *Ramalinga Annai v. Narayana Annai* and *L. Oppenheim & Co. v. Haji Mohammed Haneef*. In each case, the appeal was allowed. Brief reference to the questions involved and Counsel who appeared in the cases were forwarded at the time of the hearing and will be found in the current volume at pp. xxxix and lxxi.

The latter appeal was re-argued before a fresh Board consisting of, VISCOUNT CAVE, LORD SHAW, LORD PHILIMORE, SIR JOHN EDGE, and Mr. AMER ALI on the 17th February and the judgment of their Lordships was delivered by VISCOUNT CAVE.

In the case of *Murphy and others v. Hurley*, on appeal from the Court of Appeal in Ireland, the House of Lords recently gave an interesting decision on the principle upon which notice of want of repair should be given to a landlord as a condition precedent to his liability in an action for breach of his contract. The landlord was responsible for the repair of a Sea Wall which was seriously damaged by high tides in September 1918 and the tenants' holdings were flooded. Their Lordships decided that the landlord was not entitled to receive notice from the tenants of the want of repair as he and his tenants were on equal terms as regards means of knowledge and they distinguished the case of *Hugall and McLean*, (1885) 33, W. R. 588.

In the Chancery Division, Russell, J., held in the case of *In re Lucas*, that a gift of five shillings a week each to the "oldest respectable inhabitants in Gunville" was a good charitable bequest.

16-3-22.

On March 9th the arguments in the case of *Srinivasa Chariar v. Eyalappa Mudaliar* were concluded and judgment was reserved.

The hearing of an appeal from the Central Provinces, *Syed Kasam v. Jorwar Singh*, was commenced before the Board. The suit was for a declaration of title to possession of certain lands which were ancestral property of the Plaintiff's family. The Defendants claim title under a sale deed.

Messrs. DeGruyther, K. C. and Parikh appeared for the Appellants.

The Respondents are represented by Mr. Kenworthy Brown.

(1) *Subbiah v. Palwry*, I. L. R. 31 Mad. [1908] 446 (451).

Owing to the reconstitution of the Board the case stood over and the part-heard case *Chet Ram v. Ram Singh* was further argued on the 10th and 12th and judgment was reserved.

Judgment was delivered on the 10th March in the Madras case, *K. Gopal Chetty v. T. G. Vighayaraghavachariar*, allowing the appeal which was argued *ex parte* before the Board by Sir G. Lowndes, K. C. and Mr. A. M. Talbot.

Judgment was also delivered by the Board on the 7th March in the cases of *Ramalinga Annari v. Narayana Annari* and *Oppenheim & Co. v. Md. Haneef Sahib*, which were referred to in these notes at the time of hearing. In each case the appeal was allowed.

On the 14th March judgment was delivered in *Radhakrishna Ayyar v. Sundaraswamiar*. Their Lordships dismissed the appeal.

On the same day their Lordships heard arguments in the Patna appeal, *Girwar Pershad Singh v. Ramcesar Lal Bhagal*, and dismissed the appeal.

The Appeal from Bengal, *Banku Behari Dhur v. Galstann*, came before the Board on the 15th and 16th. The question for decision was as to the construction of the terms of a consent decree.

Messrs. DeGruyther, K. C., Ramsay, and *Kalimullah* appeared for the Appellant and *Sir George Lowndes, K. C.* and *Mr. Dubé* for the Respondent.

At the conclusion of the arguments their Lordships said they would consider the advice that they should tender to His Majesty.

G. D. M.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before RICHARDSON and B. GHOSH, JJ. CIVIL RULE No. 750 OF 1921. RAMANATH MUKERJI, Petitioner *v.* SIDHESWAR BANERJI, Opposite Party. The 26th January 1922.

C. P. C., Or. IX, r. 13—Application to set aside *ex parte* decree before the decree is drawn up and signed but after the judgment if maintainable.

The Opposite Party instituted a suit for partition against the Petitioner and obtained a preliminary decree. There was some land to the west of the *ijmali* property belonging exclusively to the Petitioner. A Commissioner of partition was appointed and the parties gave evidence before him as to the boundary of the *ijmali* property to the west. The Commissioner submitted his report on the 11th August 1920 and on the 18th August an order was passed in the absence of the Petitioner to the effect that as no objections had been preferred against the report of the Commissioner the final decree be drawn up in terms of the Commissioner's report. On the 19th August the Petitioner came to know of this order and on the 31st August he made an application under Or. IX, r. 13 to set aside the *ex parte* decree on the ground that he was prevented for sufficient cause from attending the Court and therefore could not prefer objections to the Commissioner's report. The final decree was prepared and signed on the 14th September 1920. Both the lower Courts held that the application under Or. IX, r. 13 was not maintainable as when it was made there was no decree in existence and the application was rejected on the preliminary point. The Petitioner then moved the High Court under sec. 115, C. P. C.

Babu Rupendra Coomar Mitter for the Petitioner submitted that there was in the eye of law a decree on the 18th August when the judgment was pronounced giving direction for the preparation of the final decree 16 I. A. 195 and 34 C. L. J. 494 referred to.

Babu Baranashi Bashi Mukerji for the Opposite Party showed cause.

Held—That the application under Or. IX, r. 13 even before the decree was drawn up and signed was maintainable.

S. C. C.

Rule made absolute.

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[No. 22.]

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REPORTS (See Index.)

Jury trial and racial distinction.

We stated in our last issue that even under the existing provisions of the Criminal Procedure Code, if a jury is empanelled properly under the provisions of secs. 450, 452 and 275 of the Code of Criminal Procedure, Europeans or Americans in such jury need not exceed the Indian element by a bare majority of one. It must be remembered that sec. 450 says that the number of such jurymen shall not be less than half. In trials before the High Court Sessions the jury consists of nine persons and before a Court of Sessions in the mofussil it is to consist of not less than three and more than nine and the number, which must be uneven, is fixed by notification by the local Government. We shall assume for illustration that the number for the High Court and the mofussil is nine and that a sufficient number of European and Indian jurors have been summoned. The practice now followed in the High Court is to empanel five European jurors to start with by drawing the lot from amongst the Europeans present and ballot for the remaining four from amongst the European and Indian jurymen. The result therefore is quite contrary to the spirit of sec. 450 and there is often a large preponderance of European jurymen. But as the High Courts are entitled to make rules in this behalf under sec. 276, the practice is very likely technically justified under this rule-making power. There is no bar in law now to confining the ballot amongst the Indian jurors present till four Indian jurors are empanelled and then the remaining five European jurors may be drawn by lot in the usual manner from amongst the Europeans and Americans present.

If the recommendation of the Removal of the Racial Distinction Committee is going to be that European British subjects are to have a bare majority of one, then this could have been done by regulating the ballot for juryman as indicated above under the rule-making power of the High Court and there was no occasion for the waste of public funds and public time by the appointment of a ponderous committee and the examination of numerous witnesses from the different parts of country. If after all it recommends what might very well have been done by the High Courts themselves, it would be a typical case of a mountain being in labour and bringing forth a moribund mouse to the disgust of the public at large. As for trial by assessors, the provisions of the law present no difficulty whatsoever. The assessors under sec. 284 of the Code need not be more than two. Sec. 450 provides that in the case of Europeans, at least half the assessors must be Europeans. So under the law as it is one Indian and one European may be chosen by the Judge as assessors. The Judge, besides, is not bound to accept the opinion of the assessors. As for the rest we presume that the committee would not be so reckless as to recommend that the absurdities of special privileges secured to European British subjects in respect of trials before Magistrates and Sessions Judges under Ch. XXXIII of the Code should be extended to Indians and to the other various races that are to be found in India. So the only sensible solution of the whole question lies in the repeal of Chap. XXXIII altogether and the amendment of the law on the lines suggested by us in our last issue.

Court-fee on plaints and affidavits.

A rather interesting point of stamp law is mooted in a letter from a correspondent which we publish in another column. From another letter received about the same time, it appears that the recent amendment of the Court Fees Act is giving rise to a question of court-fee of another character. In one in-

stance, the day before the Amendment Act came into force, in a suit valued at Rs. 999, a court-fee was paid which fell short of the amount then payable by one anna. On that very day the Court, it is stated, made an order demanding payment of deficit court-fee calculated under the Amendment Act. How the Court did it before the Amendment Act was published and came into force, we find some difficulty in making out. The order, if made, was obviously erroneous. But assume that the deficit was discovered after the new Act came into force. Was the deficit demandable under the old or the new Act? When deficit court-fee is paid, it operates retrospectively and the plaint is viewed as presented with full court-fee as from the day when it was originally filed. It seems to us therefore that the deficit, even in such cases, is payable under the old and not under the new Act. The argument to the contrary may be formulated thus: On the day on which the short payment of court-fee was discovered, the plaint was insufficiently stamped. The Court-fee Amendment Act had already come into force then and therefore the proper court-fee payable had to be ascertained on the day when the discovery was first made, the plaint having remained invalid up to that date at any rate. But this argument assumes that plaint as originally filed was wholly invalid. But on this assumption it would seem to follow that the plaint would become operative for all purposes (for the purpose of the law of limitation, for instance) from the day on which the deficit is paid and not before. But this is not the case; the plaint on payment of deficit court-fee within the time allowed is validated retrospectively. It is otherwise, if the payment is not made within the time allowed. (*Raja Pudmanam Singh v. Anant Lal Misser*, F. B. 11 C. W. N. 38).

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

22-3-22.

On March 16th and 17th, the Board, composed of LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE and MR. AMHER ALI, heard arguments in an appeal and cross-appeal from Lucknow in the suit of *Rani Bijai Raj Kuar v. Thakur Jai Indar Bahadur Singh*. The appeals relate to lands in a village called Chhauch which the Rani claims to be entitled to hold rent-free under the terms of her husband's Will.

Messrs. A. M. Dunne, K. C. and Amiend Jackson appeared for the Rani and *Messrs. DeGruyther, K. C. and Kenworthy Brown* for the Thakur.

Judgment was reserved.

The same Board with the addition of VISCOUNT CAVE commenced the hearing on March 17th of another Oudh appeal, *Badri Narain Singh v. Harnam Kuar*.

The litigation relates to the Taluqdari estate of a Taluqdar Lal Ram Kinkar Singh, the deceased husband of the first Respondent. Ram Kinkar's predecessor in title had received a primogeniture *sanad* in 1863, but the estate had been placed in List IV prepared under the provisions of the Oudh Estates Act, 1869 and the main question at issue between the parties was whether in determining the succession to the estate the limitations contained in the *sanad* should be considered or whether placing the estate in List IV made the provisions of the *sanad* inapplicable.

Argument was heard on the 17th, 20th and 21st March and judgment has been reserved.

Messrs. A. M. Dunne, K. C. and Kenworthy Brown appeared for the Appellant and *Messrs. DeGruyther, K. C. and Dubé* for the Respondent.

The Board delivered judgment on the 21st March in the appeal from Lucknow, *Khan Bahadur Abdul Ghani Khan v. Musammam Fakhr Jahan Begam*, which was heard on February 20th, 21st and March 2nd.

The appeal was dismissed.

29-3-22.

The sittings are practically at an end. On the 23rd instant the argument in *Banerjee v. Corporation of Calcutta* was concluded and judgment was reserved. The suit was brought by the Appellants to restrain the Corporation from taking proceedings for the acquisition of the Appellants' property for the construction of a Dharmshala on the Kalighat Road. The suit was decreed by the Subordinate Judge who held that the proposed acquisition was "*ultra vires*." That decree was reversed by the District Judge and by the High Court and the Plaintiffs now appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and Kenworthy Brown appeared for the Appellants and *Messrs. Dunne, K. C. and Hyam* for the Respondents.

Pattajinta Seshayya v. Gullapalli Lakshminarayana, an appeal from Madras, was heard on the 23rd and 24th instant, and was dismissed by the Board without calling on the Respondents.

Mr. Wallach appeared for the Appellants and Messrs. DeGruyther, K. C. and Narasimham for the Respondents.

Syed Kasam v. Jonaman Singh, an appeal from the Berar jurisdiction of the Central Provinces, was part heard, on March 9th but owing to the reconstitution of the Board was not taken up again until the 24th March. The suit was brought for a declaration of title to, and for possession of, certain lands said to be ancestral property of the Plaintiffs' family. The Defendants claimed to be entitled to it under a sale deed executed by a member of the family. The question is raised as to whether Berar is governed by the Bombay law or by the usual Mitakshara.

The Appellants were represented by Messrs. DeGruyther, K. C. and Parikh, the Respondents by Mr. Kenworthy Brown. At the conclusion of the arguments the Board intimated that they would consider their judgment.

G. D. M.

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

I shall be obliged if you will be good enough to make room for the following in an early issue of your much esteemed journal.

On account of the passing of the Bengal Stamp (Amendment) Act (III of 1922, B. C.) stamps upon affidavits are being realised at the rate of two rupees per affidavit in some of the Civil Courts in the mofussil, relying upon Art. 4 in Sch. I A of the aforesaid Act. The position requires examination. If one turns to cl. (b) of the exemptions to the aforesaid article, he will find that affidavits, when made, "for the immediate purpose of being filed or used in any Court or before the officer of any Court" are exempted from liability to stamp duty. It is thus clear that the Courts cannot fall back upon Art. 4 in Sch. I A of the Bengal Stamp Amendment Act for the purpose of realising stamps upon affidavits at the rate of two rupees per affidavit. We next go to the Court Fees Act. This Act is totally

silent about affidavits. Then we take up the Calcutta High Court's General Rules and Circular Orders, Appellate Side (Civil), Vol. I. Here we find on page 162 (edition of 1918) that "the charge for administering the oath to the deponent in the case of any affidavit under the Code of Civil Procedure shall be one rupee in all Civil Courts in the Bengal Presidency and Assam. This charge shall be paid by means of a court-fee stamp and will be credited to Government." This amount, be it noted, is realised not as a stamp duty upon the affidavit but as a charge for administering the oath. Here arises another question. Whether it is within the jurisdiction of the High Court to levy such a fee. The Letters Patent of the Calcutta High Court is silent on this point. We next turn to the Government of India Act (9 and 10 George 5 Ch. 101). Here we find in sec. 107, cl. (e) that the powers of High Courts with respect to Subordinate Courts extend to settling tables of fees to be allowed to clerks and officers of Courts. But this fee, be it noted, is not "allowed" to officers and clerks of Court. It is credited to Government. So it is respectfully submitted that the High Court has no jurisdiction to realise this fee and credit it to Government. Then, another anomaly arises—taking for granted that the High Court has powers under sec. 107, cl. (e) of the Government of India Act to realise this fee and credit it to Government—and it is this: the payment of this fee can very safely be avoided. Sec. 139 of the Code of Civil Procedure (1908) lays down the following "In the case of any affidavit under this Code (a) any Court or Magistrate may administer the oath to the deponent." So if the deponent goes to any Magistrate not sitting as a Criminal Court, he will not have to pay the fee of Re. 1 for the Circular Orders, Civil and Criminal, speak only of "Civil and Criminal Courts in Bengal and Assam." It is thus clear that the Magistrate cannot realise this fee from the deponent either under the Circular Orders, Civil and Criminal or under the Stamp Act, for such affidavits are explicitly exempted from payment of stamp duty. Then another question arises: What is the meaning of the expression "affidavit under the Code of Civil Procedure?" Is it synonymous with affidavits filed in a Civil Court? If not, then obviously the fee of Re. 1 cannot be realised upon each and every affidavit filed in a Civil Court by virtue of the aforesaid Circular Order. These are the numerous questions which I

venture to submit to your profession through the medium of your esteemed journal.

Yours, etc.,

BIRENDRA NATH SEN,
Pleader, Patuakhali.
6-4-22.

Reviews.

THE PRINCIPLES OF THE HINDU LAW OF INHERITANCE (TAGORE LAW LECTURES, 1880). By Raj Kumar Sarvadhikari, B. L. Second Edition. Revised and brought up-to-date by Jyoti Prasad Sarvadhikari, M.A., B.L. Madras; The Law Book Depot, Limited, 1922.

Sir Henry Maine's brilliant contributions to the history of law ushered in an era of research in the field of historical jurisprudence comparable in some measure only to that which in the biological sciences followed the publication of Darwin's epoch-making work on the Origin of Species; and amongst Indian scholars and writers who made their mark in the quarter of a century which succeeded the publication of Maine's treatises, none appears to have been more thoroughly imbued with the spirit of the master than Raj Kumar Sarvadhikari. To carry on the work of Maine in the field of Hindu jurisprudence one had to be not merely a profound Sanskrit scholar which Raj Kumar Sarvadhikari undoubtedly was: Texts and ancient treatises are stubborn material which yield their secrets only to the touch of genius. It is because Raj Kumar Sarvadhikari was not only an erudite Sanskrit scholar but also possessed the alchemy of genius that he was able to make lasting contributions to the history of Hindu law and snatch from obscurity and hold up to light the principles which have guided the development of the law of inheritance in the two leading schools of Hindu law.

The close association of a people's laws of inheritance with its practices in the matter of obsequial offerings to the dead in the earlier stages of its social history had already been clearly outlined by Sir Henry Maine. In the first part of his lectures Raj Kumar Sarvadhikari demonstrated it in detail, so far as concerned the Hindu law of inheritance. With characteristic thoroughness, he followed up his juristic analysis of the "Sradha" ceremonies by tracing the development of the principles of the law of inheritance, which lay in germ in these ceremonies, through the texts and treatises and the changing historical

circumstances of what he has called the Middle Ages of Hindu jurisprudence up to modern times, the latest legal writer dealt with being Jagannath. All this is pioneer work which has broken ground for successors to take it up at the point where he left it. It is fortunate, however, that Raj Kumar Sarvadhikari did not conclude his labours with merely tracing the history of the principles of Hindu inheritance through the Ages. In the rest of the work he proceeded to elucidate, develop and work out these principles for use and application in the determination of the many practical problems of inheritance which daily demand solution under the Dayabhaga and the Mitakshara Schools of Hindu law as administered in the Courts at the present day. It is in this latter half of the work that a critical consideration of judicial decisions assumes importance, and it is this part which has needed retouching by the present editor. True to the spirit of the author, the editor has not contented himself with merely noting down recent judicial decisions; he has examined and commented on them, as he was conscientiously bound to do, in the light of the principles laid down and expounded by the author. The pious duty which the editor took upon himself of bringing out a second edition of one of the most authoritative treatises on Hindu jurisprudence contributed from this side of India has been discharged in a manner worthy of the work itself. The greatest credit, we may add, is due to the printers and the publishers, for the get-up of the work is as near perfection as it well may be.

THE COURT FEES ACT, 1870, as amended by the Bengal Court Fees Amendment Act, IV of 1922. Dinesh Chandra Roy, M.A., B.L. As. 12.

The profession will welcome this publication which embodies the results of the amendments effected in the Act by the Bengal Court Fees Amendment Act recently passed by the Bengal Council. The amendments are indicated by being printed in Italics. So far as we are aware, this publication appears to be the first of its kind in the field and is cheap for its price.

THE Calcutta Weekly Bells

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[No. 23.]

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Criminal Sessions.

Mr. Justice Rankin presides at the Second Calcutta Criminal Sessions which commences its sittings from date.

The late Mr. Boidonath Dutt.

We record with regret the death during the Easter Holidays of Mr. Boidonath Dutt, a senior Vakil of the Calcutta High Court, who enjoyed a considerable practice on the Appellate Side of the High Court, prior to his retirement, owing to failing health, a few years ago. He was a contemporary of the late Mr. Sarada Churn Mitra, and was held in high esteem by members of all three branches of the legal profession in Calcutta and by the Judges before whom he practised for his sound knowledge of law, his forensic ability and command over the English language. He was of an unobtrusive and retiring disposition and took hardly any part in public life. Appreciative references were made by the Hon'ble the Chief Justice, the Advocate-General and the Senior Government Pleader on Monday last to mark the sense of the loss sustained by the Bar and the Bench by his death.

Short-cut to Swaraj—Sec. 67A of the Government of India Act.

People who are in earnest about obtaining full responsible Government in this country will do well to study carefully the Government of India Act. In reviewing the constitution of the self-governing Dominions, which are more or less modelled on the British constitution, we pointed out that the key to the popular control on any Government consists in the control of the public purse by the representatives of the people. Once the legis-

lature can secure control of the purse strings, the Government is bound to be responsible to the legislature. The Government of India Act, sec. 67A, furnishes quite a wide scope to the Indian legislature to bring the public purse under its control, if the people at large would support the demand made by the elected representatives in the Legislative Assembly on the 26th of January last that the Military Budget should be submitted to the vote of the Assembly. In our view of sec. 67A of the Government of India Act, it does not present any statutory difficulty to the Governor-General of India in granting the demand made by the Assembly. It was supported by the majority of the members of the Assembly—51 voting for it and only 27, mostly official members, voting against it. It is worthy of note that not only all the non-official European members voted for the motion but also some official members followed suit.

We would not quote sec. 67A of the Government of India Act but would expect our readers to refer to it. Cl. (1) says that the annual Budget of the Government of India shall be laid before the Legislature. Cl. (2) says that no proposal for the appropriation of any revenue or moneys shall be made except on the recommendation of the Governor-General. Every student of the English and Dominion constitutions knows that the Crown can alone bring proposals for expenditure before the House. This is a very old constitutional rule and is intended as a safe-guard against the legislature indulging in extravagant expenditure on private initiative. The Crown can alone propose expenditure, it is for the popular representatives to accept, reject or reduce. They cannot even enhance expenditure. So the scope of cl. (2) is precautionary and not reactionary as it is common to British and Dominion constitutions.

It is only cl. (3) which makes a reservation in respect of the practice that

obtains in the House of Commons and the Dominions. This clause says that certain heads of expenditure such as interests on loan, sinking fund charges, some other expenditure prescribed by law, salaries and pensions of judges and members of the Civil Service and expenditure under the heads of (a) ecclesiastical, (b) political, (c) defence "shall not be submitted to the vote of the legislative assembly, . . . unless the Governor-General otherwise directs."

It will be seen that it places no statutory bar to the military expenditure which comes under the head of "defence" or any of the other items mentioned above being made votable, "if the Governor-General so directs." Thus it will not require any fresh Parliamentary legislation to annul the distinction between the votable and non-votable items. If the pressure of public opinion is brought to bear on the Governor-General to exercise his discretion to confer the fullest financial control in the Assembly, we doubt whether he will be able to resist the demand for any length of time. So, if political demands in this country were directed to definite issues as indicated above, the attainment of responsible Government would be comparatively an easy task.

- We may mention here that even in England interest on public debt, sinking fund charges, salaries of judges and certain items of the civil list and certain charges for the maintenance of the army and navy are treated in the manner of reserve subjects. They are paid for, as we shall explain below, out of the "Consolidated fund charges." Provisional lump grants are made for them by the House of Commons at the instance of the Government. But the details of expenditure are set out in the Appropriation Bill and every item is submitted to the vote of the House later on. No responsible legislature would deprive the judges and other officials of their salary or the country of its defence. But the legislature would certainly effect economy and retrenchment wherever practicable. It is by such means that the Legislature exercises control over the acts, policy and functions of the executive.

The joint Parliamentary Committee gave discretionary powers to the Governor-General alone and not to his Executive Council to de-

cide when the distinction between the votable and non-votable items should be done away with. All credit is due to the Legislative Assembly for having in January last recommended to the Governor-General that the military expenditure should be submitted to the vote of the Assembly along with the civil budget. If public opinion in India had asserted itself and demanded that the recommendations of the Assembly should be given effect to by the Governor-General, we do not think that it would have been possible for the Secretary of State for India to fetter the discretion of the Governor-General under the unwarranted legal opinion of the law officers of the Crown in England. The opinion of the law officers of the Crown is neither binding on the Governor-General, nor on the Legislative Assembly and much less on us or the citizens of India. We hope, therefore, that public opinion in India will yet support the demands of the Legislative Assembly and enter a firm protest against the Governor-General not giving effect to the recommendations of the Legislative Assembly in this behalf. Those who have studied the provisions of the Government of India Act are aware that it furnishes ample scope for the attainment of responsible Government in this country, if the people of the country would demand what is due to them as of right. The joint Parliamentary Committee, as is well-known, gave much wider powers to the legislature in respect of financial control than was originally contemplated and their reservation with regard to non-votable items by the analogy of the consolidated fund charges, coupled with the discretionary power given to the Governor-General alone clearly indicates that the distinction between "votable" and "non-votable" should be done away with whenever there is a public demand for it. We need not tell H. E. Lord Reading that "discretion" does not mean whim, caprice or any arbitrary will but means fair, just and well-considered judicial opinion.

The following extract from the proceedings of the Legislative Assembly Vol. II, No. 23 (26th January 1922) will throw some light on the recommendations of the Joint Parliamentary Committee in respect of sec. 67A, cl. (3) of the Government of India.

MR. J. CHAUDHURI (Chittagong and Rajshahi Division, Non-Muhammadan Rural): Sir, it may be said that the recommendations of the Joint Committee are in conflict with the section on

which my Honourable and learned friend now relies. I wish, therefore, to read the relevant passage from the Joint Committee's Report:

"The Committee consider it necessary (as suggested to them by the Consolidated Fund Charges in the Imperial Parliament) to exempt certain charges of a special or recurring nature which have been set out in the Bill, for example, the cost of defence, the debt charges and certain fixed salaries, from the process of being voted. But otherwise they would leave the Assembly free to criticise and vote estimates and expenditure of the Government of India."

I need only remind the Honourable the Home Member, who will very likely speak on this subject, that, whatever the Committee might have said in their report, may not now be taken into consideration for the interpretation of this section, but I am not going to be technical at all. I say there is no conflict between the recommendations of the Joint Committee and the section as eventually enacted. The section gives a discretionary power to the Governor-General. Now, the whole question is whether the Governor-General is prepared to exercise that discretionary power at the present moment, and we say that, without any misgivings, His Excellency may exercise that discretion, according to the wishes of this House. I need only mention that the Committee's recommendations are based on the analogy of the Consolidated Fund Charges in the Imperial Parliament. I shall say only a few words with regard to the expression 'Consolidated Fund Charges.' As it is, the maintenance of the Army in England does not entirely depend upon the passing of the Appropriation Bill. Here I mention this for this reason, that ours is an infant institution and, so far as practicable, we should follow the same procedure as is followed in the House of Commons. It will be impossible to maintain the Army or Navy in England if the expenditure in connection with them entirely depended upon the Appropriation Bill, or, at any rate, if it awaited the passing of the Appropriation Bill. The procedure followed in the House of Commons is this: On the 31st of March, or just before, a Consolidated Charges Bill is introduced. It does not give any detailed estimate of the Army expenditure, but it only obtains the sanction of the House, authorising the Treasury to pay out of the consolidated funds the expenditure for the Army and the Navy. If this process were not followed, many difficulties would arise. I say that, if a similar Committee was appointed here, and the Military Budget was introduced in this Assembly on analogous lines, there is no reason to apprehend that this House will not be prepared to pass a vote for sanctioning the expenditure in connection with the Army. This Consolidated Charges Bill not only brings in supplementary estimates of the expenditure which have been incurred by the Army over and above what was sanctioned in the previous year, under the Appropriation Act, but also makes provision for prospective charges. If the Military Secretary and the Finance Member are prepared to explain to the

House the reasons for which this money is wanted, I do not think that this House will be wanting in its sense of responsibility to give its sanction to it. All that the House desires to do is to keep an eye over the expenditure, be that in the Military Department, or be it in the Civil or any other Department. That is the function of the representatives of the people. It is for the experts to lay their case before them and it is for the latter to criticise and suggest economy where particable.

So, I say that, with necessary safeguards, the procedure that is followed in the House of Commons may, without prejudice, be introduced into this House. It will give us training in the due discharge of our responsibility to the country and to the Government. It will have to come, and I think, it is very desirable that a beginning should be made, and the sooner the better.

Now that the Governor-General, apparently out of deference to the opinion of the British Cabinet, has not given effect to the recommendations of the Legislative Assembly, it is for the public to demand that His Excellency do give effect to it. Having regard to the supreme importance of popular financial control to the constitution we welcome Mr. A. K. Ghose's articles on "Constitutional aspect of the English Financial Administration" in which he will present the leading features of it.

CONSTITUTIONAL ASPECT OF THE ENGLISH FINANCIAL ADMINISTRATION.*

I.

(1) THE SERVICES.

English expenditure may be roughly divided into two main branches called the Consolidated Fund Services and the Supply Services. The former provides for the Interest and Management of the Public Debt, Payments in aid of Local Taxation, the Salaries of the Judges and certain other miscellaneous items. Everything else practically falls under the Supply Services which include the Army, Navy, and Civil Services, Customs and Inland Revenue, and Post Office. The expenditure on these branches of the Public Service is met from what are known as Exchequer issues, and Exchequer issues can only take place under formal orders passed by the Comptroller and Auditor General who has, as his guide as to what issues are admissible and can be granted by him, the "Votes" which are passed by the House of Commons in Committee of Supply.

(2) WAYS AND MEANS AND SUPPLY.

The exact procedure as to providing the necessary revenue to meet the required expenditure is that the Chancellor of the Exchequer presents to the House of Commons his "Budget" which states the estimated expenditure and revenue for the year and the proposals made by the Government of the day for any new taxes, the enhancement of old ones, or their abandonment or reduction, and the most important function of the House of Commons as regards finance is its approval in *Committee of Ways and Means* of the taxes by which the revenue necessary to meet the expenditure of the year is to be raised. The House of Commons has thus two separate duties. Approval in *Committee of Ways and Means* of the necessary taxation, and voting in *Committee of Supply* what amount is to be spent upon each of the "Services" of the year, except the Consolidated Fund Services which are to a large extent fixed.

(a) Supply.

The detailed estimates of the year therefore are brought forward in *Committee of Supply* and criticised and passed therein. To this, it may be added that it is nearly always found necessary towards the end of the year to bring in "supplementary estimates" to provide for unforeseen expenditure, and it is also usual for the *Committee of Supply* to pass votes on account of the Supply Services in the early spring, in anticipation of the ensuing Budget. There are thus two processes, one of which, the supplementary estimates, resembles the Indian practice of "additional grants," while the other, where part of the money is voted in anticipation of the Budget, has no counterpart in Indian procedure. These supplementary estimates and "Votes" on account are usually taken between the address at the opening of the spring session and the actual introduction of the Budget. The embodying of the votes on account of the Acts necessary to give effect to the votes will be referred to later on.

(b) Ways and Means.

The Committee of Ways and Means on the other hand decides by resolutions that certain taxes shall or shall not be levied, and when the resolutions have been carried, a bill is brought in embodying the resolutions in an Act of Parliament. This is known as the Finance Act. In theory the House of Commons controls and votes all the supplies for the particular year, but as a matter of fact a great deal of the taxation revenue is continued from year to

year upon the authority of previous Finance Acts, and only a few of the taxes which are required for the service of the year are actually voted in that year, and inserted in *that year's Finance Act*. Any new tax, however, and any increase of an existing tax must, of necessity, be voted by the Committee and find a place in the Finance Act. As an instance of a tax which, although levied from year to year, still requires to be annually passed in *Committee of Ways and Means* may be mentioned the Income Tax. It is not easy to say exactly which of the taxes at any given time do not require to be renewed from year to year, but the present ordinary customs duties, except the Tea duty are of this character, although any increase therein requires of course to be passed by resolution in *Committee of Ways and Means*.

(c) Appropriation.

There is besides the above a *third* stage in the proceedings of the House of Commons in the exercise of its financial functions and this is what is known as "Appropriation." Having voted the necessary taxation and having approved of the details of national expenditure, there remains the allocation of the whole revenue of the year to the various services which have been previously approved and this is done by what is known as the Appropriation Act passed at the end of the session.

As noted above, however, it is necessary to carry on the business of administration during the interval which usually elapses before the passing of the Annual Appropriation Act, and this is done by votes of the Army, Navy and Civil Services which are embodied in a Consolidated Fund Act or if necessary by more than one. This Act (or Acts) is passed every year before the financial year begins, namely the 1st of April. The financial year ends in March 31st, and the funds provided by the Appropriation Act of the previous year are no longer available.

It remains to be added that, as regards the Consolidated Fund Services, these are voted *en bloc* in Committee of Supply without discussion and incorporated in a separate "Consolidated Fund Bill;" any increase or reduction however of the amount set apart for the service of the debt is included by a clause in the Finance Act.

A. K. GHOSE,
Bar-at-Law.

(To be continued.)

THE Calcutta Weekly Notes.

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[No. 24.]

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REPORTS (See Index.)

The late Dr. A. V. Dicey.

The English mail brings news of the death, on April 7 last, of Dr. A. V. Dicey, whose name has been a household word in all parts of the British Dominions as the author of the "Law of the Constitution." An Indian writer of our acquaintance has indeed credited him with being the inventor of the English "Rule of Law," in the same sense as the Seventeenth Century scholar, Sir Henry Spelman, has been claimed to have "invented" the Feudal system, and Chief Justice Coke as the discoverer in that "tale of feudal privileges" known to English history as the Magna Carta, of a charter of all people's rights. In all his writings the late Professor combined brilliancy of presentment with great logical acumen. Though less known, yet equally remarkable and suggestive and possessing all the merits of his classical treatise on the English Constitution was his work on "Law and Opinion in England." He was a Liberal in his political views but strongly opposed to Home Rule in Ireland which he strenuously fought by speech as well as writing. A legal journal cannot, in paying tribute to the memory of the departed jurist and public man, afford to pass without notice the one purely professional treatise which came from his pen. "Dicey on Parties." Published in 1870, it is still keenly sought after in every Court within the British Dominions whenever a knotty question on the law of parties has to be argued.

Court-fee on *Jaminnama* to stay execution.

We think our correspondent, Mr. Ganguly,

is right in contending that a *Jaminnama* executed to obtain a stay of execution cannot be charged with duty under both the Stamp and Court Fee Acts as recently amended. The amendments do not appear to have done more than raise the amounts of duty payable on certain documents under each of the two Acts, so that, apart from the amount of fees payable, the law remains substantially unchanged. This being so, we think that both on principle and on the authority of the decision referred to by Mr. Ganguly, such a document should be stamped under the Bengal Stamp Amendment Act, Sch. I A, Art. 57, and not under the Court Fees Act, Sch. II, Art. 6.

Right of Muktears to appear in enquiries under secs. 73 and 74 of the Registration Act.

A correspondent enquires if it is in order to permit Muktears to appear before a District Registrar or Sub-Registrar in contested cases of enquiries under sec. 73 and 74 of the Registration Act (XVI of 1908). It seems in some Districts they are not allowed to do so, but in others, in the 24-Pergamahs for instance, they do appear as a matter of practice. Our correspondent, who is himself a pleader, is of opinion that Muktears have no right to take part in inquiries which the Registrar or Sub-Registrar by law holds "as if he were a Civil Court," and he adds that in his opinion, Revenue agents also cannot appear in contested cases but may do so only, in *ex parte* inquiries. We cannot say for ourselves that the provisions of the Registration Act give any definite lead one way or the other upon the question; and the matter cannot be decided merely on the ground of privilege belonging to the one or the other branch of the legal profession without reference to the interests of the litigant public and without reference to the practice prevailing in the several Districts.

CONSTITUTIONAL ASPECT OF THE ENGLISH FINANCIAL ADMINISTRATION.

(Continued from p. xcii.)

With these various Acts, the functions of the House of Commons cease for the time being, and the next stage is the actual supply to the spending departments of the funds necessary to carry on the services of the year. But, before proceeding to describe this procedure, it may be mentioned that the revenue of the country—from which the funds required for meeting the national expenditure (except such portion as is met from borrowed money) must necessarily be eventually supplied—is, as it is collected by the departments responsible for its collection, paid into the Consolidated Fund in the Bank of England or Ireland. All expenditure, not only on what are technically called the "Consolidated Fund Services," but also on the "Supply Services," is met from the "Consolidated Fund." The fund is of course not a hoard, but a balance. The Bank can use it as any other banker can use the balance of his constituent, so long as it is forthcoming when required, this practice having an analogy in our own Indian Treasury Balances at the Presidency Banks, now the Imperial Bank.

II.

(3) ISSUE OF FUNDS FOR EXPENDITURES.

Turning then to the procedure for the supply of funds to the spending departments, this is done by means of the authority of the Comptroller and Auditor-General. This office is the creation of the Exchequer and Audit Act of 1866. He is appointed by letters patent. He and the Assistant Comptroller and Auditor both hold office during good behaviour and are only removable by the King upon address by both Houses of Parliament.

(a) *Money for the Consolidated Fund Services.*

When money is wanted for the Consolidated Fund Services the Treasury makes a requisition on the Comptroller and Auditor-General for a Treasury credit. That officer, if satisfied that the requisition is in accordance with the Acts which govern the expenditure, makes the order and thus unlocks the Treasury Chest. The Treasury then calls on the Bank to transfer the sums required from the Exchequer Account to that of a principal accountant, usually the Paymaster-General, and at the same time to transmit the authority for the transfer to the Comptroller and Auditor-General

who is thus enabled to record the issues from the Exchequer. Of these he subsequently receives and examines an account called the Consolidated Fund Account.

(b) *Money for the Supply Services.*

It will be observed that the money required for the Supply Services has been granted to the Crown by Parliament, and the first step in the process of expenditure is an order under the Royal Sign Manual desiring the Treasury to authorise the Bank of England to make payments from time to time in accordance with the terms of the grant. This order is countersigned by two Lords Commissioners of the Treasury who thereby demand of the Comptroller and Auditor-General that he will give them credit for the sums required upon the Exchequer Account of the Bank. This is done by a credit order to the Bank signed by the Comptroller and Auditor-General. The Treasury then from time to time directs the Bank to transfer the sums specified in the Royal order to the Supply Account of the Paymaster-General or other principal accountant to communicate such transfers to the Comptroller and Auditor-General.

(4) CHECK ON REVENUE AND EXPENDITURE.

The above traces the revenue from the pocket of the tax-payer into the hands of those to whom payment is due for the rendering of public service. It has still to be noted how security is taken that the money issued for certain purposes is actually expended on these services. This security is obtained by the twofold powers of the Comptroller and Auditor-General. He not only controls the issues, but receives and audits the accounts of expenditure. Every day two accounts are furnished to him, one from the Banks of England and Ireland of receipts and issues of the Consolidated Fund and one from the Revenue Department of sums paid to the Fund. These latter which are also supplied to the Treasury enable him to check the Bank account as to receipt of revenue. He also follows closely the course of expenditure, having in the huge spending departments, such as the war office, a local staff, whose audit, as regards expenditure being duly authorised and correctly charged to the proper head of service, may be said to be concurrent with the outlay. In smaller departments his audit is periodical and monthly.

(5) FINANCE AND APPROPRIATION ACCOUNTS.

Now in respect of both Consolidated Fund Services and Supply Services, Parliament receives every year Finance Accounts and Ap-

appropriation Accounts. The Finance Accounts are laid before Parliament before the 30th of June every year. They contain a detailed account of the sums paid into the Exchequer and of the issues from the Exchequer, these constituting the revenue and expenditure of the year from the point of view of the Chancellor of the Exchequer. In these accounts, therefore, the receipts realised by the different revenue departments while they remain in the hands of these departments or are in transit to the Exchequer, and similarly that portion of the imposts for expenditure which remains unspent in the hands of the departmental officers, are left out of consideration, but the amounts so left out do not materially affect the accounts as they remain nearly constant from year to year. The Finance Accounts, moreover, are prepared not by the Comptroller and Auditor-General but by the Treasury from information furnished to it by the Banks of England and Ireland and from accounts rendered by the officers paying money into, and drawing money from, the Exchequer, and the Treasury is responsible for them.

A. K. GHOSE,

Bar-at-Law.

(To be continued.)

THE HINDU LAW OF REVERSIONS AND REVERSIONERS.

(Continued from p. lxxv.)

Such a surrender is sanctioned by the Hindu law only for the purpose of bringing the estate back to the natural line of succession (1), but the surrendering widow is not, thereby, divested of her right to maintenance, which is an absolute obligation cast by that law on whosoever takes the estate (2). The motive for such surrender, if the right so to surrender is once conceded, is immaterial (3) and cannot be impeached (4), provided, of course, it is not used as a cloak or device for partition of the estate between widow and reversioner (5). As pointed out by Mookerjee, J., in *Debiprosad v. Golap Bhagat* (6), the doctrine of surrender is admitted as a general proposition of law by all

the Indian High Courts and is recognised by their Lordships of the Privy Council in *Bayrangi v. Manokarnika Baksh Singh* (1) as well founded on principle, the only question is—what are the limitations or qualifications, if any, subject to which the doctrine has to be applied?

These limitations are laid down in *Behari Lal's* case (2) by their Lordships of the Privy Council. There Lord Morris in dealing with the widow's power of accelerating the reversion, observed: "It may be accepted that, according to Hindu law, (i) the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate," and that (ii) "it was essentially necessary to withdraw her life-estate, so that the whole estate should get rested at once in the grantee." Or, as interpreted by Wallis, J., in *Rangappa Naik v. Kampti Naik* (3), "*Behari Lal's* case laid down that the widow's power of acceleration, to be validly exercised, must relate to the whole estate without any reservation in her favour."

The various High Courts in India had at different times, taken different views as to what was meant by Lord Morris by the expression "whole estate" which occurs in the passage just quoted in his judgment in *Behari Lal's* case (4).

The Calcutta High Court in *Pulin Chandra Mondal v. Bolar Mondal* (5), [since overruled by a Full Bench decision of the same High Court—*Debi Prosad v. Golap Bhagat* (6)] took the view that that expression meant nothing more than that the widow was bound to divest herself of all her interest in the particular portion of the estate which she was transferring.

Other High Courts (7) on the contrary have held that the passage in question intends to lay down a much wider rule, namely, that the widow is bound to withdraw from the entire estate which she holds so as to accelerate succession in favour of the nearest reversioner.

This passage in Lord Morris's judgment in *Behari Lal's* case (8) read along with the Privy

(1) *Ganqu Pershad v. Shunabhoonath*, 12 W. R. 393; *Nasir Joss v. Morthu Sounduri*, 1. L. R. 5 Cal. 732 (734); *Moti v. Lal Das*, 1. L. R. 41 Bom 93 (103); *Nachiappa v. Rangasami*, 26 Indian Cases 767 and *Chinnaswami v. Appaswami*, 1. L. R. 42 Mad. 25.

(2) See last cited case.

(3) *Challa v. Palury*, 1. L. R. 31 Mad. 446 (450).

(4) 1. L. R. 22 Cal. (1894) 354 (361).

(5) *Rangasami v. Nachiappa*, 23 C. W. N. 777 (509) (P. C.)

(6) 1. L. R. 40 Cal. 721 (F. B.)

(1) 1. L. R. 30 All 1 (P. C.)

(2) *Beharilal v. Madholal*, 1. L. R. 19 Cal. 236 (241) (P. C.)

(3) 1. L. R. 31 Mad. [1908] 366 (373).

(4) See *supra*.

(5) 1. L. R. 35 Cal. [1908] 939.

(6) 1. L. R. 40 Cal. 721 (F. B.)

(7) E.g., the Bombay High Court in *Pilu v. Babaji*, 1. L. R. 34 Bom [1909] 165 and the Madras High Court in *Marudamuthu v. Srinivasan*, 1. L. R. 21 Mad. [1908] 128 (F. B.). See also *Wazir Chand v. Makhru*, 17 Punjab Record, 1902.

(8) 1. L. R. 19 Cal. 236 (241) (P. C.)

Council decision in *Bajrangi Singh v. Manokarnika Baksh Singh* (1), where the entire estate was "destroyed" by *piece-meal alienations thereof* (2), subsequently ratified by all the reversionary heirs, might lend some support to the contention raised in the pleadings in *Pulin v. Bolai* (3), in *Debi Prasad v. Golap Bhagat* (4), in *Marudamuthu v. Srinirasa* (5) and, lastly, in *Nachiappa v. Rangasami* (6), namely, that the widow should retain no interest in what was surrendered, and that, therefore, a partial surrender, provided that the surrender was absolute as to that part, was valid. "This however," said their Lordships of the Privy Council in *Rangasami v. Nachiappa* (7), "is quite against the principle on which the whole transaction rests. It is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date. Now there cannot be a widow who is partly effaced and partly not so. The land mark of decision as to this (doctrine of surrender) may be taken as the case of *Behari Lal v. Madho Lal Ahir Gyawal* (8)."

Now it is settled for all the High Courts in India that in order to accelerate the vesting of the estate in the nearest reversioner there must be a complete, and not a partial withdrawal from that estate.

There are, it seems to me, two good reasons for this rule which lays down that a surrender must be of the whole inheritance, viz., firstly that it furnishes a practical check on the frequency of such conveyances, and, secondly that it prevents the anomaly, which would otherwise arise, of two successive classes of heirs becoming owners of the inheritance at one and the same time—the immediate rever-

sioner by the act of surrender, and the actual reversioner by survivorship to the widow. This rule their Lordships of the Privy Council have refused to relax.

N. MUKERJEE, M.A., B.L.,
Bar-at-Law.

(To be continued.)

Correspondence.

TO

THE "EDITOR, CALCUTTA WEEKLY NOTES.

DEAR SIR,

I beg to request the favour of your publishing the following in the correspondence column of your esteemed journal.

How is an instrument of obligation (*Jaminama*) executed in pursuance of an order of a Civil Court in order to stay execution proceedings to be stamped, whether under the Bengal Stamp Amendment Act, 1922, Art. 57, Sch. I A. or under the Bengal Court Fees Amendment Act, 1922, cl. 6, Sch. II or under both the Acts?

In this connection, I would beg to point out that their Lordships the Honourable Judges of the Calcutta High Court (agreeing, it seems, with the opinion of the Munsif of Ranaghat) ruled that such an instrument is to be stamped under the Stamp Act and not under the Court Fees Act. However, there cannot be double imposition; and it should be stamped under either of the Acts and not both. (See 21 C. W. N. 1150).

An expression of opinion by the members of the Bar will oblige

Yours faithfully,

HEM CH. GANGULY.

Pleader, Alipur Duar (Jalpaiguri).

23-1-22.

(1) I. L. R. 30 All. 1 (P. C.)

(2) From the judgment in *Bajrangi's case* (I. L. R. 30 All. 1) three important facts emerge with sufficient clearness:

(a) That the widow had sold the whole estate of her husband to a stranger for valuable consideration;

(b) That the whole body of the nearest reversioners of her husband, (indeed the whole body of reversioners), had ratified the sales and assented to them after receiving consideration for their ratification and assent;

(c) That the suit which was brought to contest the sales was brought by the sons of the consenting reversioners—*per Shah Din, J.* (Punjab Chief Court), in *Deridas v. Raja Khan*, 24 Indian Cases [1914] 417 (419).

(3) I. L. R. 35 Cal. [1908] 939.

(4) I. L. R. 40 Cal. [1913] 721 (F. B.)

(5) I. L. R. 21 Mad. [1891] 128 (F. B.)

(6) 26 Indian Cases [1915] 757.

(7) 29 Cal. L. J. [1919] 539 (544) (P. C.)

(8) I. L. R. 19 Cal. 236.

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REPORTS (See Index.)

Benchers in making the rules intended to guard against frivolity and the freaks of fashion invading the law Courts. Anyhow female barristers so attired would not attract clients by their looks. They would not surely resemble the romantic figure of Porth.

Lady Barristers and their robe.

We have noted in these columns before, the success that intellectual young ladies have secured at the final examination for the Bar in England. Some of these ladies having expressed their desire to practise at the Bar, a mixed Committee of the Bench and the Bar went into the question of their forensic attire. The Committee have recommended a form of attire which is said to have met with the approval of the fairer sex but which would make them surely unsightly in the eyes of men. The Committee have recommended that a lady barrister should be attired as follows:—

(1) Ordinary barrister's wigs should be worn, and should completely cover and conceal the hair.

(2) Ordinary barrister's gowns should be worn.

(3) Dresses should be plain, black or very dark, high to the neck, with long sleeves, and not shorter than the gown, with high plain white collars and barrister's bands; or plain coats and skirts, may be worn, black or very dark, not shorter than the gown, with plain white shirts and high collars and barrister's bands.

The Committee in making these recommendations evidently intended that the sex of the female member of the legal profession should not be conspicuous. A woman so attired would be hard to distinguish in a profession where the members are clean-shaven like Brahmin pundits. But the ugliness of the horse-hair wig will be enhanced as it would be bigger than those of men for concealing the hair. Short frocks will not evidently be allowed. The Committee is however silent about high heels. This is evidently an oversight. We wonder if the Judges and

Suit by Trustee in Bankruptcy to recover betting dues paid to book-maker by bankrupt by cheque.

In this week's London Notes there is a short report of the judgment of Astbury, J., in which he held that the Trustee in Bankruptcy is not entitled to recover from a book-maker moneys paid by cheque by a bankrupt to meet his betting losses. We confess we found some difficulty in appreciating the reasons assigned by the learned Judge in support of his conclusion. So far as we could make out the learned Judge appears to have thought that such actions even by private persons, though permissible, are far from creditable, and the Trustee in Bankruptcy being an officer of the Court, the Court is justified in preventing him from pursuing a discreditable though legal claim. A Reuter's message, recently received, now announces that the Court of Appeal has reversed Mr. Justice Astbury's decision. The Master of Rolls, with whom Warrington and Younger, JJ., concurred, said, there was nothing discreditable or dishonourable, as the law stood, in the Trustee in Bankruptcy collecting the debt for distribution among the creditors of the bankrupt. The "Officer of the Court" idea is very often pushed too far and this was one instance of it.

JURISDICTION OF THE HIGH COURTS ON HABEAS CORPUS.

The jurisdiction of the Indian High Courts to issue the writ of *habeas corpus* is derived from the Supreme Courts, and it is, therefore, important to trace the origin and the extent of the exercise of the power by these Courts. The

writ was apparently introduced into India after 1773: See the *Resolution of the Court of Proprietors*, 10th May 1773, cited in 1 Knapp's Reports at p. 13. The Mayor's Court did not possess the jurisdiction. When it became necessary for the Court of Queen's Bench to issue the writ to this country, special statutes were passed to give the power [*Reg. v. Shaik Boodin*, (1846) per O. C. 434, 446]. Owing to the difficulty of obtaining a copy of the Charter of the Recorder's Court, it is hardly possible to state with confidence whether this Court had the jurisdiction. I have found no instance of the exercise of it in the Reports available in Calcutta. The present article, therefore, deals only with the sources of the jurisdiction of the Supreme Court and the limitations to which it was subject from time to time.

JURISDICTION OF THE SUPREME COURT IN PRESIDENCY TOWNS FROM 1774 TO 1862.

(a) Under the Letters Patent.

* The powers of the Justices of the King's Bench in England to issue the writ *ad subjiciendum* [as to which see Black. Com. Vol. III, 131, cited in *Re Ameer Khan*, (1870) 6 B. L. R. 392, 445: *Re Nataraju*, (1912) 36 Mad. 72, 77: see also *Reg. v. Shaik Boodin*, (1846) per O. C. 434, 445-449] were given by the Letters Patent, 1774, cl. (4) [corresponding to the Madras Letters Patent, 1800, cl. (8) and the Bombay Letters Patent, 1823, cl. (10)] to the Supreme Court Judges individually and severally, and not to the "Court" collectively: [*Reg. v. Ramgovind Mitter*, (1871) Mort. 210: *Reg. v. Warren Hastings*, (1775) Mort. 206, 209 (Chambers, J.): *Re Henrietta Brown*, (1792) Mort. 212n: *Re Nataraju*, supra, p. 71. (cf. *Reg. v. Wright*, (1827) Mort. 222 (crim. information) L. R. v. Matilal, (1918) 41 Cal. 178, 195, 237 (contempts)]. But some judges held that the "Court," as such, was also so empowered (*Reg. v. Warren Hastings*, supra, p. 206, per Hyde, J., see *Re Nataraju*, supra, pp. 91-92). Though Impey, C. J., used the word "Court" (p. 209) in *Warren Hastings*'s case and was so understood in *Re Ameer Khan*, (1870) 6 B. L. R. 392, 445, Chambers, J., said in *Reg. v. Ramgovind Mitter*, supra, that the C. J. had denied the power of the "Court," and Hyde, J. himself stated that the "Court" had never issued the writ. But a practice grew up of the hearing before the "Court" of the rule issued by a single Judge, and probably the distinction was thus ultimately ignored. The power was attributed to the "Court" almost invariably in the later decisions without any advertence to the

previous distinction [*Reg. v. Wright*, (1827) Mort. 222, *Re Justices of the Supreme Court*, (1829) 1 Knapp. 1, 58: *Re Ameer Khan*, (1870) 6 B. L. R. 392, 445: L. R. v. Matilal, (1913) 41 Cal. 173-239 (contempts): *Re Besant*, (1916) 39 Mad. 1164, 1174 (*certiorari*)].

The Jurisdiction of the Supreme Court was generally laid under the Letters Patent (see cases *supra*, particularly, 6 B. L. R. 392, 445, 447: Paper on E. I. affairs vol. VI 1281, 1285, 1286 (1831): Third Report of the Select Committee of H. C. 5th appx. 1225, 1281).

(b) Under Habeas corpus Act 31 Car. II C. 2.

The parts of the statute general in terms apply to India and afford additional reason for so construing the Letters Patent as to enable the court to issue the writ, *Re Ameer Khan*, p. 444.

The Calcutta Court issued the writ in some cases under the statute, but not being marked "*per statutum*," treated it as issued under the Common Law. *Re Bancharam* 1775 cited in 1 Knapp. p. 14.

(c) Under the Common Law.

The English Common Law which gives the right to the writ was introduced in Calcutta with the general body of English law (1). Jurisdiction under such law is referred to as the foundation of the writ in some cases (2).

The Supreme Court had power to issue the writ *ad subjiciendum* to a person within its local limits wherein it had a general jurisdiction (3) i.e., to all the inhabitants of the Presidency Towns (4) e.g., the Governor-General (5) (before the passing of 21 Geo. III c. 70). British-born and native officers of the Nawab of the Carnatic, (6) garrison town major at Fort William (7) Chief Police Magistrate (8) Keeper of the Jail in Calcutta (9), Sheriff of Calcutta (10), etc., for illegal confinement, public or private, of any person within the limits of the town e.g., alien friend (11), British born soldier confined under the

(1) *Re Moharance of Lahore*, (1848) Tay 428, 433 cited in 6 B. L. R. 392, 446, 447.

(2) 1 Knapp. p. 14.

(3) *Re Justice of Supreme Court*, (1829) 1 Knapp. 1, 58.

(4) See Cases in 1775, cited in 1 Knapp, pp. 13-15 and *infra*.

(5) *Reg. Pavesi*, (1776) 1 Knapp., p. 15. See *Reg. v. Warren Hastings*, (1775) Mort. 206.

(6) *King v. Moniesse*, (1810) 1 Str. N. C. 415: *Ibid v. Ibid*, 1 Str. N. C. 418.

(7) *King v. Gordon*, (1791) East's Notes (2 Mer. Dig.) 223.

(8) *Q. v. Le Geyt*, (1843) Per O. C. 397.

(9) *Q. v. Hume*, (1848) Tay 368.

(10) *Q. v. Shearwood*, (1851) 2 T. & B. 71.

(11) *King v. Symons*, (1814) 2 Str. N. C. 91: *Re Pavesi*.

entence of a British Court Martial held in the Mofussil (1).

Writs discharged when the confinement was equal as in cases of unlicensed British born subjects (2), escaped convicts of Native State (3).

Writs *ad subjiciendum* issued to the Sheriff to produce a prisoner in jail in a Presidency town before the court to confess judgment (4) or swear in affidavit (5).

Exceptions.

(1) By s. 21 Geo. III C. 70, s. 1 (rep. by i. L. A. 1915) the Governor-General and Council of Bengal were exempted from the jurisdiction of the Supreme Court and by s. 2 persons impleaded in such Court in any criminal process for acts done by the orders of the said authorities might plead the general issue, etc., provided (s. 3) these orders as to any British subject continued subject as before. Similar provisions were enacted as to Madras and Bombay in other statutes. (2) No writ was issued personally on the Nawab of the Carnatic acting as his own ambassador (6).

The Supreme Court also issued writs *ad estificandum* for production of prisoners in the Calcutta jail or Fort William (but not a detainee under Reg. III of 1818 (7) before itself or (8) or the Sadder Dewani Courts Registrar (9) or a Mofussil Court (10). Practice on such applications (11).

Writ *ad respondendum* issued to produce prisoner for assignment or trial before the Court (12).

JURISDICTION OF THE HIGH COURT IN PRESIDENCY TOWNS, 1862—1875.

Under 24, 25 Vic. C. 104 s. 9 the power of the Supreme Court to issue the writ of Habeas corpus was transmitted to the High Court (13); it was issued to the jail Superintendent (14) law officers (15) etc.

Writ discharged when the custody was lawful,

- (1) *Porrett's case*, (1844) Per O. C. 414.
- (2) *King v. Gordon*, (1791) Easts' Notes (2 M. D.) 223,
- (3) *Q. v. Le Geyt* (1843) Per O. C. 397.
- (4) *Watson v. Jessop*, (1812) Sm. R. & O. 260.
- (5) *Muthoor Mohun v. Alexander*, (1812) Sm. R. & O. 259.
- (6) *King v. Monisse*, (1810) 1 Str. N. C. 415, 418: Cf. *Zubunnissa v. Nabob Azeem*, (1810) *Ibid* 425.
- (7) *Danoodur v. Hurruckchand*, (1858) 1 Bom. 381.
- (8) See *Exp. Reid*, (1819) Easts' Notes (2 M. D.) 183.
- (9) *Ramsunker v. Ramanny*, (1794) Sm. R. & O. 177.
- (10) *Ram Mohun Chatterjee v. Deby Churn*, (1792) Sm. R. & O. 158.
- (11) Easts' Notes (2 M. D.) 183.
- (12) *King v. Poole*, (1815) Clarke's R. & O. Add. 34.
- (13) *Re Amcer Khan*, (1870) 6 B. L. R. 392, 437, 438, 445-448.
- (14) *Re Anwar*, (1866) 1 Ind. Jur. N. S. 100: *Re Amrito Lall*, (1875) 1 Cal. 76.
- (15) *Re Elored*, (1863) 1 Hyde 177.

et c., commitment for contempt of the High Court (1).

[1875]. By Act X of 1875, s. 148 neither the High Court nor any Judge thereof shall hereafter issue any writ of *habeas corpus* for the purposes specified in cls. (a), (g).

[1882] This provision was not repeated in the Codes of 1882 and 1898, s. 491, and it was not necessary to do so (2). A rule under s. 491 and 31 Carl II. C. 2 was issued in Bombay (3).

Quere whether the writ (as distinguished from the jurisdiction under s. 491) is now altogether abolished (4). To determine the point the Court would have to consider the cases of *Re Amcer Khan* (1870) 6 B. L. R. 392 459, 9 B. L. R. 36. *Re Moharanees of Lahore* (1848) Tay 428, *Surendra Nath Banerjee v. C. J.*, etc. (1883) 10 Cal. 209 (5), the effect of Act X of 1875, s. 148 (6) and the power of the Indian Governments under the G. I. Acts to take away such a supreme right (7).

E. H. MONNIER.

(To be continued.)

CONSTITUTIONAL ASPECT OF THE ENGLISH FINANCIAL ADMINISTRATION.

(Continued from p. xcv.)

III.

(b) Appropriation, Audit and Report.

The Comptroller and Auditor-General, therefore, has nothing to do with the Finance Account presented to Parliament. His functions are exercised over separate accounts of the actual expenditure of each department prepared by the Accounts Officers of the department concerned. These accounts known as the Appropriation Accounts show how the imprests or other advances obtained for expenditure have been expended. They are examined by the Comptroller and Auditor-General to ascertain whether the money has been spent in accordance with the votes of Parliament, and whether increased salaries or new offices have arisen without the previous sanction of the Treasury. Thus the Comptroller and Auditor-General acts on behalf of the House of Commons and of the Treasury, ensuring not merely that expenditure is in correspondence with votes, but that it has been

- (1) *Re Sittaram*, (1866) 1 Ind. Jur. N. S. 23.
- (2) Act X of 1897 (Gen. Clauses) s. 6.
- (3) *Alter Carfman v. Govt.*, (1894) 18 Bom. 636.
- (4) *Re Stallmann*, (1917) 39 Cal. 164, 181, 197.
- (5) 39 Cal. 197.
- (6) See *supra*.
- (7) See *ante*, p. 3.

made subject to the control with which Parliament has invested the Treasury. These Appropriation Accounts which contain either detailed observations or a brief list of explanations of the variations between expenditure and grant under the signature of the Accounts Officer of the Department concerned are submitted to the House of Commons by the Comptroller and Auditor-General who attaches to each account, first a *certificate* that the account has been examined and found correct, and secondly, a *report*. This latter contains the remarks of the Comptroller and Auditor-General. He comments upon (a) variations between expenditure and grants, (b) excesses over grants, and (c) irregularities. Usually his remarks are of a very brief nature and confined to (b). With regard to (c) he mentions whether irregular payments have since received the sanction of the Treasury, but sometimes he goes very much further and even interferes in such matters as the progress made in Public Works, *e.g.*, pointing out unsatisfactory delays. He also mentions such matters as (a) any alterations made in the the methods of account, (b) disposal of stores no longer required, (c) failure to levy the proper amount of income tax, (d) frauds (e) propriety of debits to capital and revenue respectively, etc. It does not appear however that ordinarily he makes any mention of objections raised in the course of audit for which recoveries have been effected. To this it may be added that in England the more important store accounts are also subjected to a "test-audit" carried out under the instructions of the Comptroller and Auditor-General. Stock-taking is performed independently by the officers of the departments concerned, and test-audits are applied to these by the several Accounts Departments, *e.g.*, the Army Accounts Department and the Accountant-General of the Navy. It also appears that even under this system frauds of magnitude occur, such as those connected with the thefts of metal from Chatham Dockyard in 1906. Frauds when they occur and the means taken to deal with them are specially brought to the notice of the Public Accounts Committee of the House of Commons in the Annual Appropriation Report of the Comptroller and Auditor-General.

There are one or two other points to notice in regard to the supply of funds and the audit of expenditure which have not been described in detail above, and these are:—

(a) *Imprest*

Although for the purposes of account and audit nothing is treated as a final payment until

accounted for as actually expended, yet issue made from the consolidated fund to the accounts of the various departments with the Paymaster General are treated as expenditure for the purpose of an interim account, in fact they are really "imprests".

(b) *Funds outside the Exchequer Account.*

Certain payments to Sub-accountants (chiefly for Army, Navy and Consular services at distant stations) are made by the Treasury direct to them or through the Paymaster General, from what is known as the Treasury Chest Fund. These are treated as *advances* out of the Treasury Chest Fund, which is a Banking Fund with a Capital of not less than £700,000 or more than £1,000,000, the dealings with which are regulated by Statute. These advances are reclaimed throughout the year by the Treasury at the end of the year to the Comptroller and Auditor-General. Another somewhat similar but smaller fund is the Civil Contingency Fund which also remains outside the Exchequer account.

(c) *Expenditure out of receipts.*

The Collectors of Revenue are authorised under certain regulations to make payments in their districts out of the funds which they collect. These may be either for expenses of their own department or for advances to other services. Thus, a Collector of customs receives on a given day £700, of which £150 is required for expenses of his department, and £100 for the army. These charges he meets and pays £450 by remitting a bill to the Customs office in London, together with vouchers for £250 expended. The £450 is paid by the Customs at once into the Consolidated fund. The two other sums will in due course be recovered out of money granted by Parliament, in one case for the Army, in the other for collection of revenue, and issued to these departments, and when recovered are paid into the consolidated fund.

It follows from the above that the Exchequer account at the Bank is not a true account of Income and Expenditure from day to day but of receipts on account and imprests, but the system in England has attained such exactness that there is very little actual difference between the receipts into and issues from the Exchequer account and the Income and Expenditure of Government, and it is therefore possible to produce what is a sufficiently accurate statement of the national income and expenditure up-to-date on any day with a few hours' notice.

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(To be continued.)

THE Calcutta Weekly Notes.

Vol. XXVI.]

MONDAY, MAY 22, 1922

[No. 26.]

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REPORTS (See Index.)

President of the Bengal Legislative Council.

It has been announced in the public press that Mr. H. E. A. Cotton has been offered by the Governor of Bengal the Presidentship of the Bengal Council on the resignation of Sir Shamsul Huda owing to ill-health, and that Mr. Cotton has accepted the offer. Mr. Cotton was a member of the Calcutta Bar and is otherwise well-known in Bengal. The Cotton family is an old Anglo-Indian family who have for generations served in India and of whom Sir Henry Cotton is remembered by the people of this country with affection and high regard. Mr. H. E. A. Cotton following in the footsteps of his distinguished father lent his unqualified support to the anti-partition and reform agitation in Bengal. After he left this country and retired to England, as editor of the "India," as a member of the old Congress Committee and as a public man he has rendered conspicuous service in combating repressive and reactionary policy and in advocating the cause of constitutional reform and responsible government in India. Like Lord Lytton, Mr. H. E. A. Cotton is also an Indian by birth, having been born at Midnapur, and may not improperly be described as a Bengali. Since his return to England he has had a very active political career. He was for many years a very prominent and progressive member of the London County Council and has also for sometime been a member of the House of Commons. Having regard to his experience, ability, sympathy and progressive views in politics, we entertain no doubt that he answers all the qualifications needed in a

President of a reformed Provincial Council in India. But all the same we must say that there was no necessity for the importation of a President from England and we say this in spite of the fact that the choice has fallen on a tried friend like Mr. H. E. A. Cotton.

But in dealing with a public question we never allow considerations of personal friendship to interfere with our journalistic duties. The offer made by H. E. Lord Lytton is certainly within his constitutional powers under the Government of India Act. For the first term of three years and a year after, the Presidents of both provincial and imperial legislatures are to be nominated by the Provincial Governors and the Viceroy respectively. After that the Legislatures are to elect their own Presidents. But in the Bengal Council when it has been found that the Deputy President, Mr. Surendra Nath Roy, during the absence of the permanent President, conducted the business of the Council all through the busy winter session with conspicuous ability, we see no reason why the Governor should have gone all the way to London to get a President, when a tried man was available in Calcutta. Our progress towards Dominion Government must proceed hand in hand with the Indianisation of the services. This principle has also been accepted by the Imperial Government. The Legislative Assembly has been putting pressure on the Government of India to give speedy effect to this policy. The principle, as has been explained by some members at the Assembly, is this that for such work as may be done by Indians, persons should not be brought out from outside India. Notwithstanding our high regard for Mr. Cotton, we are bound to say that his appointment as President is a violation of the above principle. We are not prepared to make any departure with regard to a principle of such great moment to the whole of India even in favour of one of our

best friends. In the other Presidencies of India, the Presidents of the Local Councils are Indians. Why should we then in Bengal go out of our way to import a President from England? The speaker of the House of Commons sent a message to the President of the Legislative Assembly last session saying that he would be very pleased to furnish special facilities to any member of the Assembly who may visit England to study parliamentary procedure. We hope some members will from time to time avail themselves of such facilities and give a guidance to their colleagues in the Indian and Provincial Legislatures.

Corporation—Liability to Committal.

An interesting point of law was raised on a motion to quash the indictment in the case of *Re Daily Mirror, Ltd.* (Law Journal, March 18, 1922). It was argued that under the Grand Juries Suspension Act, 1917, an indictment could only be brought before the Court by means of a Committal for trial or on a written order of the Attorney-General or Solicitor-General. Now committal means that a person was physically in prison, therefore there was no committal here. The lower Court convicted and imposed a fine on the company but did not decide the point holding that though committal, which meant physically holding somebody in prison, was impossible in the case of the company yet the document was otherwise sufficient under the Grand Juries Suspension Act. The Court of Appeal, however, reversed the decision holding that "the Committal in question commanded the constable to safely convey the company to His Majesty's prison at Brixton and then to deliver them to the Governor thereof with the precept"—that was a physical impossibility so the indictment lacked one of the essential preliminaries and the conviction based on it must be quashed. (Law Journal April 8, 1922).

CONSTITUTIONAL ASPECT OF THE ENGLISH FINANCIAL ADMINISTRATION.

(Continued from p. c.)

IV.

(7) THE PAYMASTER-GENERAL.

The position and functions of the Paymaster-General require some notice. No account of the detailed procedure in the Pay-

master-General's office is available in India, but it may be said generally that the position he occupies is very similar to that of our Accountants-General in the Presidency Towns acting in what may be called their original jurisdiction with reference to claims arising in the Presidency. The Paymaster-General's office is or used to be divided into three branches for the examination of Army, Navy and Civil Service claims, as well as his (the Paymaster's) branches and the Book-keeper's branch. The first three are for the examination of claims, while the Paymaster's branch corresponds almost exactly with our cashier of the Presidency Pre-audit Department. The exact division of the work described may vary in detail, but the main fact that the Paymaster-General performs functions identical with those of our Presidency Pay Departments remains. He discharges claims on the authority of the department responsible for their due examination after satisfying himself that the department issuing the order for payment may properly issue such order and that the authorisations and acquittances are in proper form. For Army Effective services he pays on warrants of the War Office and on Bills of Exchange drawn on himself by officers entitled to draw them. For Navy services he pays on Bills drawn by the Admiralty as above, while payments for the Civil Services are made on quarterly, monthly, weekly or daily lists or on separate orders issued by the Treasury, Home Office, etc., etc. Non-effective services are paid on permanent orders (as in India) and the system of permanent orders is extended to certain Effective Services. Claims are paid by cheques or in cash, while those which are paid on permanent orders are checked with the registers maintained by the Paymaster-General. Bills drawn on the Treasury Chest Fund are accepted by the Paymaster-General and cashed at the Bank and the payments are repaid to the Treasury Chest account by the War Office, Admiralty, etc., out of the grants voted by Parliament. The resemblance between the Paymaster-General's duties and those of our own Accountants-General dealing with civil payments arising in the Presidency Towns is therefore practically complete, the main difference being that, while the Paymaster-General deals with all claims Civil, Military, Naval, etc., under the system prevailing in India the Military claims, (and until the other day the Public Works claims) have been separately dealt with by the account officers of that department.

(8) *Account and Audit.*

Lastly, with regard to account and audit. In the case of the large spending departments, e.g., the Army and the Navy, the accounts are compiled and the audit conducted by the accounting officers of the departments concerned, i.e., the Army Accounts Department and the Accountant-General of the Navy; to these accounts an *appropriation* audit is applied by the Comptroller and Auditor-General, but besides this the latter officer himself undertakes a detailed audit of a portion of the expenditure. The detailed audit is in this case, however, confined to a *test* audit of a portion, usually one-sixth of the whole expenditure; with regard to the Civil Services, the audit is conducted by the Comptroller and Auditor-General's own staff and is complete. Thus the Comptroller-General in England is himself an audit officer and his duties as such are laid down in the Exchequer and Audit Act, these duties being to see (1) Whether payments charged by an accounting department to a grant are supported by vouchers or proofs of payments, (2) (when required) whether they are supported by proper authority and (3) whether the money expended has been applied to the purposes for which such grant was intended to provide.

(9) *Controlling authority in India and in England.*

Now in comparing our Indian procedure and control with that of England, the first thing to bear in mind is the difference in the supreme controlling authority. In England it is the House of Commons. With them rests the responsibility for the supply of funds and also the authority for insisting upon their application in accordance with the intention of their resolutions. It is true that the Treasury, although it has no power to go beyond the provisions of each vote as a whole, exercises very wide powers *within* the votes granted by the House and indeed in one respect even goes beyond the Indian practice. It can sanction new appointments, transfer funds from one sub-head to another sub-head, and under sec. 43 of the Exchequer and Audit Act can even override a disallowance made by the Comptroller-General. Its action in these respects is, however, liable to examination and comment by the Public Accounts Committee of the House of Commons. That Committee receives the appropriation report of the Comptroller and Auditor-General annually and proceeds to discuss it with the aid of witnesses called from the different departments and

finally reports its conclusions to the House as a whole, one of the principal witnesses being the Comptroller-General himself.

(10) *In India.*

In India the case is different. The supreme controlling authority is the Secretary of State for India in Council. His powers, even if regarded as delegated to him by the House of Commons, rest upon Statute law (sec. 21 of the Government of India Act, 1919). The only control which is exercised by Parliament over his actions in respect of expenditure out of the revenues of India is *first* that provided by sec. 22 of the Act quoted, which prevents the revenues of India being applied to meet the expenses of any military operations carried on beyond the frontiers without the consent of both Houses, except under certain special or sudden circumstances, and *second* the provision of sec. 26 of the Act which requires complete accounts of the revenue and expenditure of India to be laid before both Houses annually, but it does not appear that this latter provision operates in practice to enable the House of Commons to interfere with the manner in which the Secretary of State's control is conducted in spite of sec. 2, cl. (3) which puts him completely under the control of the House itself. There is a *third* provision which subjects the *English* expenditure of the Secretary of State to audit by an Audit Officer appointed by the Crown, and although the report of that auditor has to be laid before Parliament, it may be noted that his report is directed to be made to the Secretary of State and not to the House of Commons. Any control therefore which is to be exercised in India by the chief audit authority over expenditure out of the revenues of India is exercised on behalf of the Secretary of State, and it rests with the Secretary of State to say how far the audit conducted satisfies his requirements and whether the report of that auditor should be furnished to him direct or to the Government of India. By the new Government of India Act the Auditor-General is made independent of the Government of India. A creature of the Statute, his appointment is made by the Crown and he holds his office during pleasure of the Crown. In practice, however, he is subject to the authority of the Government of India, and his reports are addressed to that body and not to the Secretary of State although copies thereof are furnished to the latter.

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LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The recent decisions in the HOUSE OF LORDS in *Dey v. Mui*, (1920) 2 K. B. 346, and *Sutters v. Briggs*, (1921) A. C. 1, in effect decided that under the Gaming Act, 1835, a person who had paid a lost bet by cheque was entitled to recover the amount. It was anticipated that considerable litigation would result not so much at the hands of backers and bookmakers, but of trustees who by reason of their fiduciary position are apparently under an obligation to get in for the estate every asset that could be legally recovered.

An interesting judgment on the rights or duties of trustees in Bankruptcy was delivered by ASTBURY, J., on the 6th instant, in the case of *Trustee of A. F. Schanton v. Pearson*. In the course of his judgment the learned Judge said that no doubt the Plaintiff had a statutory right to bring an action to recover the amount of bets paid by cheque but at the same time it was the duty of the Court to prevent its officer from doing what was dishonourable. He made no reflection on the conduct of the Plaintiff who was merely trying to find out what his duty was, but considered that the debtor had induced the bookmaker to deal with him and trust him, and to continue to do so by paying his losses from time to time by cheques, he receiving his winnings in the same way. His Lordship dealt with the authorities, and held that in the circumstances of the case the action was one which it would not be honourable for an ordinary individual to prefer, and *a fortiori* it was not an action that should be brought by a trustee in Bankruptcy who had always been treated as an officer of the Court.

10-4-22.

G. D. M.

Reviews.

THE LAW OF LIMITATION AND ADVERSE POSSESSION. Being an exhaustive and critical Commentary on the Indian Limitation Act, 1908. Third Edition. By K. J. Rustomji, Barrister-at-Law, Lahore. Empire Law Publishing Society, Law Publishers, 1922.

We were one of the first to recognise the sterling merits of Mr. Rustomji's Commentaries on the Limitation Act, and we are not surprised that in less than seven years there

should be a demand for a third edition. As was to be expected, the author has carefully followed every new development in the law of limitation, legislative or judicial, and the recently reported Privy Council decision in *Vidya Varuthi v. Balusami Ayyar*, I. L. R. 44 Mad. 831, (which came somewhat as a surprise, in view of previous decisions of the Judicial Committee, to the profession) is amongst the cases noticed in the *Addenda*. Not much need be said of a work which has already made itself indispensable to legal practitioners and judges. We have to note, however, that in the matter of mechanical execution, the book has not attained the standard of excellence which might be expected of it. As the condition of the paper market is improving, it is not unreasonable to expect that there will be a noticeable improvement in the next edition in the get-up of the work without materially adding to its price.

THE STAMP ACT, 1899. As amended by Bengal Stamp Amendment Act, III of 1922. By Dinesh Chandra Ray, M. A., B. L. Published by J. Sarkar, B. Sc., for the Bengal Supplies, Ltd., 30, Simla Street, Calcutta. Price Rs. 10.

This is a companion hand-book to the author's Court Fees Act as recently amended, which we noticed some time ago. The manner in which the amendments have been shown and embodied is explained by the author in his preface. The book will undoubtedly prove useful.

THE INDIAN STAMP, COURT FEES AND SUITS VALUATION ACTS [with the Bengal Stamps and Court Fees (amendment) Acts] as modified up to 27th March 1922, Calcutta. S. K. Lahiri & Co., College Street, 1922. Price Rs. 1-4.

It is no doubt a great convenience to have all these three enactments, with the latest amendments embodied or shown in their proper places, in one handy manual. The busy practitioner will find good value for the very moderate price he may have to pay for a copy.

THE Calcutta Weekly Notes.

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MONDAY, MAY 29, 1922

[No. 27.]

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REPORTS (See Index.)

Newspaper Posters and Election Expenses.

In the Daily Mirror case noted in our last issue, an important point of election law was raised and decided. The Daily Mirror had posted all over a certain constituency a contents bill showing the photographs of and containing eulogies of a particular candidate and they were hauled up for breach of sec. 84 of the Representation of the People Act, 1918, the material provision of which runs as follows:—

"A person other than the election agent of a candidate shall not incur any expenses on account of holding public meetings or issuing advertisements, circulars or publications for the purpose of promoting or procuring the election of any candidate at a parliamentary election, unless he is authorised in writing to do so by such election agent."

The candidate's agent had not authorised the *Daily Mirror* to incur any such expense and the Defendant's contention was that these posters were merely for the purpose of increasing the circulation of the newspaper. Rowlatt, J., held, that that was no answer, if they were also directed to promote or procure the election of a candidate. The jury found the Defendants guilty of the statutory offence charged and imposed a substantial fine.

We give below the corresponding section of the Indian Election Offences and Enquiries Act, 1920, for comparison as the law here is almost identical with the law in England:—

"Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting or upon any advertisement, circular or publication or in any other way whatsoever for the purpose of promoting

or procuring the election of such candidate shall be punished with fine which may extend to five hundred rupees." There is a proviso to the section which for our purposes is immaterial.

Criminal liability of employees of Corporation.

Where the whole case was brought up before the Appellate Court, the Appellate Court held, as noted ante, that a corporation cannot be "committed" but at the same time as against the employee of the company, the Court held that he had acted "with full consciousness of what he was doing and was a party to the purpose which was being served, viz., the promotion of the candidature of Rear Admiral Sueter as a Member of Parliament," and the fact that the conviction of the company was quashed did not affect the employee's conviction. They took such a serious view of the matter that they further refused an application on the employees' behalf against the disqualification for voting and holding public office, which the conviction entailed.

The Journal of Comparative Legislation and International Law.

The February number of the Journal of Comparative Legislation and International Law contains a number of contributions of both general and special interest. Sir Tynden Macansey's article on *International Labour Legislation* is of topical interest and deals with the report presented by M. Albert Thomas, Director of the International Labour Office, at the conference held in October last at Geneva. The *Powers of Colonial Legislatures* are discussed by Professor W. Harrison Moore with special reference to the question of delegation of powers, upon which he clearly shows that the very affirmative propositions laid down in *Hodge v. The Queen*, 9 A. C. 117, *R. v. Burah*, 3 A. C. 889 and *Powell v. Apollo Candle Co.*, 10 A. C. 282, cannot be taken to be the last words. Would the "plenary powers" of

legislation conferred by Parliamentary Statutes on Colonial Legislatures authorise such legislatures when delegating legislative functions to another authority to determine its own legislative functions, either temporarily or for ever? Some restrictions upon the power of delegation must be recognised, and if so, what is the bearing on the question of such a provision as that contained in sec. 5 of the Colonial Laws Validity Act that "every representative Legislature shall have full power to make laws respecting the constitution, powers and procedure of such Legislature"? See *Webb v. Outtrim*, (1907) A. C. 88 and *McCawley v. The King*, (1920) A. C. 714. Considerations of space prevent us from doing more than barely mention *The Hague Rules*, 1921, contributed by Mr. C. R. Dunlop, K. C. and the very interesting resumé of the *Law of Adoption among the Maoris of New Zealand* by Mr. F. O. V. Acheson, LL. M., a Judge of the Native Land Court and Native Appellate Court of New Zealand. Professor Berriedale Keith speaks with authority on *Mandates* and contributes *Notes on Imperial Constitutional Law* of abiding value. These, however, do not exhaust the varied contents of the number, each item of which will repay careful perusal.

JURISDICTION OF THE HIGH COURTS IN HABEAS CORPUS.

(Continued from p. xcix.)

JURISDICTION OF THE SUPREME COURT OUTSIDE THE PRESIDENCY TOWNS.

Writ ad subjiciendum.—The jurisdiction of the King's Bench to issue the writ beyond England was considered by the Bombay Supreme Court (1). But a more correct view, based on later decisions, was taken subsequently (2).

[1774—1781]. From 1774 down to the passing of 21 Geo. III c. 70 the Supreme Court of Calcutta sent its writs to persons living in the mofussil, but assumed to be subject to its jurisdiction constructively (3).

The writ thus issued to certain persons at Murshidabad to bring up a native Indian (4). It was also issued to owners of land, as persons

in the service of the East India Company, and so subject to the jurisdiction of the Court (1).

[1781—1862]. The very wide construction put by the Court on 13 Geo. III c. 63, and the Letters Patent, 1774, especially in connection with its jurisdiction to issue the writ outside Calcutta, led to conflict between the Court and the Government, in consequence of which 21 Geo. III. c. 70 was passed to remove doubts as to the persons subject to the Court (2). The power to issue it outside Calcutta was not questioned by the statute (3), but restrictive provisions as to persons were introduced (4). The right was, however, preserved to British born subjects committed by the Governor-General in Council (5).

The Supreme Court had no power, under 13 Geo. III, c. 63, secs. 13, 14, the Letters Patent (1774), cl. 4, and, 21 Geo. III, c. 70, to issue the writ to a person, not in law an inhabitant of Calcutta or the factory of Fort William or their limits, and not otherwise personally subject to its jurisdiction, e.g., a native residing in Bengal, Behar and Orissa where the illegal detention also took place (6); or to a jailor or other officer, as such, of a "Native Court," [the Supreme Court having no power to discharge a person imprisoned by such Court (7)] including in the term a Native Court Martial (8).

It could not release by writ a British born person sentenced by a Company's Court competent to try the subject-matter, on the ground of erroneous assumption of jurisdiction, but only for total want of such competence (9).

The Court had power to issue the writ outside the Presidency Towns to persons subject to its civil and criminal Jurisdiction (10), e.g., to a British subject detaining any person

(1) Arg. in *Re Justices of Supreme Court*, (1899) 1 Knapp, pp. 25 [citing *Mill's Hist. of Br. India*, Rank V, Chap. 61 36, 41.

(2) Arg. in *Re Justices of Supreme Court*, supra: Preamble to 21 Geo. III, c. 70.

(3) *Re Ameer Khan*, supra, p. 448.

(4) See ss. 1, 9, 11, 13, 17, 21.

(5) S. 3, and 6 R. L. R. pp. 445, 448.

(6) *Reg. v. Gorulnauth*, (1821) Clarke's R. & O. Add. 38, 41—43, Mort. 220; *Re Justices of Supreme Court*, (1829) 1 Knapp, 1.

(7) 1 Knapp 1.

(8) *Reg. v. Shaik Boodin*, (1848) Per O. C. 434, 448, 460, follg. 1 Knapp 1.

(9) *Re Fou*, (1850) 1 T. & R. 219, 224—238, [follg. *Brennan's Case*, 1847 10 Q. R. 402; *Re Justices of Supreme Court*, (1899) 1 Knapp, 1; Cf. *Q. v. Siddulph*, (1850) 1 T. & R. 337 [certiorari].

(10) *Re Justices of Supreme Court*, (1829) 1 Knapp, 1, 58. See cases *infra*.

(1) *Reg. v. Shuk Boodin*, (1848) Per O. C. 434, 445.

(2) *Re Ameer Khan*, (1870) 6 B. L. R. 392, 430, 437, 445. *Re Nataraja*, (1912) 36 Mad. 72, 77, 81, 92. See 25 and 26 Vol. c. 20.

(3) See 1 Knapp, p. 22.

(4) *Re Cosa Zachariah Khan*, (1779) Mort. 263.

illegally (1), [though it would not do so where the custody was legal, as under Reg. III of 1818 (2) and it would have, in consequence, to remand the prisoner (3)]: to natives constructively inhabitants of Calcutta (4): to natives in the service of the East India Company or of British subjects causing illegal detention in a private capacity (5), such natives being subject to the jurisdiction of the Supreme Court (6): to British born or native jailors of the Company's Courts, being in the service of the Company and unlawfully detaining a British born subject, the Supreme Court having jurisdiction over the jailor in such cases in respect of his torts, *i.e.*, his wrongful act of detention (7): to natives subject to its criminal jurisdiction by reason of the commission of an offence within the limits of the town though not otherwise subject, as where a master abducted a servant in Calcutta and detained him in the mofussil (8): to natives arresting and detaining a witness going from the Court to his home (9).

The Letters Patent, 1774, cl. 4 were held to have conferred the power to issue the writ outside the Presidency Towns from the time of the Supreme Court's first establishment: and these decisions settled the law, and cannot now be questioned except by a higher Court (10). The Madras Letters Patent were similarly construed (11).

Writ ad testificandum.—This writ was issued to produce, as witnesses before the Supreme Court, any one commorant in Bengal, Behar

and Orissa or the annexed districts (1). It was directed to jailors to bring up natives confined in the mofussil jails (2). The Supreme Court had power to issue *sub-poenas* to the mofussil (3).

Writ ad respondendum.—An application was made to remove a prisoner into the custody of the sheriff for trial, but refused for want of jurisdiction in the Court collectively (4).

JURISDICTION OF THE HIGH COURT OUTSIDE THE PRESIDENCY TOWNS.

[1862—1872]. Under 24, and 25 Vic. c. 104, sec. 9, the power of the Supreme Court to issue the writ outside the Presidency Towns passed to the High Court, subject to the Letters Patent, 1865, and cl. 11 does not affect the limits within which the writ *ad subjiciendum* can be issued; the issuing of the writ not being a matter of Ordinary Original Civil Jurisdiction (5). The Madras Court has adopted the same view (6).

The Calcutta Court issued the writ in the case of private detention of a minor outside Calcutta (7).

The High Court undoubtedly possessed the inherited power to issue the writ outside the Presidency Towns till the passing of the Code of 1872, and the only question is whether it has since been abrogated.

[1872].—Sec. 81 of the Code, 1872, gave the High Court jurisdiction throughout its territorial limits and other places in the case of European British subjects (8). But by sec. 82 the jurisdiction beyond the Presidency Towns was taken away in other cases.

[1882].—Sec. 456, Code, 1882, reproduced sec. 81 of the preceding Code with alterations.

In 1912 the Madras Court held, though incidentally, that the High Court had jurisdiction, derived from cl. (8), Letters Patent, 1800,

(1) See 12 Geo. III, c. 67, s. 14, and L. P., 1774, cl. 13, 19. *Re Maharanees of Lahore*, (1848) Tay. 428, 433: *Re Ameer Khan*, (1870) 6 B. L. R. 302.

(2) Tay. 428. *Re Tuckut Roy*, (1858) 1 Boul. 354: *Re Ameer Khan*, (1870) 6 B. L. R. 302: *Ibid*, 459, 468.

(3) 6 B. L. R. 455, 456 [citing 21 Geo. III, c. 70, ss. 1, 2]: *Ibid*, 459, 467, 478.

(4) *Rez. v. Goolnauth*, (1824) Clarke's R. & O. Add. 89, 41—43: *Re Muddoosoden*, (1815) East's Notes (2 Mor. Dig.) 29.

(5) Conceded in *arg.* for the E. I. Co. in 1 Knapp. 41—43, and apparently accepted by the Privy Council.

(6) 12 Geo. III, c. 67, s. 14: L. P., 1774, cl. 13, 19.

(7) *Re Poy*, (1850) 1 T. & B. 214, 224.

(8) *Re Greenuth Roy*, (1810) Mort. 228 [ditto *Rez. v. Goolnauth*, and 1 Knapp. 1]. See East's Notes 2 M. D. 29.

(9) *Rajuk Mohinder v. Ramonnai*, 1791 Sm. R. & O. 148.

(10) *Re Ameer Khan*, (1870) 6 B. L. R. 302 [citing *Impov. O. J.* in *Rez. v. Warren Hastings*, (1775) Mort. 204, *Brejeessee v. Ram Narain*, (1800) Sm. R. & O. 201: also Mort. 213: Sm. R. & O. 148: East's Notes 29: Mort. 228, 1 Knapp. 1, opinions of Grey and Ryan, C. J. in Third Rep. of Sel. Com. of House of Commons, 5th Annex (1829, 1830 pp. 1225, 1281) *Re Nataraja* 1912 36 Mad. 72, 77, 91, 92, appg. 6 B. L. R. 302.

(11) 36 Mad. 77, 91, 92, 93.

(1) *Buddinauth v. Deverall*, (1820) Mort. 184 [cited in *Q. v. Shave*, (1813) Fult. 328, and *Re Ameer Khan*, (1870) 6 B. L. R. 302, 446].

(2) Anon, 1800 Tay. 146: *Brejeessee v. Ram Narain*, (1800) Sm. R. & O. 201: *Q. v. Shave*, 1813 Fult. 328.

(3) Tay. 184, 185: *Rez. v. Shahik Boodin*, (1818) Par. O. C. 431, 419: *Re Ameer Khan*, pp. 401, 418: *Re Nataraja*, (1912) 36 Mad. 72, 78.

(4) *Rez. v. Rangwind Mitter*, (1781) Mort. 210.

(5) *Q. v. Ameer Khan*, (1870) 6 B. L. R. 302, 479. Question not decided by the Court of Appeal: *Re Ameer Khan*, (1870) 6 B. L. R. 460, 469, 478.

(6) *Re Nataraja*, 1912 36 Mad. 72, 77, 91, 92, 93: *Ibid*. in *Re Kookunni*, (1921) 45 Mad. 14.

(7) *Re Sm. Beenodeeny*, (1864) Cory. 78.

(8) *Eg. v. Ward v. Q.*, (1880) 5 Mad. 33.

to issue the writ on any one and anywhere in the Madras Presidency (1), the restrictions on the Supreme Court's power, in respect of persons and Courts in the mofussil, having been removed by their becoming the King's subjects and the King's Courts since 1858 (2). Recently the jurisdiction was expressly affirmed by Sastri, J., who held that the general power to issue the writ outside the Presidency Towns was independent of, and not curtailed by, sec. 491, Cr. P. C. (3). The Patna (4) and Calcutta (5) Courts have left the question open: the case of *Tops v. Emperor* (6), *infra*, merely holding that the Court has no such power under sec. 491. To determine the question, the Court must consider *Re Amcer Khan*, (6 B. L. R. 392), *Re Maharana of Lahore* (Tay. 128) and *Surendra Nath Banerjee v. C. J.* (10 Cal. 209) (7), but principally the effect of sec. 82, Code, 1872; sec. 456, Code 1882; and the power of the Indian Legislature to take away altogether such a supreme right.

R. H. MONNIER.

(Concluded.)

Review.

THE LAW OF APPROVERS. By V. P. Mahadeva Aiyer, B. A., B. L., Madras. Published by the Law Printing House and the Lawyer's Companion Office, Mount Road. 1922.

This is a carefully prepared resumé of the law relating to approvers as laid down in legislative enactments and authoritative decisions of the Indian High Courts, arranged under five heads, *viz.*, I, Tender and Acceptance of Pardon, II, Forfeiture of Pardon, III, Prosecution of Approver for giving false evidence IV, Corroboration of Approver's evidence and V, Value of Approver's confessions, preceded by an interesting Introduction, historical and comparative, and several Appendices which set out *inter alia* the legislative provisions bearing on the subject. It is a handy volume, and well got up and should prove useful.

(1) *Re Nataraja*, (1912) 86 Mad. 72, 77, 91, 92, [93, follg. 6 B. L. R. 392.

(2) 86 Mad. p. 95.

(3) *Re Kochummi*, (1921) 45 Mad. 14, 22, follg. 36 [11] Mad. 72, and 6 B. L. R. 392.

(4) *Parneshwar v. Emp.*, (1918) 3 P. L. J. 537, 539, 565.

(5) *Re Stallmann*, (1911) 39 Cal. 164, 181, 197; *Tops v. Emp.*, (1918) 44 Cal. 31, 41.

(6) (1918) 44 Cal. pp. 52, 53, 55.

(7) 39 Cal. p. 197.

Correspondence.

DUTY ON SECURITY-BOND.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES.

DEAR SIR,

Your correspondent has raised a point regarding duty to be paid on security-bonds (*jaminnama*) given for stay of execution in your issue of the 8th May.

The point seems to have been set at rest by the ruling quoted by him, namely, 21 C. W. N. 1150. The Munsif of Ranaghat who referred the matter to the Hon'ble High Court was of opinion that as the security-bond is given under Art. 6, Sch. II of the Court Fees Act, it need not be written on non-judicial stamp paper but a court-fee stamp is necessary to be affixed on it (presumably on plain paper). This view was not accepted by the Hon'ble Judges of the High Court, who seem to have made distinctions between bonds which the parties are bound to give in pursuance of the order of the Court and those which they can furnish or not as they please. Security-bonds given for stay of execution were held to belong to the latter class, not being such as the parties were bound to give in pursuance of the order of the Court, and as such they were held to be chargeable with stamp duty only. So the provision for paying court-fee under cl. 6, Sch. II of the Court Fees Act does not apply to such bonds.

It is no doubt a fact that in some districts a practice obtains under which both the duties are paid on such bonds, but neither the law nor the ruling favours such practice. The only case in which the question of paying both the duties may arise is when the amount secured in the security-bond exceeds Rs. 1,000, and the giving of the bond is obligatory upon the party, inasmuch as in this case both Cl. (b), Art. 57 of the Bengal Stamp (Amendment) Act and Cl. 6, Sch. II of the Court Fees Act may be applied.

Yours faithfully,

RAJENDRA NATH SOM, B.L.,
Pleader, Howrah.

11-5-22.

THE Calcutta Weekly Notes.

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MONDAY, JUNE 5, 1922.

[No. 28]

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REPORTS (See Index.)

Rights of Ghatiyas of sacred rivers.

The *Ghatiya* is an institution at Benares and other places to which pilgrims resort in large numbers to bathe in the sacred rivers. What he does is to place platforms on the public *ghats* to facilitate the bathing; and for the use of these platforms and other small services performed by the *Ghatiya* for the comfort and convenience of the pilgrims, he receives remunerations. The *Ghatiya's* business is thus a fairly profitable one—sufficiently profitable indeed to lead to disputes between rival claimants of the business and the profits arising therefrom. But once such a dispute is taken to the law Courts, the question is immediately raised, "Has the *Ghatiya* any rights?"; and if so, "Are they rights of property?"

From the report of the case of *Suraj Prasad v. Ganesh Ram*, 1. L. R. 43 All. 581, it appears that the business of a *Ghatiya* at a particular *ghat* has sometimes been exclusively performed for generations by, and has been confined within, particular families. How this monopoly of user originated may be surmised. When pilgrims from distant places began to resort in large numbers to these bathing *ghats*, the demand arose for persons to look after their needs and comforts and the supply followed the demand. A *Ghatiya* would before long fix his station and his user of a particular *ghat* for plying his trade would not be interfered with by other *Ghatiyas* so long as there was room enough for all. As to the State or the general public interfering with

the *Ghatiyas* whether for police or other purposes, the idea that such a user of public *ghats* is really a franchise, and needs to be regulated by the State or the community as such, would hardly occur in a country so unsophisticated as regards public rights as India. The rights of the *Ghatiyas*, if they are rights, cannot be supposed to have arisen in grant, but must have in every case had their foundation in prescription. Whether this is altogether consistent or not with principles of English law which, in present conditions, are apt to be referred to in dealing with such questions, it is certainly not politic to ignore the exclusive rights of particular families of *Ghatiyas* where they have grown up and have been generally admitted. But, it was argued in this case, how do you distinguish the right claimed by the *Ghatiya* from that which came up for consideration in *Bansi v. Kanhaiya*, 18 A. L. J. 983? There the right claimed was the exclusive right to receive alms at a particular *ghat*. The bathing in the sacred river and the giving of alms are a part and parcel of the same religious act, and the giving of alms on these occasions is by no means a casual act of benevolence. The takers of these alms (we dare not, with the Judges, call them "beggars") are instruments who directly assist the pilgrims in the acquisition of the full measure of religious merit which the bathing in the sacred river is intended to secure. The "beggar" at the sacred *ghat* is as much an institution as the *Ghatiya*. However the Judges (Mears, C. J. and Banerjee, J.) were satisfied that the case of these "beggars" bears no analogy to that of the *Ghatiyas*. The decision in *Bansi v. Kanhaiya* has by negating the exclusive right of individuals to receive all alms given at particular *ghats*, presumably increased the influx of beggars at *ghats*, so that the pilgrims can have no ground for complaint on the score of their opportunities for acquiring religious merit by distributing alms having been narrowed by it. But a similar decision with

regard to *Ghatiyas* would have aggravated the scramble for pilgrims at sacred places to the point of endangering even their lives and limbs. The price demanded for acquiring even such plenary religious merits as bathing in the sacred rivers is expected to confer, may prove too heavy.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Easter Sittings of the Privy Council commenced on April 27th. There are 15 Indian appeals set down for hearing, and it is anticipated that these will all be heard before the Court rises at Whitsuntide. The only appeal which is expected to have a protracted hearing is the case of *Khatubai v. Md. Haji Abu* which comes from Bombay and raises the question as to the law of succession which is applicable to *Halai Memons* of Porebunder.

On April 27th judgment was delivered by the Board in the case of *Sarju Prasad Missir v. Maksudan Chowdhury*, an appeal from a judgment of the High Court of Patna which was dismissed with costs.

A Board consisting of LORD ATKINSON, LORD PARMOOR, LORD CARSON, SIR JOHN EDGE and MR. AMEER ALI sat to hear the 1st case on the list which was an appeal from Madras, *Lakkmisetti Basavarlingam v. L. Panidessaya*. The question for determination was as to whether a partition had taken place in a Hindu joint family. Mr. J. M. Parikh (*Ex parte*) for the Appellants contended that the High Court was wrong in refusing to re-open part of the partition proceedings. The Board dismissed the appeal.

A question on the construction of a Parsi Will was raised in the next case, *Dinbai v. Nusserwanji*. The Appellant was represented by Messrs. Upjohn, K. C. and E. B. Raikes. The Respondent by Messrs. DeGruyther, K. C. and Kenworthy Brown. At the conclusion of the argument their Lordships reserved judgment.

The case of *Jagdeo Narain Singh v. Baldeo Singh* consisted of 7 consolidated appeals from the High Court of Patna and raised the question whether the Respondents were tenants of the Appellants, or themselves proprietors, and whether or not the Appellants were barred by

limitation from asserting their title. Messrs. DeGruyther, K. C. and J. K. Roy appeared for the Appellants and Messrs. Dunne, K. C. and Dubé for the Respondents.

At present the Board presided over by LORD PHILLIMORE are hearing the case of *Radha Krishna v. Bisheshar Sahay*. This is an appeal from Patna in which the Appellants are seeking to prove that the Respondent had purchased the suit property *benami* after being forbidden by the Court to bid. The Respondent denies the alleged *benami* nature of the transaction and contends that the suit is barred by limitation. The Appellants are represented by Messrs. DeGruyther, K. C., Parikh, and Abdul Majid, the Respondent by Mr. B. Dubé.

G. D. M.

*4-5-22.

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

May I through the courtesy of your columns draw the attention of our legislators to two much needed amendments of the procedure obtaining in the trial of criminal cases.

The first is the provision with regard to the grant of bail. Chap. XXXIV of the Criminal Procedure Code codifies the law on the subject. Under sec. 497, a Magistrate cannot grant bail to a person accused of any non-bailable offence "if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused." Beyond the fact that the term "reasonable grounds" is delightfully vague—what is reasonable to one Magistrate being quite the reverse to another—does not this provision militate against the fundamental principle of criminal jurisprudence, namely, that a person is to be considered innocent until he is *proved* guilty? And again refusal to grant bail in a majority of cases operates as denial of opportunity to the accused to defend himself properly. Bail, therefore, should not be refused unless the Magistrate is satisfied that if enlarged on bail the accused is likely to abscond.

The second point that I want to bring forward is with regard to the grant of copies of First Information Reports and of Statements made to Police Officers in the course of their investigation under Chap. XIV, Cr. P. C. Copies of F. I. Rs. are not granted until they

are made exhibits, that is to say, until the trial has begun and in most cases proceeded some way. The result is that the accused is shut out from knowledge of the offence with which he is charged until the prosecution chooses and he is left to grope in the dark. An accused person ought to be furnished with a copy of the First Information Report at the earliest opportunity—as soon as he is apprehended or as soon as he comes to Court, so that he may be prepared from the very beginning to meet the charge. Then again the accused is not entitled to inspect or take out copies of statements made by witnesses before investigating Police Officers unless the Court after referring to the same, *at the request of the accused*, thinks it expedient for the interests of justice that the accused should get such copies (sec. 162). This “request” presupposes knowledge of the accused of statements made by witnesses before the police officer. But are all the witnesses examined in his presence? And how can he be armed beforehand with knowledge sufficient to impeach the credit of a witness making an amplified or totally different statement in Court unless he is allowed to inspect or to take out copies of statements made by the witness before the investigating officer? Instances are not rare in which witnesses who have only heard about an occurrence and said so before the investigating officer blossom forth into eye-witnesses in Court and whose statements but for conscientious and careful public prosecutors would pass muster.

I have only baldly stated my points; what I want to urge is that the provisions of criminal procedure should be so amended as to give in every instance the accused a sporting chance.

Yours faithfully,

PROBODH GOPAL MUKERJEE.

29-3-1922.

Notes of Cases CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before CUMING and PANTON, JJ. CIVIL RULE NO. 295 of 1922. HARENDRA KUMAR ROY and others, Petitioners *v.* NISHI CHANDRA JALIA and others, Opposite Party. The 8th April 1922.

Limitation Act, sec. 5—Application to admit

a second appeal filed out of time, when analogous appeal in time.

There were two analogous rent appeals before the Subordinate Judge, 2nd Court, Chittagong.

Both the rent appeals were dismissed on the 27th day of September 1921 by one and the same judgment. The decree was signed on the 30th September 1921 and on that day the Plaintiff-Appellants filed an application for copies of the judgment and decree. In one case the folios were requisitioned on the 30th September 1921 while in the other case folios were requisitioned on the 3rd November 1921. The Plaintiff-Appellants supplied the folios on the 3rd November 1921 in both the cases. The copies were made ready in both the cases on the 8th November 1921. Two second appeals, *viz.*, File Nos. 162 and 163 of 1922, were filed on the 8th January 1922 in the Hon'ble High Court. The office reported that second appeal File No. 162 was filed in time but the second appeal File No. 163 was filed out of time by four days. The Appellant-Petitioners were misled by the entry on the back of the copy of the decree of the Lower Appellate Court in connection with second appeal File No. 162 and therefore they were prevented by sufficient cause from filing the second appeal File No. 163 within time. The Petitioners then moved the High Court under sec. 5 of the Indian Limitation Act and obtained this rule:

Held—That the second appeal File No. 163 should be admitted under sec. 5 of the Indian Limitation Act.

Babu Kshitish Chandra Chakrabarti appeared for the Petitioners.

No one appeared for the Opposite Party.

K. C. C.

Rule made absolute.

CIVIL REVISIONAL JURISDICTION. Before GREAVES and B. GHOSH, JJ. REV. No. 648 of 1921. SM. HARI BHABINI DEBI and another, Plaintiffs, Petitioners *v.* NARENDRA NATH ROY and another, Defendants, Opposite Party. The 27th February 1922.

Restoration of appeal—Whether the Court has power to restore it when dismissed under Or. 41, r. 10, C. P. C.

The facts briefly stated are these:—

The Plaintiffs' case was that the Petitioner, Sm. Hari Bhabini Devi, an old widowed lady owned and possessed a one-storied house and some adjoining land worth about Rs. 8,000 at

Shibpur within the town of Howrah, and lived there with her widowed daughter Sm. Monorama Debi; and they had no male guardian to look after them. For sometime past Babu Narendra Nath Roy acted as their pleader, and was their sole adviser, who lived near their place, and in whom they placed much confidence. The Petitioners, being in need of money, took a loan of Rs. 1,000, as alleged, and executed a document which they understood to be a mortgage deed; that thereafter in 1921 Narendra obtained a decree for ejectment. Then they came to know the deed in question was an out and out sale, and instituted a suit in the Court of the Munsif at Howrah for a declaration that the deed they executed was a mortgage and not a sale deed. The learned Munsif, however, dismissed the Plaintiffs' suit. Being thus aggrieved they preferred an appeal (Title Appeal No. 110 of 1921) in the Court of the Additional District Judge at Howrah on 23rd May 1921. On the 1st June 1921, Narendra, the Respondent made a petition before the District Judge, praying for security for costs of the suit as well as the appeal, then pending, to be furnished by the Appellants. No notice was served upon the Appellants. On the 3rd June 1921 the learned District Judge passed an *ex parte* order calling upon the Appellants to furnish security before 24th June 1921 to the extent of Rs. 300. The order-sheet, however, purported to bear the initials of one of the Appellant's pleaders. Then on 25th June, Narendra put in a petition for dismissing the appeal, and the learned Judge dismissed the appeal under Or. 41, r. 10. Then on 21st July 1921 the Appellants put in a petition for restoration of the appeal, alleging that they had no notice of the orders for security, and Narendra having already attached a decree for Rs. 800 obtained by Appellants, further security was unnecessary. The learned Judge, however, refused to restore the appeal, holding that there was no provision of law for restoring the appeal.

The Petitioners, then, obtained a rule upon the Opposite Party to shew cause why the appeal should not be restored.

Babu Manmatha Nath Ganguly, Vakill for the Petitioners.—This is a rule obtained on behalf of the two *purdanashin* ladies against the orders passed by the learned District Judge, dismissing the Petitioners' appeal for failure to furnish security for costs of the suit and the appeal under Or. 41, r. 10, C. P. C. The

learned Judge ought to have first satisfied himself that the Appellants did get a notice of the application; and having regard to the fact that both the Appellants were *purdanashin* ladies it was all the more necessary that notice should have been served. It was rather an extraordinary petition, having regard to the fact that Narendra had already attached a money decree of Rs. 800 standing in favour of the Appellants.

[GREAVES, J.—You say you had no notice, but I see in the counter-affidavit it is mentioned that your pleader did sign the order.]

The pleader was not in charge of the case, and the order was never communicated to the Appellants. These orders are usually signed by pleaders whenever presented to them. I don't know whether your Lordships are going to rely upon a counter-affidavit like this. The affidavit is not in proper form. Your Lordships ought to disregard it altogether, I. L. R. 37 Cal. 259.

[GREAVES, J.—Suppose we exclude the counter-affidavit, it is a matter of record that your pleader did sign it.]

I submit that under the circumstances of the case your Lordships should consider that a notice ought to have been served upon the Petitioners. I should not be shut out from my appeal in this way. I ought to have been given an opportunity.

Then, again, I put in a petition with a security bond offering security, but that was rejected. I submit the Court had ample power to grant my prayer, and restore the appeal.

[Dr. Mitter.—When once the appeal was dismissed the Court was *functus officio*.]

I submit the Court has power to restore it. 13 L. A. 57, 17 I. A. 1 and 21 Bom. 576.

Dr. Dwarkanath Mitter (with *Babus Peary Mohan Chatterjee*, *Hari Charan Ganguly* and *Haradhan Chatterjee*) for the Opposite Party No. 1 was not called upon to reply.

M. N. G. The Rule was discharged.

THE Calcutta Weekly Notes.

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MONDAY, JUNE 12, 1922.

[No. 29.]

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REPORTS (See Index.)

The late Sir William Comer Petheram.

Bengal owes a special tribute to the memory of Sir William Comer Petheram, the news of whose death, at the ripe age of 87, has been received recently. He was one of the most popular Chief Justices of the Calcutta High Court. Sir Barnes Peacock, Sir Richard Couch and Sir William Garth were, perhaps, abler lawyers, but Sir William Comer Petheram was not second to any of them in maintaining the high traditions of the oldest High Court in India. Sir William was an equity lawyer and though well-versed in the technique of law, his chief look out on the Bench was to do justice. He used to judge each case on its own merits and, without burdening his judgments with case-law, he used to point out broadly how the case before him differed from the precedents cited and decide the issues of facts and law by bringing to bear on them sound general principles and the dictates of a strong common sense. He started life as a special pleader and this stood him in good stead in getting a quick grasp of the facts and the law at the hearing of appeals on the Appellate Side of the Calcutta High Court. In England he enjoyed a fairly good practice and took silk in 1880. In 1884 he came out to India as Chief Justice of the Allahabad High Court and two years later he was appointed Chief Justice of the Calcutta High Court and after serving 10 years in the latter capacity he retired from India in 1896.

Although socially he was more or less of a retiring disposition, yet by the sterling qualities of his character both as a judge and a gentleman he commanded universal respect. It will be remembered that after his retirement, when his furniture and books were sold by auction, many people vied with each other for possessing such articles as his office chair, pictures, etc., as mementos. It may be asked at this distance of time what was the secret of his

great popularity? It was simply this that he was absolutely independent of the executive. Many will remember the case of the Deputy Magistrate who had displeased the executive by paying no heed to considerations of policy in the trial of criminal cases and was on that account taken to task by the executive Government. Sir William Comer boldly supported his cause and extended his protection to him against such executive interference with the administration of justice. Sir William Comer never visited the Government House or the Belvedere except on ceremonial occasions or when he was invited. He used to say that a Judge had to a great extent to shun society, and humorously add that in his case it was pretty easy, since he had no daughter to marry. In his days political trials were not very common. When the Bengal Government prosecuted the editor of the *Bangabashi* newspaper for sedition, Sir William Comer himself presided over the Sessions at which the trial was held: when the jury returned to Court and informed the Chief Justice that they could not agree, he discharged the jury at once saying that in such an important trial he would not have any divided verdict. The Government thereupon abandoned the prosecution. We have special reasons to be grateful to him because when we approached him with the project of starting a legal journal in this city he called a meeting of the Full Court and gave us the same facilities for reporting cases as to the Editor of the *Indian Law Reports*.

Court-fee on landlord's application under sec. 105, Bengal Tenancy Act, for enhancement of rent of tenure, recorded as not variable.

We publish in another column a letter from Mr. Profulla Kumar Das in which he has ingeniously argued that when a landlord applies under sec. 105, Bengal Tenancy Act, for enhancement of rent of a tenure, which he alleges was erroneously recorded as not variable, the issue which is raised as to whether the tenure was held at a fixed or a variable rent is not an issue as to whether the tenant belongs to one class or another, within the meaning of cl. (e) to sec. 105A of the Bengal Tenancy Act, and

that therefore the application is not properly chargeable with *ad valorem* court-fee, under the notification in that behalf issued by the Governor-General in Council. The terms of sec. 4 do undoubtedly lend support to Mr. Das's contention; but where the tenure has been recorded as bearing a fixed rent, must not the landlord have the entry amended before he can ask the Settlement Officer to enhance the rent? For in the absence of such a prayer (backed, too, by evidence to establish it) the Settlement Officer is bound to proceed upon the assumption that the entry is correct.

The application for enhancement of the rent of a tenure recorded as held at a fixed rent must therefore contain an allegation that the entry is incorrect and thus involves "a dispute regarding an entry" in the record-of-rights within the meaning of sec. 106, Bengal Tenancy Act, and would in substance be an application under sec. 105 for settlement of fair rent joined with a suit under sec. 106 for correction of an entry in the record-of-rights. If the above reasoning be correct, then the court-fee payable would be just the same as if the issue raised was treated as one arising under cl. (e) of sec. 105A of the Act, for according to Government Notification a plaint in a suit under sec. 106 must also bear *ad valorem* court-fee subject to the maximum of Rs. 10. It would be otherwise where the entry is that the rent is variable but the tenant upon an application of the landlord for settlement of fair rent under sec. 105 challenges the correctness of the entry. No suit is required to be instituted by the landlord in such a case under sec. 106, and whether the issue raised is one contemplated by cl. (e) of sec. 105A or not, it is not one "raised by the applicant" within the meaning of the notification cited by Mr. Das.

***Ad valorem* court-fee on claims exceeding Rs. 150 in value up to Rs. 1,000.**

A correspondent communicates to us his doubts as to whether the amount Rs. 18-0 stated as the proper *ad valorem* court-fee payable upon a claim valued at Rs. 160 in the revised table of rates of *ad valorem* fees appended to the Bengal Court Fees Amendment Act, IV of 1922, is not a misprint for Rs. 17-6 which according to him is the fee properly payable under the scale of fees prescribed in Art. 1 to Sch. I of the Act. We have examined the language of the article as amended by Act IV, B. C., of 1922, and are satisfied that there is

no conflict between the provisions of that article and the amount stated in the table to which exception has been taken. Had the relevant clause of the article read thus: "When such amount or value exceeds one hundred and fifty rupees, for every ten rupees or part thereof *in excess of one hundred and fifty rupees*, up to one thousand rupees," as our correspondent assumes it to do, the proper fee payable upon a claim of Rs. 160 would have been Rs. 17-6. But the words italicised do not occur in this clause. In the other clauses, the amount of fee prescribed in the third column is made payable upon amounts in excess of the stated minimum, and this no doubt is what led our correspondent to assume that there is a similar qualification in the clause in question. That the omission was deliberate however becomes apparent from an examination of the scale of fees recorded in the third column of Sch. I which are progressively 6 as., 8 as. and Re. 1-10 as. upon amounts in excess of the stated minima, but the next item is Re. 1-2 as. and this is made payable upon all claims ranging from above Rs. 150 to Rs. 1,000 and not upon excesses over the minimum of Rs. 150. The matter upon the language of the article does not really present any difficulty, but as the mistake has been made and is likely to be repeated we have deemed it desirable to draw our readers' attention to it by this note.

Correspondence.

**COURT-FEE ON LANDLORD'S APPLICATION UNDER SEC. 105, BENGAL TENANCY ACT, FOR ENHANCEMENT OF RENT OF TENURE,
' RECORDED AS NOT
VARIABLE.**

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

Will you kindly publish the following in your much-esteemed journal so that the grievance mentioned in it may attract the attention of the legal profession as well as of the Settlement Department.

In exercise of the powers conferred by sec. 105, sub-sec. (3), of the Bengal Tenancy Act, the Governor-General in Council has been pleased to direct that an application made under the said section shall bear:—

(a) a stamp of eight annas for each tenant making or joining or joined in the application, and,

(b) if, at any time during the hearing of the application, an issue is raised by the applicant under sec. 105A of the said Act, in addition a stamp to the amount of an *ad valorem* fee chargeable under Art. 1, Sch. I, of the Court Fees Act, subject to a maximum of ten rupees. [Vide Notification No. 2254 F, issued by the Government of India in the Finance Department on the 8th August 1918, published in the Gazette of India, dated the 10th August 1918, and re-published for general information in the Calcutta Gazette, dated the 28th August 1918.]

The operation of cl. (b) of the above Government Notification is often wrongly extended to the great hardship of litigants to cases not properly coming within the purview of the clause. To cite a typical instance, additional court-fees under the clause are levied from landlords of tenure-holders at variable rent, wrongly recorded as tenure-holders at fixed rent, when they seek enhancement of rent from such tenure-holders by proceedings under sec. 105. Are additional court-fees legally leviable in these cases? The answer to the question depends upon the answer to the further question, "Is an issue under sec. 105A really raised in these cases?" Now, if in these cases an issue is at all raised under sec. 105A, it must be raised either under cl. (e) or cl. (f) of that section. Under no other clause of sec. 105A can an issue be raised in these cases. Leaving aside, therefore, all other clauses of sec. 105A, let us confine ourselves only to cls. (e) and (f) of that section and examine whether in these cases an issue is really raised under any of these two clauses. Issue is raised under cl. (e) of sec. 105A "when the tenant belongs to a class different from that to which he is shown in the record-of-rights as belonging." Issue is raised under cl. (f) of sec. 105A "when the special conditions and incidents of the tenancy, or any right of way or other easements attaching to the land have not, or has not, been recorded, or have or has been wrongly recorded." Issue under cl. (e) of sec. 105A will not therefore be raised if a tenure-holder at variable rent be a tenant of the same class as a tenure-holder at fixed rent. The question which here emerges for consideration is: Is a tenure-holder at variable rent a tenant of the same class as a tenure-holder at fixed rent? Tenure-holders including under-tenure-holders, raiyats, holding at fixed rates, occupancy raiyats, non-occupancy raiyats and under-raiyats are the only classes of tenants for the purpose of the Bengal Tenancy Act (*vide* sec. 4 of the Bengal Tenancy Act). Tenure-holders at variable rent do not,

therefore, figure in the Act as belonging to a different class from tenure-holders at fixed rent. The fact of occupancy raiyats belonging to a different class from raiyats holding at fixed rates is apt to give rise to an impression that tenure-holders at variable rent also belong to a different class from tenure-holders at fixed rent. That it is not so and that no inference by analogy can be drawn will be clear if we consider the matter a little more closely. The only difference between a tenure-holder at variable rent and a tenure-holder at fixed rent is that the rent of the former is variable while that of the latter is fixed. There is absolutely no other difference between them. Both of them have the same powers of alienation and same rights in respect of use of land. The law with respect to their succession and liability to eviction is also the same. But the difference between an occupancy raiyat and a raiyat holding at fixed rates is not merely that the rent of the former is variable while that of the latter is fixed. A raiyat holding at fixed rates can transfer his interest (*vide* sec. 7 of the Bengal Tenancy Act) whereas, an occupancy raiyat ordinarily cannot (*vide* the F. B. cases of *Dayamoyi v. Anand Mohan*, *Sheikh Azim v. Golak Singh* and *Ambika Charan v. Ram Charan*, 18 C. W. N. 971; s. c. 20 C. L. J. 62; s. c. I. L. R. 42 Cal. 172). A raiyat holding at fixed rates can create permanent under-raiyati leases (*vide* *Harimohan v. Atul Krishna*, 19 C. W. N. 1127; *Amar Chandra Roy v. Prasanna Dassi*, 25 C. W. N. 9), whereas an occupancy raiyat cannot create under-raiyati leases for more than nine years. The interest of a raiyat holding at fixed rates, unless he has also acquired a right of occupancy is not a protected interest and is liable to annulment by a purchaser at a rent sale, whereas the interest of an occupancy raiyat is a protected interest and is not liable to annulment by a purchaser at a rent sale (*vide* sec. 160 of the Bengal Tenancy Act). A raiyat holding at fixed rates has the right to cut and appropriate trees independently of local custom (*vide* *Radhika Nath v. Samir Fakir*, 20 C. W. N. 636), whereas the right of an occupancy raiyat to cut and appropriate trees is dependent upon local custom (*vide* sec. 23 of the Bengal Tenancy Act); and so on. Indeed the incidents of a raiyati holding at fixed rates resemble more those of a tenure than those of an occupancy holding. The fact of occupancy raiyats belonging to different class from raiyats holding at fixed rates does not, therefore, lead to the conclusion that tenure-holders at variable rent also belong to a differ-

ent class from tenure-holders at fixed rent. That, unlike occupancy raiyats and raiyats holding at fixed rates, tenure-holders at variable rent are tenants of the same class as tenure-holders at fixed rent will also appear from the scheme of the Bengal Tenancy Act itself. Chap. II of the Act mentions the different classes of tenants. Chap. III then deals with the first class of tenants, *viz.*, tenure-holders. Chap. IV deals with the second class of tenants, *viz.*, raiyats holding at fixed rates. Chap. V deals with the third class of tenants, *viz.*, occupancy raiyats. Chap. VI deals with the fourth class of tenants, *viz.*, non-occupancy raiyats. Lastly Chap. VII deals with the fifth and last class of tenants, *viz.*, under-raiyats. The Bengal Tenancy Act thus does not deal with tenure-holders at variable rent and at fixed rent separately as it does with occupancy raiyats and raiyats holding at fixed rates. It is therefore clear that tenure-holders at variable rent are tenants of the same class as tenure-holders at fixed rent. Consequently no issue is raised under cl. (e) of sec. 105A of the Bengal Tenancy Act when the landlord alleges that a tenant recorded as a tenure-holder at fixed rent is not in reality one at fixed rent but merely one at variable rent and upon such allegation seeks enhancement of his rent under sec. 105 of the Bengal Tenancy Act. Let us next examine if in these cases an issue is raised under cl. (f) of sec. 105A of the Bengal Tenancy Act. Cl. (f) speaks of "special conditions and incidents of a tenancy," as distinguished from its ordinary conditions and incidents. Issue is not therefore raised under this clause when merely an ordinary incident of a tenancy is wrongly recorded. Variability or fixity of rent can by no stretch of imagination be regarded as a "special condition and incident of a tenancy." It is merely an ordinary incident. Issue is not therefore raised under cl. (f) of sec. 105A of the Bengal Tenancy Act in these cases where merely tenures at variable rent have been wrongly recorded as tenures at fixed rent. The class of cases contemplated by cl. (f) of the section is indicated by the expression "any right of way or other easement attaching to the land" following the expression "special conditions and incidents of the tenancy" in the clause, for by the well-known canons of construction the two expressions must be read *eiusdem generis*.

But is a Revenue Officer acting within the scope of sec. 105 of the Bengal Tenancy Act competent, without taking recourse to sec. 105A of the Act, to enhance the rent of a

tenure-holder at variable rent, wrongly recorded as a tenure-holder at fixed rent? That the Revenue Officer is so competent will be obvious if we for a moment consider the purpose for which the machinery provided for by sec. 105 has been intended. The machinery has been intended for settling fair and equitable rent. The issue "what should be the fair and equitable rent," if put to analysis, resolves itself into the issue "should the existing rent be allowed to continue or should it be enhanced or reduced?" The latter issue again involves the issue "Is the rent liable to variation?" Thus the issue, "Is the rent liable to variation?"—becomes one of the standard issues triable in proceedings under sec. 105. This view is also supported by rule 38, Chap. XVIII, Part VII of the Technical rules and Instructions of the Settlement Department. Now, the controversy that arises when the landlord seeks enhancement of rent from a tenure-holder recorded as one at fixed rent on the allegation that the entry in the record-of-rights is incorrect and that the tenure-holder is in reality merely one at variable rent and he is opposed by the tenure-holder on the allegation that the entry is correct and that he is in reality a tenure-holder at fixed rent is amply covered by the issue "Is the rent of the tenure-holder liable to variation?" It would therefore be meaningless technically to dispute that a Revenue Officer acting within the scope of sec. 105 of the Bengal Tenancy Act is competent, without taking recourse to sec. 105A of that Act, to enhance the rent of a tenure-holder at variable rent wrongly recorded as a tenure-holder at fixed rent.

No additional court-fee under cl. (b) of the above Government notification is therefore legally leviable from landlords of tenure-holders at variable rent wrongly recorded as tenure-holders at fixed rent when they seek enhancement of rent from such tenure-holders by proceedings under sec. 105.

There are numerous other instances of similar wrong extension of the operation of cl. (b) of the above Government Notification and improper levying of additional court-fees. As this is attended with great hardship to litigants, I ask you to allow me the use of your columns to invite the attention of the legal profession as well as of the Settlement Department to this matter.

Yours faithfully,
 PRAFULLA KUMAR DAS,
 Pleader.

MAGURA :
 16th April 1922.

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REPORTS (See Index.)

Land acquisition "awards" and appeals to the High Court and the Privy Council.

The very severe comments which the decision of the Privy Council in *The Rangoon Botatoung Co., Ltd. v. The Collector, Rangoon*, L. R. 39 I. A. 197; s. c. 16 C. W. N. 961, called forth at the time it was first published in India (*vide* 16 C. W. N. cclvii—cclix) appears to be fully justified by the events. In that case a person whose land in Rangoon City had been compulsorily acquired by Government, being dissatisfied with the amount of compensation assessed by the Collector, sought a reference to the Court under sec. 18 of the Land Acquisition Act. The reference was heard by a Bench of two Judges of the Chief Court of Burma sitting on its Original Side who confirmed the Collector's award, whereupon the claimant appealed to the King in Council. Lord Macnaghten who delivered the judgment of the Board upheld the Respondent's plea that no appeal lay on two grounds: (1) that the "award" of compensation (though judicially determined) was not a "decree" from which an appeal lay to the Privy Council; and (2) that the Court on a reference under sec. 18 of Act I of 1894 acted as "arbitrator." The "award," it was consequently held, must be taken as final except in so far as an appeal was provided by statute. The only appeal so provided was by sec. 54 of the Act, which says: "Subject to the provisions of the Code of Civil Procedure applicable to appeals from Original Decrees, an appeal shall lie to the High Court from the award or any part of the award of the Court in any proceedings under the Act." This special and

limited right of appeal, it was said, was exhausted by an appeal to the High Court and was not enough to take the matter up to the King in Council. As to sec. 53 of the Act which provides that "save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act," this, it was stated, applied to an earlier stage of the proceeding and "seemed" to have nothing to do with an appeal from the High Court.

This decision, which we had felt compelled to traverse at almost every point, has now been "considered" by the Judicial Committee itself in *Ram Chandra Rao v. Ram Chandra Rao*, reported at p. 713 of this issue. A question arose in this latter case as to whether a determination by the High Court, upon appeal, in a proceeding under sec. 32 of the Land Acquisition Act, that one of the rival claimants of the compensation money had a limited and not an absolute estate in the land acquired was a "decree" and as such appealable to the Judicial Committee. Now such a dispute between rival claimants has to be heard and determined in the first instance by the Court which hears the reference under sec. 18 of the Act; and the questions of which (in view of the decision of the Privy Council in the *Rangoon Botatoung Company's* case) one would like to find satisfactory answers are, first, whether and if so under what provision of the law the appeal which in that case was taken to the High Court could be so taken; and, secondly, whether and under what provision of the law a further appeal could be taken to the Privy Council.

With regard to the first question, the only provision of law under which the appeal could have been taken to the High Court was sec. 54 of the Act, and unless the determination under sec. 32 of the Act was treated, as in fact it was by Mookerjee and Teunon, JJ., in

Trinayani Dassi v. Krishna Lal De, 17 C. W. N. 635n, as an integral part of the "award," obviously no appeal would lie to the High Court. But once that is conceded, the decision of the Judicial Committee in the Rangoon case comes in and shuts out an appeal to the Privy Council. But it struck Lord Buckmaster, who delivered judgment in *Ram Chandra Rao's* case, as "strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal which would be wholly taken away when the piece of land was represented by a sum of money paid into Court." Therefore, it had to be held, and their Lordships have so ruled in *Ram Chandra Rao's* case, that a determination of a dispute between interested people as to the extent of their interest in the compensation awarded is no part of the award, thus overruling the decision aforesaid of the High Court reported in 17 C. W. N. 935n and the earlier ruling of that Court in *Balaram v. Sham Sunder*, I. L. R. 23 Cal. 526. But if this reasoning suffices to save the appeal to the Privy Council, does it not on the other hand lead to the still greater anomaly of depriving the parties of their right to appeal to the High Court, seeing that "an appeal does not exist in the nature of things" and "must be given by express enactment" (*vide* observation of Bramwell, J., in 3 Q. B. D. 1, quoted with approval in the judgment of the Judicial Committee in the Rangoon case) and sec. 54 of the Act allows an appeal only from the "award"?

The decision in *Ram Chandra Rao's* case goes a long way towards retracing the false steps previously made in the Rangoon case, and in so far as it does so we cannot but commend it. It throws overboard in the first place, the extra-ordinary assumption that the Court in reviewing the Collector's assessment of compensation acts as "arbitrator." Secondly, it limits the definition of "award" in sec. 54 to so much of the Court's determination as states "the area of the land, the compensation to be allowed and the apportionment among persons . . . whose interests are not in dispute." But as is inseparable from decisions which seek simply to get round, instead of squarely facing and disowning a previous error, it has created other difficulties in the very process, one of which, as we have shown, is how to take an appeal to the High Court upon a question of disputed apportion-

ment of the compensation awarded, otherwise than under sec. 54. One has either to say there is no appeal, and the disappointed claimant must go up direct to the Privy Council or not appeal at all, or ring changes upon the language of sec. 53, which the Judicial Committee appears, in the Rangoon case, to have already declared as being concerned only with the procedure in the Court hearing a reference under sec. 18 and as having nothing to do with the question of appeal. The exact language employed is that the section "applies to an earlier stage and seems to have nothing to do with an appeal from the High Court." The addition of the words italicised perhaps leaves room for the argument that sec. 53 made the appeal sections of the Civil Procedure Code also applicable to all determinations of the Court upon a reference under sec. 18 on the question of apportionment or under sec. 32 of the Act, at least up to the High Court. We hope it does, though just why it should stop there is more than we can guess.

It has to be noted, in conclusion, that the main decision in the Rangoon case has already been nullified by the action of the Indian Legislature which now by Act XIX of 1922 provides, by an amendment of sec. 26, that every award made by the Land Acquisition Court shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of sec. 2, cl. (2), and sec. 2, cl. (9), respectively, of the Code of Civil Procedure, 1908; and, by an amendment of sec. 54 of the Act, that "subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court and from any decree of the High Court passed in such appeal as aforesaid an appeal shall lie to His Majesty in Council subject to the provisions contained in sec. 110 of the Code of Civil Procedure, 1908, and in Or. XLV, thereof."

PRODUCTION OF DOCUMENT IN COURT.

(By MR. SURENDRA NATH ROY, MUNSIF, NETROKONA.)

The Civil Procedure Code provides for the

method in which civil suits are to be tried, and cases are tried on oral and documentary evidence. Now the question arises what documents, to be taken in as evidence, are to be produced in Court. The character of the documents suggest two main divisions; viz., those which are home made, such as account books, collection papers and those that are produced from public custody or are registered under the Registration Act. The former class of documents may be tampered with or manufactured; while there is less chance of fraud being perpetrated in relation to the latter class of documents. Again the later production of documents involves inconvenience to the other party, who is so long kept in the dark as to the documents on which his adversary relies. but even this inconvenience operates in lesser degree in relation to the latter than to the former class.

When the document is one, on which the Plaintiff sues, he must produce it in Court when the plaint is presented, and shall deliver the document to be filed with the plaint. But if the document be in the nature of an account book which is for daily use of the party, the Plaintiff is to produce a copy of the same along with the original document, and the copy is to be compared with the original and certified to that effect by the Chief Ministerial Officer of the Court. The copy with the certificate is to be presented in the record of the case along with the plaint and the original is to be returned to the Plaintiff, who is required to produce the same at the trial of the case. But with respect to documents on which the Plaintiff relies as evidence in support of his claim, whether such documents be in his possession or power or not, he is required to enter such documents in a list to be added or annexed to the plaint (1). The penalty for not observing these rules is that these documents shall not be received in evidence on his behalf at the hearing of the suit without the leave of the Court (2). The case of *Gopal Chandra v. Vishnu Krishna* (3), serves as a judicial exposition of this rule and it further holds that the plaint is not to be rejected on that ground. The object of the rule is to provide against false documents being set up after the institution of a suit. In those cases, therefore, where there is no doubt of the exist-

ence of a document at the date of the suit, the Court should admit the document in evidence even though the document was not produced with the plaint or entered in the list of documents annexed to the plaint (4). It is to be observed, however, that in the mofussil courts the rule as to the production of list of documents relied upon by the Plaintiff as evidence in support of his claim, is followed more in the breach than in the observance.

Then the question arises whether documents produced by any of the parties at any stage of the suit can be accepted as evidence in the case. By Or. XIII, r. 1, C. P. C., it is provided that all documents are to be produced at the first hearing of the suit, save and except documents produced for cross-examination. Then the solution of the question hinges upon the interpretation of the words "first hearing of the suit." In cases where issues are framed, the summons on the Defendant is for settlement of issues, and in other cases, summonses are issued for the final disposal of the suit. In the former class of suits the date fixed after the service of summons cannot be said to be the first hearing of the suit, while in the latter class of cases the date fixed after the service of summons is the first hearing day. But that day cannot be said to be the day of first hearing of the suit with respect to both the parties. The Defendant's contention comes in after he files his written statement and the first hearing of the suit in contentious cases must be on the day fixed for hearing after the written statement is filed. In mofussil courts, in several districts, it is found that following the practice under the old Code, on the day the written statement is filed a certain number of days are allowed in the order-sheet for the parties to produce their documents. This order seems quite unnecessary and not required by law. The parties can produce their documents on the first hearing day, and this rule has been made as a safeguard against fraud as also to give facility to the other side to know the documents and to take up the procedure for inspecting them. But in the case of *Tarak Mandal v. Rai Chandra Mandal* (5), it has been held that the first hearing day means the day on which the trial commences. With due deference to the learned Judge who tried the case, it seems that the interpretation given is not correct. The Bom-

(1) Or. VII, r. 14, C. P. C.

(2) Or. VII, r. 18, C. P. C.

(3) I. L. R. 22 Bom. 971.

(4) *Devidas v. Pirjuda*, 8 Bom. 377.

(5) 50 Ind. Cas. 293 (1911).

bay High Court in the case of *Ranchhod v. The Secretary of State for India* (6) has held that this rule has been enacted to prevent fraud by the late production of suspicious documents. The Calcutta High Court ruled to the same effect in the case of *Telewar Singh v. Bhagwan Das* (7). It thus comes to pass that the first hearing day must be the day fixed for hearing the suit after the written statement is filed and in cases where issues are framed, after the framing of the issues. To interpret it otherwise will be to go against the policy of the law, and the documents which are classed as home made documents must be filed on or before that date, unless the Court, for good reason to be recorded in writing accepts the same at a later stage. This stringent rule, of course, does not apply to public documents, documents produced from public custody and registered documents, whose existence on the date of the suit is beyond suspicion.

Notes of Cases. CALCUTTA HIGH COURT.

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(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CHOTZNER, JJ. REFERENCE UNDER THE LEGAL PRACTITIONERS ACT No. 3 of 1922. IN THE MATTER OF BABU BIMALANANDA DAS-GUPTA, Pleader. The 1st June 1922.

Legal Practitioners Act, sec. 14—Pleader suspending practice and taking service as teacher in a National College.

On January 30th 1922, the District Judge of Dacca was informed by an anonymous letter that Babu Bimalananda Das-Gupta, a pleader practising in the Court of the said District Judge, had accepted a salaried appointment in the Dacca National College and had enrolled himself as a volunteer in the Dacca Congress Committee's Office. The Judge thereupon requested the District Magistrate to enquire if the facts alleged against the Defendant were true. The Magistrate not only confirmed the information, but further informed the Judge that the pleader had been present at a meeting held in Dacca on the 30th January last in con-

travention of an order made by him under sec. 144, Cr. P. C., and had been arrested and tried for an offence under sec. 188, I. P. C., that he had been acquitted of the charge, but that in the course of the trial he had said to the trying Magistrate that he bore no allegiance to the British, and had no regard for the post held by the Magistrate. The Judge, therefore, took proceedings against the pleader under sec. 14, I. P. Act on the following charges:—

(1) That it was reported that the said pleader had suspended practice in July 1921 and engaged himself as a professor of Economics in the Dacca National College without the permission of the High Court;

(2) that it was reported that the said pleader was present in, and took part in, a meeting held at Dacca in contravention of the order of the District Magistrate; and

(3) that the said pleader when tried for an offence under the I. P. Code had stated to the Court that he owed no allegiance to the British, etc. The copy of the charges was served on the pleader and notice was issued to him that the charges would be taken into consideration on March 7th. He neither appeared nor shewed cause on that day, but he wrote a letter in which, if he did not admit, he did not deny the charges. He said that in the course of the trial, he did not say that he owed no allegiance to the British, but said that he owed no allegiance to the British Courts. The Judge took evidence and found the charges to be true except that the said pleader as a matter of fact stated that he owed no allegiance to the British Courts, that he had no faith in British Justice and that he had no regard for the post held by the Magistrate. On these findings, the Judge referred the matter to the High Court with the recommendation that the pleader be dismissed and directed that pending the orders of the High Court he be suspended from practice.

Their Lordships accepted the recommendation and directed that the certificate granted to the pleader be cancelled, but that, if in future his faith in British Justice returns and he applies for a certificate, the matter should be considered.

The Senior Government Pleader and the Junior Government Pleader appeared for the Crown.

No one appeared for the Pleader.

S. C. C.

Reference accepted.

(6) I. L. R. 22 Bom. 173.

(7) 12 C. W. N. 312.

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Super-tax upon dividend payable to non-resident share-holder.

If the decision of the majority in the Reference under sec. 51 (1) of the Income Tax reported at p. 745 of this issue (*The Imperial Tobacco Company of India, Ltd. v. Secretary of State for India in Council*) is correct, then it discloses a serious defect of drafting in the provisions of secs. 31 to 34 of the Income Tax Act, 1918. It is perfectly clear upon the language of these sections that it was the intention of the Legislature to make income or dividend earned by non-resident persons in India chargeable with tax under the Act, and these sections were obviously framed with the object of providing the machinery by which the tax was to be assessed and realised. The persons receiving the income themselves being non-resident, the only practicable course was to hold some person in India who would be responsible for receiving for, or transmitting the dividends to, them responsible also for the tax. The idea was, in the first place, to provide, where there was an agent in India specifically appointed by such a non-resident person to receive income accruing in India, that such agent himself should be made vicariously subject to the provisions of the Act so as thereby to compel him to deduct the income or super-tax imposed upon such income from moneys he may be under an obligation to remit to his principal. But if this were all, then non-resident persons who did not specifically appoint agents in India to receive incomes on their behalf would escape, and we agree with B. B. Ghose, J., that sec. 34 of the

Act was enacted to provide for such cases, and that the object of this section was to enable the Collector, after notice, to proceed *inter alia* against any person having business dealings with the non-resident and holding moneys payable to him, as if he were his agent although not specifically appointed to receive the same for him as such. We also agree with him that it was never the intention of the legislature to exempt dividends remitted by Companies doing business in India direct to non-resident shareholders from the tax and to leave the liability to taxation of income or dividend payable to non-resident persons to depend upon the accident of their having appointed an agent in India to receive such income or dividend for them. If, however, that be the result of the provisions of the Act as drafted, the remedy, it is clear, is in the hands of the Legislature. The amendment of the sections should be forthwith undertaken so as to prevent the object of the Act being defeated owing to bad drafting.

Retraction of libel—A suggested change in the law.

A writer in a recent issue of the *Harvard Law Review* (Vol. XXXV, pp. 867-870) suggests that "refusal to make a reasonable retraction" of a defamatory statement should destroy the immunity of a conditional privilege set up in defence. It is pointed out that the German law permits a Plaintiff who cannot show economic injury to secure a retraction and the Dutch law allows generally the recovery of a similar "honourable amend." In English law, however, it has primarily evidential effect. Thus the Defendant may prove a retraction to establish absence of malice; and refusal to retract may be relied on by Plaintiff as evidence of malice, malice destroying the privilege when the objected statement is proved to be false. Somewhat illogically, English law permits retraction of the libel or refusal to retract to be proved in mitigation or aggravation of damage, as the case may be.

The point of the writer, however, is that when a defamatory statement made *bonâ fide* on a privileged occasion is by the Plaintiff demonstrated to the Defendant to be false, the Defendant should be ready forthwith to publish a retraction. If he does not do so, he should be mulcted in damages even if he should succeed in making out that he believed the statement to be true when he originally made it. The suggested change in the law is not only reasonable, it will simplify the law and save Judges dispensing English Common Law whether in America, England or India from resorting to the highly circuitous and often disingenuous reasoning which they have to employ to do what justice demands in such cases. This of course does not mean that a retraction of a libel willingly made will, if proved, be a complete defence, in every case. This, if allowed, will encourage libellous publications in abuse of the qualified privilege now allowed by the law.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The following is the record of business in the Judicial Committee of the Privy Council during the past week :—

On May 4th was heard *Rai Radha Krishna v. Bisheshar Sahay*, an appeal from Patna. The hearing was concluded and judgment of the Board was reserved. The main question for determination on this appeal related to the validity of an auction sale of the property in dispute. *Messrs. DeGruyther, K. C., J. M. Parikh* and *Abdul Majid* appeared for the Appellant and *Mr. B. Dubé* for the Respondent.

Subbaraya Pillai v. Rajah Kumara Venkata Perumal, an appeal from Madras, was heard on May 4th and 5th and judgment was reserved. This was a claim for possession of certain villages which had been sold in execution of a decree obtained against the Plaintiff. The latter in his plaint contended that the purchaser was his trustee inasmuch as the purchase money had been supplied by the Plaintiff and he further claimed to be entitled to a reconveyance under an agreement. On the present appeal the construction of the agreement was in issue and also a question of limitation. *Messrs. DeGruyther, K. C. and Dubé* appeared for the Appellants. *Mr. J. M. Parikh* for the Respondents.

Damodar Narayan Choudhury v. Miller, an appeal from Patna, was heard on May 8th and judgment was reserved. The suit was instituted by the Appellants as Plaintiffs to recover possession of certain property on the ground that the Defendants who allege themselves to be transferees of occupancy rights are merely trespassers. *Messrs. DeGruyther, K. C., and Sen* represented the Appellants and *Messrs. Dunne, K. C. and Kyffin*, the Respondents.

Ram Sumran Prasad v. Mt. Shyam Kumari, an appeal from Patna, was heard on the 8th and 9th May. The hearing was concluded and judgment reserved. This appeal raised a question of the powers of a Hindu widow to deal with the estate of her husband of which she is in possession. *Messrs. DeGruyther* and *Kenworthy Brown* represented the Appellants who are the reversionary heirs. *Mr. Abdul Majid* represented the widow and *Messrs. Dunne, K. C. and H. N. Sen*, others of the Respondents.

Jai Barham v. Kedar Nath Marwari, an appeal from Patna, was heard on May 9th and 11th. The hearing was concluded and judgment reserved. The present Appellants were the successful Appellants in an appeal reported in L. R. 41 I. A. 38, where an auction sale of certain landed property was set aside. The present proceedings were commenced by an application under sec. 144 of the Civil Procedure Code for restitution of mesne profits. The Subordinate Judge passed a decree for restitution but that decree was reversed by the High Court. (*Roe and Jwala Prasad, JJ.*). *Messrs. Dunne, K. C. and Kenworthy Brown* represented the Appellants and *Messrs. DeGruyther, K. C. and Hyam* for the Respondents.

11-5-22.

The Board, having concluded their business on the 25th instant, have risen for the Whitsun Vacation and will not sit again until the 13th June.

On May 12th the following pronouncement with regard to the delivery of judgments was made by Lord Buckmaster :—

"For the future it will not be a matter of course to read in full the reasons which support the advice that the Board tenders to His Majesty. In any case where any member of the Board desires that the reasons should be read, they will,

of course, be read; and if there should be reasons known to counsel why, in their opinion, it would be desirable that the judgment should be read in full, the Board will give the most favourable consideration to any application by counsel that that should be done. After the Board has announced what is the advice that they propose to offer, the printed reasons will be handed out to the parties on each side, and to the press. If, as occasionally but not frequently, occurs, counsel desire to ask questions upon the reasons, it will be open to them to do so at the mid-day adjournment, or at any other convenient time. Their Lordships, in making this change of procedure, have been influenced by considering the time that is necessarily involved in the reading of judgments which are often and necessarily long; during the last term alone very nearly a week of judicial time was occupied in that procedure. Their Lordships think that it will tend to the more expeditious despatch of business, and improve the procedure of this Board, if the rule now adumbrated be adopted."

It is understood that the above change of procedure is not intended to cause any alteration in the practice whereby counsel attend to hear judgment delivered.

It is understood that Counsel will be present as usual to hear judgment and copies of the printed judgments will be handed to them to enable them to make any submissions to the Board that they may deem necessary whether in regard to costs or otherwise.

31-5-22.

G. D. M.

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

A learned Pleader correspondent of yours, in discussing whether a decree-holder is entitled to a notice under sub-r. (2) of r. (1) of Or. 21, when a payment under an instalment decree is made into Court, concludes at page lxviii (68) of the present volume, by saying that the practice of giving such notice may safely be dispensed with. But such a conclusion is hardly warranted by true interpretation of law and the process of reasoning he employs is not, it is apprehended, altogether free from errors. For cls. (a) and (b) of sub-r. (1) of r. 1 of Or. 21, indicate the ordinary modes of payment under all kinds of decrees (an instalment decree not being excepted), other than those coming under the special provision of cl. (c). The judgment-debtor may avail himself of either of these modes and both are equally effective. He may make the payment into Court or out of Court to the decree-holder

in order to secure a valid discharge of his judgment-debt, and one is the alternative of the other. But as prefaced by the word "otherwise," cl. (c) seems to exclude the former two clauses and must be taken to provide for a mode of payment contemplated in neither of them. To be more clear, this last clause appears to have been intended to meet the case of a decree which contains a special direction compelling payment by an altogether new mode. In such a case no valid discharge can be obtained unless and until the special direction is strictly complied with. Here payment neither into Court nor to the decree-holder will absolve the judgment-debtor from liability.

Such being the easy and evident interpretation of the provisions of sub-r. (1) of r. 1, it is for your readers to decide how the case of an instalment decree can be made to fall outside the scope of cls. (a) and (b) and to come under the purview of cl. (c). As regards modes of payment in the sense just pointed out, there is very little appreciable distinction between an instalment decree and one that is executable at once. An instalment decree is as much satisfied as an ordinary decree when payment is made into Court or to the decree-holder out of Court. Such a decree does not direct that payment should be made "otherwise," i.e., in a mode different from those indicated in cls. (a) and (b) so as to oust their application. It simply directs the gradual payment of decretal amount in order to avoid hardship likely to arise from its immediate enforcement and is generally silent as to *where* and to *whom* the payment should be made so that it may attract the application of cl. (c). Besides, it is as much the duty of a Court to execute its instalment decrees as those that are executable at once. The qualifying clause coming after "Court" in cl. (a) seems to have been employed to exclude any other Court whose duty it never would be to execute such decrees even when the instalments are over-due. Ordinarily therefore there is nothing in an instalment decree that can differentiate it from an ordinary one and thus justify the application of cl. (c). It is not, therefore, intelligible how in such a case the practice of giving notice can legally be dispensed with. Sub-r. (2) is new and appears to have been added not only to stop the running of interest payable under a decree but also to inform the decree-holder, in due time, that the money deposited is available for him, that he is at liberty to draw the amount and

that he need not take any further legal steps for its realisation by way of execution. Now where there is no service of notice after deposit and the decree-holder applies for execution, who will be responsible for costs incurred for such infructuous steps taken? It cannot reasonably be maintained that the decree-holder should always be on his look-out to see that payments under his decree have been duly made and regulate his conduct accordingly.

As for the attempt of your correspondent to justify the abolition of the practice of giving notice on the score of hardship to indigent debtors, it would be more advisable and prudent to avail themselves of the provisions of cl. (b) and approach the decree-holder who will, in most cases, be very glad to accept the money to avoid unnecessary expenses, legal and illegal, of drawing it out from the Court. And it would be quite illegal and inequitable to dispense with this practice and thus to deprive the decree-holder of a precious legal right on this consideration alone, heedless of future complications and troubles likely to arise out of such invalid deposits.

I remain, Sir, yours truly,

BINOD BEHARI CHATTERJEE,

Pleader, Noakhali.

Notes of Cases CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CHOTNER, JJ. REFERENCE UNDER LEGAL PRACTITIONERS ACT No. I OF 1922. IN THE MATTER OF BABU APARNA CHARAN DE, Pleader. The 1st June 1922.

Legal Practitioners Act, sec. 14—Pleader did not attend Court owing to mental uneasiness for the arrest of two fellow practitioners—High Court did not accept the reference by the District Judge.

This was a reference by the District Judge of Chittagong under sec. 14 of the Letters Patent Act against pleader Babu Aparna Charan De practising in Patiya Munsif's Court. The said pleader did not attend Court on the 4th July 1921 when money suit No. 433 of 1920 in the fourth Court of the Munsif at Patiya which had been heard in part on a pre-

vious date was called on for hearing in spite of a requisition on the part of his client and without any explanation. For this reason half-an-hour of the Court's time was wasted and the client had to conduct his own case, to the prejudice of his interests, as he was unable to engage any other pleader. The explanation of the said pleader was that owing to mental uneasiness he was not in a mood to do any professional work and he did not attend Court on that day, that he had asked the client to engage another pleader, that his fees had not been paid, and that the client was not prejudiced owing to his absence. The Judge found that the mental uneasiness was due to the arrest of two fellow practitioners, viz., Mr. J. M. Sen-Gupta and Babu Mahin Chandra Das. The Judge held agreed with the Munsif who had held an inquiry that the pleader was guilty of gross neglect of duty, which comes within the scope of professional misconduct as contemplated by the Legal Practitioners Act. The Judge, however, did not think it necessary to suspend the pleader from practice pending the High Court order, since the misconduct complained of might from some points of view not be considered serious as it fortunately did not have serious consequences, and as the Munsif had stated in his report that the pleader was a leader of the local Bar and had been noted for the honesty of his dealings with his clients.

Their Lordships discharged the reference in the special circumstances of the case.

The Senior Government Pleader and the Junior Government Pleader appeared for the Crown.

Babu Norendra Kumar Das who appeared for the Pleader was not called on to reply.

S. C. C.

Reference discharged.

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High Courts' Disciplinary Jurisdiction over Pleaders for conduct not charged as unprofessional.

We have received by the last mail a full report of the proceedings before the Judicial Committee upon the application by *Shankar Ganesh Dehir* for leave to appeal against an order of the Court of the Judicial Commissioners of the Central Provinces and Berar suspending him from practising as a pleader. The Petitioner, it appears, had delivered certain speeches strongly condemning a certain tax, called the Mahar Baluta, and advocating its non-payment by the agriculturists of Berar to whom, these speeches were addressed. This led to the institution of proceedings under sec. 107 of the Criminal Procedure Code against him in consequence of which he was bound over to keep the peace for a term. After this order was made by the Criminal Court, the Court of the Judicial Commissioner called upon him to show cause why he should not be struck off from the Rolls and in the result the Court found that the conduct of the Petitioner for which he was bound over by the Criminal Court comes within the purview of sec. 13, cl. (f) of the Legal Practitioners Act and passed order suspending him from practising as a Pleader.

Counsel for the Petitioner wanted to argue that the order under sec. 107 of the Criminal Procedure Code itself was illegally made and was in the circumstances an abuse of the process of the Court and that even if it be assumed to have been correctly made the conduct with which he was charged did not involve any moral turpitude so as to attract the disciplinary jurisdiction of

the Court under sec. 13 of the Legal Practitioners Act. Their Lordships made it clear from the very outset that they could not review the order under sec. 107, Criminal Procedure Code as it was a criminal order, and that as regards the order suspending the Petitioner from practice, once it was established that the conduct for which the Pleader was bound down was one which the Court was entitled to consider in the exercise of its disciplinary jurisdiction, their Lordships would not go into the question whether the order striking the Pleader from the Rolls was one which should have been made in the circumstances, as that was a matter entirely in the discretion of the Court of the Judicial Commissioner. The only question therefore which was argued before the Board was whether the Petitioner's having incited agriculturists in his District not to pay an unpopular tax was a reasonable cause for taking disciplinary action against him under the Act.

The question whether the words "any other reasonable cause" in cl. (f) of sec. 13 of the Legal Practitioners Act is to be interpreted *eiusdem generis* with the matters mentioned in cls. (a) to (c) of the section was raised, but Counsel for Petitioner conceded that these words could not be confined absolutely to professional misconduct. But he contended that conduct which cannot be condemned as unprofessional must in order to attract the disciplinary jurisdiction of the Court involve some moral turpitude. He argued that making strong speeches against the payment of a tax and even advocating its nonpayment does not show moral delinquency or defect of character. There was some fencing between Counsel and some members of the Board on the question whether inciting people to acts which might lead to a disturbance of public tranquility did not necessarily involve moral delinquency, and a piquant interest was lent to this portion of the argument by the fact that Lord Carson was a member of the Board. But it appears to have been ultimately agreed that the Petitioner had

not been charged with anything which merited moral disapprobation. After this it was inevitable that the idea that the Pleader was an officer of the Court and was under a special obligation as such to assist the administration of the law would be put forward in support of the Court's jurisdiction to take disciplinary action for conduct not disclosing a defect of character.

LORD SUMNER.—This man is a pleader and an officer of the Court. He assists in the administration of the law. That being so he invites and incites a very large number of people not to assist in the administration of the law but to defy it. Is that proper conduct for a man who is one of the officers of the Court?

Counsel submitted that a member of the Legal Profession is as well entitled to say that a law is an unjust law as anybody else and merely to say 'do not pay this or that tax' is not defying the law.

LORD BUCKMASTER.—That may be a perfectly simple thing for a man to do who is under no obligation to the Court, but when a man is an officer of the Court he is in the administration of the law.

And again :—

LORD BUCKMASTER.—The point here is not whether this Board would have thought that the offence was one which warranted suspension, they express no opinion whatever upon that because that is absolutely for the Court over there. The question is whether a man who is an officer of the Court and who goes beyond political agitation and adds to it a direct incitement to break the law has not been guilty of some offence which is a reasonable cause why his conduct should be considered.

Mr. Dube.—I submit it is too much to say that a professional man should be disbarred because he has been convicted of a criminal offence. It is only those offences which amount to defects of character.

LORD CARSON.—We are only saying it is a matter for the Court to consider.

Mr. Dube.—Your Lordship is familiar with strong speeches on political and religious questions.

LORD CARSON.—I have made many myself but that does not show that the Court has not a discretion if a man is brought before them.

Mr. Kenworthy Brown in opposing the application on behalf of the Secretary of State for India in Council relied on the Full Bench decision in 29 Cal. 890 which laid down that by cl. (f) of sec. 13, the Court had jurisdiction to consider conduct not chargeable as professional misconduct. The Board apparently accepted that decision as correct.

LORD BUCKMASTER.—Directly that is not confined to professional misconduct, then it becomes a matter on each occasion for the Court to consider that.

Mr. Dube. Not necessarily because if there is an act which does not involve any moral turpitude at all it does not come within that clause. I am asking your Lordships for special leave to consider the broad proposition that in the case of a legal practitioner if it does not involve moral delinquency it cannot come under sec. 13. I do not contend for the proposition that a Pleader of the Court can be suspended only on grounds of professional misconduct.

LORD SUMNER.—You have been quite lucid. You say professional misconduct or a criminal offence involving moral turpitude. Then your proposition is, that being the foundation of the jurisdiction where is the moral turpitude here?

Mr. Dube.—Yes.

LORD SUMNER.—You say there is no evidence of moral turpitude?

Mr. Dube.—None at all. The man is regarded by a vast number of his fellow countrymen as holding the view which was right and proper, though the Executive Government may possibly take a different view, but I submit it does not certainly involve moral turpitude.

The order of the Board which was passed at the conclusion of the arguments (on 23rd May 1922) dismissing the application for leave was delivered by Lord Buckmaster :—

LORD BUCKMASTER.—Their Lordships have carefully considered the arguments that have been advanced in support of this Petition for leave to appeal and in expressing the opinion which they hold that in accordance with the practice of this Board the Petition ought not to be granted, they expressly desire to have it understood that that opinion carries with it no manner either of approval or of reflection upon the Order that has been made against which leave to appeal is sought. That Order was entirely one for the discretion of the Court that made it, and the only matter that it has been necessary for them to consider is whether a *prima facie* case has been made out that establishes that there was no foundation upon which the jurisdiction could properly repose. It appears that the Petitioner was bound over by the Sub-divisional Magistrate at Basim to keep the peace for a period of one year, and that Order was confirmed by the District Magistrate and by the High Court. The offence for which he was so bound over was connected with an agitation that he was instituting against the Baluta tax and it appears that in that agitation he did not confine himself to protesting however vehemently against the tax or against its injustice, but that he urged an organised resistance to the payment of the tax, and attempted to establish a system which would have impeded and might have defeated its recovery. These circumstances led to the conviction to which reference has been made and caused his conduct as a Pleader to be brought before the Court in their jurisdiction under the Legal Practitioners Act of 1879. Their Lordships are of opinion that the circumstances to which they have referred were sufficient to found jurisdiction under sec. 13, sub-sec. (f) of that Statute, and for these reasons they think that no leave to appeal ought to be granted in this case, and they will humbly advise His Majesty accordingly.

A fuller report of the judgment will be published in due course.

DOES POSSESSION FOLLOW TITLE?

(By MR. KHETRA NATH SINGH, MUNSIF,
RANCHI.)

The recent Full Bench ruling of the Patna High Court as reported in 6 P. L. J. 478 has brought into prominence the much complicated question of presumption arising in a suit for ejectment from Plaintiff's title and prior possession. Much confusion of thought arises from the fact that not only is the distinction between presumption of fact and presumption of law not always kept in view, but the cardinal difference

between Art. 142 and Art. 144 of the Limitation Act is also overlooked. Again, there is no legal conception more open to a variety of meanings than the word "possession." Mr. Rustonji has drawn attention to this at page 574 of his Limitation Act (3rd Ed.). By possession, according to him, is meant possession of that character of which the property is capable. This is fully borne out by their Lordships of the Privy Council in 26 C. W. N. 666 at page 670 of the Report. Lord Shaw who delivered the judgment of their Lordships observes:—

"Upon this subject of possession much importance attaches to the nature of the property itself. . . . Their Lordships sympathise with the difficulties which confronted the Courts below, as to the possession of the property under appeal and they agree with what is apparently the view of both Courts that such possession has to be interpreted according to the fairest view of what the property itself was capable of in the way of possession and what, upon a broad view would be considered an adequate assertion of title by sufficient occupation."

The difference between presumption of fact and presumption of law has been pointed out by the Hon'ble Sir Dawson-Miller, C. J. at p. 485 of the above-mentioned Patna Full Bench ruling. His Lordship observed:—

"The case of *Runjeet Ram v. Goburdhun*, 20 W. R. 25 (P. C.) has sometimes been taken to support the proposition that where there is no evidence of possession on either side or where the evidence of each party is unworthy of credit, possession may be presumed to accompany title." His Lordship then goes on to state:—"In my opinion that decision lends no support to such a proposition. It should be observed that (in the 20 W. R. ruling) the presumption is called in aid for the purpose of adding weight to evidence in itself credible but so shaken by adversary's testimony as to create doubt or difficulty in arriving at the truth. Where there is no evidence or only such evidence as is found to be unworthy of credit the presumption in itself does not carry the weight of proof. The presumption is one of fact and merely gives rise to a probability and can have no more weight than any other probability arising from the circumstances of the case. Unlike a presumption of law, it does not join upon the Court the necessity of drawing an inference, either conclusive or rebuttable of the existence of a fact."

The Hon'ble Mr. Justice Walsh has pointedly drawn attention to the distinction between the two above-mentioned Articles of the Limitation

Act in I. L. R. 41 All 669. His Lordship states that, while under Art. 142, the burden of proof lies on the Plaintiff to prove not only his title but possession within 12 years of the suit, the burden under Art. 144 lies on his opponent in which case the Plaintiff need prove his title in the first instance, leaving the Defendant to prove how the Plaintiff lost his own title. Such being the wide difference between these two Articles, it is clear that any observation made in a case arising out of one Article, e.g., Art. 142, must be limited to that Article. Thus observations made in 6 P. L. J. 478 F. B. as embodied in the head-note of that ruling (which is, by the way, not happily worded) cannot be made applicable to any case other than under Art. 142 to which it expressly refers.

The rule of *onus probandi* in cases arising out of Art. 144 has been repeatedly laid down by their Lordships of the Privy Council in a series of rulings of which I need mention three only—viz., (1) 4 C. W. N. 597 P. C. (2) 39 Mad. 617: s. c. 20 C. W. N. 1311 and (3) 26 C. W. N. 666 P. C., mentioned above. It is worthy of note that the head-note of 4 C. W. N. has been accurately framed and though their Lordships of the Privy Council did not expressly limit the ruling to Art. 144, the head-note in so doing correctly represents the actual decision of their Lordships. 39 Mad. 617 has, however, been expressly limited to that Article as will presently appear. In the 26 C. W. N. ruling, full arguments of Counsel appearing on both sides clearly show that Art. 144 was applied. The following observations of their Lordships at pp. 631, 632 of 39 Madras, which have been quoted in more rulings than one will prove instructive in this connection.

"Nothing is better settled than that the *onus* of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct, it would be open to the possessor for a year or a day to say, 'I am here, be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions' Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory including not only islands arising from the sea but great spaces of jungle lands, necessarily not under the supervision of Government officers would disappear, because

there would be no evidence available to establish the state of possession for 60 years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession. * * * To such a situation their Lordships think that Art. 144 applies. * * * In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the Plaintiff."

Following the above ruling, it is ruled in 45 Bom. 1020 :—

"An owner of property does not lose his right to property merely because he happens not to be in possession of it for 12 years. Under sec 28 of the Limitation Act, his right is only extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property, that period cannot be determined unless it has commenced to run and until the owner is aware that some one else is in possession and is holding adversely to him." It is superfluous to say that the above observations relate to cases falling under Art. 144.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The following is the record of business transacted during the past week :—

22nd May: *Chholey Lal v. Collector of Moradabad*, an appeal from Allahabad, which raised a question as to whether a mortgage had or had not been duly registered. *Messrs. DeGruyther, K. C.* and *Dubé* for Appellants, *Messrs. Dunne, K. C.* and *Kenworthy Brown* for Respondents. Judgment was reserved.

May 22nd and 23rd: *Narain Das v. Abinash Chunder* (Allahabad), which raised the question whether a lease granted by the manager of a joint family was valid or not. *Messrs. DeGruyther, K. C.* and *Wallach* for Appellant, *Sir George Lowndes, K. C.*, and *Mr. Kenworthy Brown* for Respondents. The Board dismissed the appeal without calling on the Respondents.

May 23rd: *In re Shanker Ganesh Dabir* (Central Provinces): This was a petition for special leave to appeal from an order of

the High Court suspending a pleader under sec. 13 of the Legal Practitioners Act. The Board, composed of LORDS BUCKMASTER, ATKINSON, SUMNER, CARSON and SIR JOHN EDGE, refused leave. *Mr. Dubé* for Petitioner, *Mr. Kenworthy Brown* for Opposite Party.

May 25th: Judgment was given in the following appeals :—*Dinbai v. Nusserwanji* (Sind). Appeal dismissed. *Damodar N. Chaudhury v. Miller* (Patna). Appeal allowed. *Radhakrishna v. Bisheshwar Sahay* (Patna). Appeal dismissed.

Port Press Co. v. Municipal Corporation of Bombay was heard on the same day (May 25th). The question raised here was as to whether the parties were entitled to come to an agreement after proceedings had been taken for the compulsory acquisition of land by the Municipality. *Messrs. G. J. Talbot, K. C.*, and *A. F. Woolten, K. C.* for the Appellants, *Sir George Lowndes, K. C.*, *Messrs. W. H. Upjohn, K. C.*, and *E. B. Raikes* for the Respondents. At the conclusion of the argument LORD BUCKMASTER delivered the judgment of the Board dismissing the appeal.

31-5-22.

Judgment was given by the Board in the following Indian Appeals on May 31st :—

Rash Sumran Prasad v. Shyam Kumari, (from Patna), the appeal was dismissed; *E. Subbaraya Pillai v. Venkata Perumal*, (from Madras), the appeal was allowed; *Medai D. T. Midaliar v. Nainar Teran*, (from Madras), the appeal was dismissed.

The next sittings commence on June 13th.

G. D. M.

5-6-22.

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REPORTS (See Index.)

Jurors and pledge of secrecy.

The grand jury in England are pledged to secrecy as to what transpires between them before they come to a verdict. Every member of such jury has to take an oath in the following terms:—"The King's counsel, my fellows", and my own I will observe and keep secret." But the ordinary jurors, who are empanelled during trial, are not expressly required to swear that they would maintain secrecy as to their own individual views, and those of their other colleagues. But it is a long established practice in the English Law Courts that they should do so. In the recent *Armstrong* case a juror departed from this tacit understanding and communicated to a press-man what view he had taken of the case and also what transpired in the jury box. All the legal journals in England considered this to be very reprehensible. Lord Hewart, in delivering judgment of the Court of Criminal Appeal in the *Armstrong* case stigmatized it as "improper, deplorable and dangerous," and added that "every jurymen ought to observe the obligation of secrecy which is confirmed in and imposed by the oath of the grand jurors." Ordinary jurors who assist at the trials are known as petty jurors although their duties are of a more responsible character. The grand jurors are so called because they are more numerous. Their functions are somewhat in the nature of a preliminary enquiry in a criminal case. Our legal contemporaries take the view that if such practice becomes common in these days of sensational journalism, the legislature will have to intervene. But we have more faith in the moral obligation in such matters than in any hasty legislation to check an evil which is by no means common.

The Criminal Procedure Code Amendment Bill.

The present Code of Criminal Procedure which was passed in 1898 came up for revision when Sir George Lowndes was Law Member to the Government of India. The draft Bill was referred to two different Select Committees in succession and in the last of these Lord Sinha also served. Owing to the War and in view of the Montague-Chelmsford Reforms, the consideration of the Bill was put off till the new constitutional reforms came into operation. Soon after the reformed legislature met at Delhi, the Bill was introduced into the Council of State and a motion was adopted there for the reference of the Bill to a Joint Committee of the Council of State and of the Legislative Assembly. Thereupon the Home Member brought in a motion before the Legislative Assembly that the motion of the Council of State be given effect to by the Legislative Assembly. This motion was opposed by the non-Mahomedan Member for the Rajshahy and Chittagong Division in Bengal, on the ground that the Legislative Assembly should not be called upon to give its assent to a motion of such importance before the members of the Assembly have had an opportunity for the perusal of an important measure of legislation of this kind. A lively debate followed, after which the Government passed the motion to a division. The non-official Members, including Europeans, recognising the reasonableness of the objection, threw out the Government motion by a large majority. The result of this was that the motion that had been adopted by the Council of State for reference of the Bill to a Joint Select Committee of both Houses fell to the ground in consequence.

The Bill was thereafter circulated amongst the Members of the Assembly during the Delhi Session of 1921 and the Bill was re-introduced in the Assembly during the Simla (September) Session of the Legislative Assembly and was referred to a Joint Committee of the Assembly and Council of State, by the Assembly. The Committee met at Simla this year on the 5th

of June. It was anticipated by Government that the consideration of the Bill would take at least two months. But credit is due to all concerned in the Committee that they were able to conclude these deliberations including the drawing up and the consideration of the report in exactly three weeks' time. The Hon'ble Dr. Sapru, the Law Member, presided over the Committee, and the meetings were attended regularly by Sir William Vincent, Sir Binod Mitter, The Hon'ble Mr. Moncrieff Smith, Rao Bahadur Subrahmaniam Iyer, Mr. J. Chaudhuri, The Hon'ble Nawab Sir Zulfiquer Ali Khan, and occasionally by The Hon'ble Mr. Raza Ali and Sir M. Dadabhai. It is a pity that some of the noninees of the Assembly could not attend, partly owing to their being engaged in other Committees and partly owing to private engagements. The Bill comprised more than 160 clauses. Had not the Secretary of the Legislative Assembly and his staff utilized the time when the Assembly was not in Session, in preparing a very useful precis of the volumes of opinion and criticism received on the Bill and also in redrafting the clauses to a great extent in pursuance thereof, and further had not a spirit of compromise prevailed in the Committee for settling all differences of opinion, the Committee could not possibly have made such rapid progress. Of all the Committees that met at Simla this summer none can claim greater expedition and thoroughness in the disposal of their work. The criticisms of the Calcutta Bar Library and Vakils' Library were found very helpful in the disposal of the Committee's work. The Committee decided to leave alone the question of racial distinction, as the report submitted by the Racial Committee is now receiving the consideration of the Secretary of State for India and his Council. We expect that the Bill, as it has been redrafted by the Joint Committee, will be found to be a great improvement on the present Code in so far as it has been amended by it. We would have preferred, if the Legislature, instead of proceeding piece-meal, had undertaken the work of consolidation. Even if this Bill is passed at the next winter session of the Legislative Assembly, the consolidation will have to come before long.

DOES POSSESSION FOLLOW TITLE?

(By MR. KHETRA NATH SINGH, MUNSIF,
RANCHI.)

(Continued from p. cxxviii.)

The qualities which make possession ad-

verse are mentioned in 4 C. W. N. 597 cited above. Their Lordships at p. 600 observe :—
“ But the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. The Appellant does not present a case of possession for the twelve years in dispute, which has all or any of these qualities. The best attested cases of possession do not cover the whole period and apply to small portions of the ground.” As pointed out in 15 C. L. J. 281 and 5 P. L. J. 273, “ no presumption of possession can be made in favour of the adverse possessor and his possession must be restricted to the land of which he has actual possession.”

But the same qualities which make up adverse possession against the true owner of the property need not be exercised by the latter to destroy the character of the trespasser's adverse possession. This principle is laid down in the concluding portion of their Lordships' decision in 26 C. W. N. 666. It is as follows :—

“ Standing a title in ‘ A,’ the alleged adverse possession of ‘ B’ must have all the qualities of adequacy, continuity, and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves . . . that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds.”

On the question of continuity of adverse possession, possession connected as of right can be tacked but possession of independent trespassers cannot be tacked. It appears that on the question of tacking possession of independent trespassers, the same rule is applicable in cases as well under Art. 142 as under Art. 144. See Mr. Rustomji's Limitation (3rd Ed.), page 646. Different views have, however, been held by Messrs. Mitra and Starling in their well-known treatise on Limitation.

The observations of their Lordships of the Privy Council just quoted above distinctly show that they are limited to a case in which the title of the Plaintiff is either admitted (as in the case of 41 All. 669) or proved (as in the

case of 45 Bom. 1020); but where the origin of the title is unknown or doubtful, such isolated acts of possession, which cannot go to make a title, considering of course the nature of possession of which the property is capable, are of no avail to the Plaintiff. Thus it is ruled in the same ruling of their Lordships (*i.e.*, 26 C. W. N. 666 P. G.) :—"Where the original title is unknown and both parties in a suit for ejectment give evidence of possession, the Court will be justified in deciding in favour of one party or the other by a comparison of the evidence judged in the light of probabilities." The same principle appears to be applicable in cases where both sides offer evidence equally well-balanced but their title is unknown or doubtful.

It is now settled law that the ordinary presumption that possession follows title arises only in the case where evidence on both sides is equally strong and well-balanced and that in such a case one, whose title is proved or admitted, succeeds.

But where the evidence produced by both the Plaintiff and the Defendant as to possession is unworthy of credit, the Plaintiff's suit fails. For this conclusion, the Hon'ble Sir John Bucknill, J., at page 525 of 6 P. L. J. 478 F. B. gives the following cogent reasons :—

"... in such class of suits (*i.e.*, under Art. 142) it is not sufficient to enable the Plaintiff to succeed for him merely to prove that at some date antecedent to a period of 12 years prior to the institution of the suit, he had acquired some proper title to the land but that he must also prove that he was in possession within that period... where, however, there is no evidence of any value on behalf of the Plaintiff as to his possession at any time during the crucial period, the Plaintiff's case simply fails. It does not matter if the Defendant's evidence is weak or indeed if he offers no evidence at all."

The next point presents itself :—Does the Plaintiff's suit fail in a case arising out of Art. 144, where both sides' evidence of possession is unworthy of any evidence? The answer should be in the negative because the title lying in the Plaintiff, and the burden of proof as to how the Plaintiff lost his title being on the Defendant, the party on whom the burden lies, fails. See also 1 Pat. L. T. 59.

Hence, the question whether apart from the context and without considering the nature of possession of which the property is capable, the presumption of possession is to follow title cannot be satisfactorily answered, unless the

allegations of the Plaintiff are first made to conform to either the one or the other of the two articles of the Limitation Act, Art. 142 and Art. 144.

(Concluded.)

IS A WRITTEN AGREEMENT FOR A LEASE COMPULSORILY REGISTRABLE?

The question whether an agreement for a lease, if embodied in a document, requires registration, deserves some consideration. Ordinarily it seems that it does not require registration, if it does not affect a present demise.

Sec. 3 of the Indian Registration Act lays down that a "lease" includes an "agreement to lease." The word used by the Legislature is "includes" and not "means." So it is clear that the Legislature has not attempted to give a definition of the term "lease." It follows then that not only a document by which a property is actually demised, but also a document by which a person gets a right to obtain a document, by which a property is demised, come within the purview of the section. It has been held in several cases that an agreement to lease is one by which a property is actually demised. But it is to be noticed that this meaning goes against the popular idea of the word agreement by which an actual demise is not contemplated.

Sec. 17, cl. (d) of the Registration Act lays down that documents which are leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rate, must be registered. If the clause be read along with sec. 3 of the Registration Act, the inference naturally follows that a written agreement for such leases mentioned in cl. (d) of sec. 17 are also compulsorily registrable.

That this was the intention of the Legislature can also be gathered from the exemption clause of sec. 17 of the Registration Act. A document creating a right to obtain a document of the description mentioned in paragraphs B and C does not require registration, as will appear from paragraph II. But cl. (h) does not affect the leases mentioned in cl. (d) and the exemption clause does not lay down anything about a document creating a right to obtain leases of the descriptions mentioned in cl. (d). The reason why the Legislature did not refer to such documents in the exemption clause is possibly that according to sec. 3, read with cl. (d) of sec. 17 of the Registration Act, such

documents require registration irrespective of whether there is a present demise or not.

The view of law I have put forward above goes against the reasonings in the cases of *Hemanta Kumari Debi v. Midnapur Zemindari Co.*, 31 C. L. J. 298 (P. C.) and *Panchanan Basu v. Chandi Charan Misra*, 37 Cal. 808.

In this connection sec. 91 of the Indian Evidence Act ought to be referred to. Sec. 91 lays down that when the terms of a contract have been reduced to the form of a document no evidence shall be given in proof thereof except the document itself. When there is an unregistered agreement for a lease of the nature indicated in cl. (d) of set. 17 of the Registration Act, that document is inadmissible in evidence under sec. 49 of the Registration Act and it follows that no other proof can be adduced of the terms of the agreement.

It should be noted here that if such written agreements are compulsorily registrable it does not necessarily follow that agreements of such leases cannot be entered into orally. Sec. 17 of the Indian Registration Act does not lay down how the transactions mentioned therein are to be effected, but it only lays down which documents are to be registered, and which, not.

DIHIRENDRA NATH RAY.

Pleader, Khulna.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Trinity sittings of the Judicial Committee commenced on the 13th June. The list of business contains one Australian appeal, 12 from Canada and one each from the Crown Colonies of Gold Coast and Trinidad. In the Indian list there are 14 appeals, 3 from Madras, 2 each from Bombay, Patna, Punjab, and Bengal and one each from Allahabad, Oudh and Upper Burma.

Two Boards have been constituted, the one presided over by VISCOUNT HALDANE, the other members being LORDS PARMOOR and TREVE-THIN, the latter being the title adopted by the ex-Jord Chief Justice. This Board are at present hearing the appeal from the Gold Coast.

LORD DUNEDIN, LORD PHILLIMORE, SIR JOHN EDGE and MR. AMBER ALI comprise the other Board which is hearing Indian appeals. The first appeal to come before them was one from Madras, *Palchur Sankareddi v. Palchur Mahalakshamma*. The sole point for determination in this appeal is whether a Will is valid or a forgery. *Sir William Failey, K. C.*

and *Mr. B. Dubé* for the Appellants contended, on the 13th and 15th June that the Will was a forgery. *Messrs. L. DeGruyther, K. C.* and *Narsimham* for the Respondents were not called upon and judgment is to be delivered on the 16th instant.

The same Board are at present hearing arguments in *Data Ram Jain v. Musammat Basant Kunwar*, an appeal from Allahabad, raising a question as to whether or not a promissory note was executed for consideration. The Indian Courts have differed in their findings. *Messrs. L. DeGruyther, K. C.* and *Dubé* appeared for the Appellants and *Messrs. A. M. Dunne, K. C.* and *E. B. Raikes* for the Respondents.

Three petitions for special leave to appeal to His Majesty in Council were heard on 15th June 1922 by the Board presided over by VISCOUNT HALDANE.

The first was *Macmillan & Co., Ltd. v. K. and J. Cooper* (Bombay). This was a case raising an important question of copyright. The Petitioner Company had published in book form extracts from North's translation of Plutarch's life of Alexander and the main question was whether this could be called an "original literary work" so as to entitle the Company to restrain other authors from making the same extracts with additions. The trial Judge decided in favour of the Company but that decision was reversed on appeal, and leave to appeal to His Majesty in Council was refused by the Appeal Court on the ground that the value of the subject-matter was below Rs. 10,000 and the matter was not a fit one for further appeal. *Sir John Simon, K. C.* (with him *Mr. Macmillan*) urged the importance of the legal question at issue and prayed for special leave to appeal. *Sir George Lowndes, K. C.* and *E. B. Raikes* opposed the application, which was however granted.

Special leave was refused in the following cases:—*Sardar Hari Singh v. Sandani Lachmi Dasi* (Lahore) in which *Sir J. Simon, K. C.* and *Mr. Dubé* appeared for Petitioner; and *Shakir Ali v. King-Emperor* in which *K. Narsimham* appeared for Petitioner and *Kcn-worthy Brown* for Opposite Party.

15-6-22.

G. D. M.

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constitutional importance to all the Provincial Legislatures in India. But for the correct attitude of Lord Lytton, we are sure, the Bengal Council would have rejected the grant ignoring the mandate of the Government of India. That the Bengal Council has avoided a very unpleasant conflict is all the more the reason that the question should be settled for good now.

Dual Control of the Calcutta High Court and consequent constitutional conflict.

The motion for the supplementary grant of Rs. 31,000 for the Paper-book Department of the Calcutta High Court indirectly raised some very important constitutional issues. Although we are of opinion that the Bengal Council has displayed a very reasonable attitude in restoring the grant which it previously refused yet we regret that we cannot at all express our approval of the part played by the Government of India in this connection. We think it is constitutionally unjustifiable for the Central Government to direct any provincial Government to restore any grant refused by the provincial Council under the extraordinary powers given to the provincial Governor under the Government of India Act. It is evident from the speech of Lord Lytton that he found his position as responsible Governor of the province very embarrassing. The extraordinary powers of the Governor are meant to be exercised on very extraordinary occasions. The spirit of the new constitution is that he should as a rule abide by the decision of the legislature. If the constitution is not worked in this spirit, full responsible Government will never be developed in the provinces except by violent conflicts between the executive and the legislature. If, however, our provincial Governors wisely follow the course of accepting the votes of the local legislature as binding on them, responsible Government in this country may be regarded as *fait accompli*. The protest of the Governor of Bengal who is quite alive to his sense of responsibility to the Legislature, owing to his long Parliamentary training, deserves the serious attention of the Government of India and of the Indian public. It raises an issue which is of grave

Lord Lytton's protest raises a very grave issue as to the constitutional position of the provinces with regard to the Central Government. The scheme of the reforms is to make the provinces autonomous especially with regard to their internal administration. The course adopted by the Government of India with regard to a question of provincial grant and provincial administration is fraught with very grave constitutional consequences if it is not now nipped in the bud. We have no desire to be unfair to the Government of India but it would be our first duty to guard against any action on their part which may in the least degree trench upon the attainment of full provincial autonomy in India. We fully recognise that the action of the Government does not proceed from any desire to domineer over the provincial legislatures but arises out of a rather anomalous position that the Central Government occupies with regard to the Calcutta High Court. While the Government of India is the administrative head of the Calcutta High Court, the Government of Bengal, which has been straining every nerve to make its two ends meet, has to find money for it. We cannot, therefore, take any exception to the jealous solicitude of the Bengal Council not to sanction any increase in the administrative cost of the province.

The Government of India on the other hand have yet to make good 20 crores or more of the current year's budget deficit. It cannot, therefore, be expected that when the Calcutta High Court goes up to the Government of India for sanction of any additional establishment in connection with the paper-book or any

other department, the Government of India would come to its financial assistance. We have no grievance on that account. What we say is that the Government of India are not competent to pronounce, from their position of isolation at Delhi or seclusion at Simla, any opinion or advice on any question of administration connected with the Calcutta High Court. With regard to the paper-book controversy the High Court has gone a great way to meet the representations of the section of the profession interested in it and we are sure that it will do its best to meet the wishes of the Bengal Council that the department should not be a burden on the tax-payer or oppressive to the litigants. But quite apart from that the present system of the Government of India continuing to be the administrative head of the Calcutta High Court is a constant source of inconvenience to the High Court, to the Government of India and still more to the Government of Bengal. For instance if the High Court asks for the sanction of even a small staff in any connection, the Government of India not being in touch with the Court, has to call for reports and not unoften, consult the Bengal Government and after considerable circumlocution and waste of time, grant the sanction when arrears have accumulated for months or years. It is only common sense that if the administration of the Calcutta High Court like that of the other High Courts was transferred to the Bengal Government much time and inconvenience would be saved. Further we are afraid that the present system is also interfering with the efficiency of the Bench. The Local Government is in a better position to judge of the requirements of the High Court both with regard to the personnel and the numerical strength of the Bench and of the ministerial staff connected therewith. All necessary informations connected with its administration are also readily available to the local Government. Now that the Calcutta University has been transferred to the Government of Bengal, we see no reason why the administration of the High Court should not be transferred also to the local Government. Public opinion in Bengal as also the provincial legislature will always guard against any interference by the executive with the judiciary and the Hon'ble Judges of the Calcutta High Court have always been very keen in maintaining their independence. But what we suggest will in no way interfere

with the administration of justice as it concerns only questions of ways and means.

The material portion of H. E. the Governor's speech in this connection is as follows :—

"The High Court is administered by the Government of India whilst the Government of Bengal has to find the money for its expenses—an anomalous position which I will not comment upon at the moment beyond saying that so long as it continues the Government of India are in a position to give me instructions regarding the provision of funds for the High Court and they did in fact instruct me to restore the vote."

LANDLORD'S CONSENT IN EXECUTION SALES OF OCCUPANCY HOLDINGS.

[By MR. DWIJENDRA NATH PAL, MUNSIF, RAMPURHAT.]

The transferability of occupancy holdings is, inspite of a large volume of rulings around it, a perpetual riddle. The question is fraught with numerous side issues which seem to defy a correct generalisation. We have seen how the anxiously considered decision in the Full Bench case of *Doyamoyi v. Ananda Mohan* was held to be incorrect by the Special Bench in the case of *Chandra Binode v. Sheikh Ala Baksh*. Even now, the question does not altogether seem to be free from difficulty. The divergence of judicial opinion is a constant source of confusion.

The question whether a raiyat can successfully object to a sale of his holding in execution of a money decree, where the landlord is neither the decree-holder, nor has he given his consent to the sale, came up before the Patna High Court in the case of *Dewan Ram Choudhury v. Atul Munder* (6 Pat. L. J. 202). The question was answered in the affirmative. It was held that the objection is a valid one and is not negated by the decision in *Chandra Binode Kundu v. Sheikh Ala Baksh* (24 C. W. N. 818). Their Lordships Das and Adami, JJ., seem to have relied on the *dictum* in the Special Bench case that "the transfer of an occupancy holding cannot be made effective unless there be the consent of the landlord." (6 Pat. L. J., p. 207). But does this mean that an execution sale cannot be allowed to take place without the landlord's consent? Let us analyse the point.

The real innovation that has been made in the Special Bench case is the placing of

voluntary and involuntary sales of occupancy holdings, on the same footing. "The life of law" we have been told, "is not logic, but experience;" but one wonders whether the decision in the aforesaid case is not a triumph of logic over the experience of about a quarter of a century. We are however not at present concerned with the reasonableness of this ruling; we must take it as the present law and a binding authority. The power of voluntary alienation of any property is no doubt the measure of its liability to involuntary alienation, but the test was perhaps for the first time applied in the Special Bench case to such an anomalous property as an occupancy holding. The Full Bench case of *Doyamoyi v. Ananda Mohan* had made a distinction between the two cases of transfer, on the strength of "modern authority." It laid down that a transfer of a non-transferable occupancy holding "is operative against a raiyat (a) where it is made voluntarily; (b) where it is made involuntarily and the raiyat, with knowledge, fails to set it aside." (18 C. W. N. 971 at p. 991). It was in fact held that a raiyat was not bound by an involuntary sale held without his knowledge though he was bound by a voluntary sale. An occupancy holding was, in this respect, not treated like other properties of the raiyat, so far at least as he was concerned. The right of the raiyat to object to an involuntary sale had formed the basis of several transactions and judicial decisions for about 25 years and the Full Bench decision formulated it clearly. But with the gradual recognition of the raiyat's power of voluntary alienation of his holding, the illogicalness of his right to object to an involuntary sale became manifest, and the Special Bench corrected the proposition quoted above in the following way: "The transfer of the whole or a part is operative as against the raiyat, whether it is made voluntarily or involuntarily." (24 C. W. N. p. 854). It has thus been made clear that a raiyat is as much bound by an involuntary sale as by a voluntary sale of his holding. An occupancy holding has now been placed on the same footing as the raiyat's other property, so far as the raiyat is concerned. Their Lordships of the Special Bench observed: "When voluntary and involuntary transfers are thus placed in the same category, so far as the raiyat is concerned, no difficulty can arise under sec. 60 of the Civil Procedure Code which makes saleable in execution all property over which he has disposing power." (24 C. W. N.

p. 854). It is difficult to see how the raiyat can object to an execution sale of his holding when voluntary and involuntary sales are placed on the same footing.

The question of landlord's consent would not thus arise between a raiyat and a third person, none of whom has the right to question the sale on the ground of non-transferability. The right to take such an objection is a special privilege which the law allows to the landlord alone. The raiyat will be bound by the sale, no matter whether the landlord gives his consent to it or not. He cannot be allowed to be the landlord's proxy and no objection by a proxy is maintainable in law. The objector must have a valid, independent right of objection in himself. The raiyat has been held to have no such right.

Neither can it be said that the landlord's consent is a condition precedent to a transfer of an occupancy holding. A transfer is quite valid and legal so far as the parties to the transaction are concerned. Only it does not become effective, as against the landlord so long as he does not give his consent to it. If the prior consent of the landlord is not necessary in order to effect a voluntary sale, it should not, according to the Special Bench case, be necessary in order to allow an involuntary sale. To hold otherwise would be to reiterate the distinction between voluntary and involuntary sales, which the whole object of the Special Bench case was to remove.

It thus appears that the Patna High Court ruling in *Dewan Ram's* case is not in line with the Special Bench case of the Calcutta High Court. As Courts in Bengal are bound to follow the ruling of the Calcutta High Court, where there are conflicting rulings of different High Courts, an objection by a raiyat to the sale of his holding in execution of a money decree, must be a thing of the past, so far as Bengal is concerned.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

On June 16th, judgment was delivered by the Board dismissing the appeal from Madras in *Palchur Sankarareddi v. Palchur Mahalakshama*. This appeal was briefly referred to in the Notes last week.

The case of *Data Ram Jani v. Mt. Basant Kunwar* was heard by a Board composed of LORDS DUNEDIN and PHILLIMORE, SIR J.

EDGE and MR. AMBER ALI on June 15, 16 and 19. The suit had been instituted by the Appellants as Plaintiffs to recover from the Respondent Rs. 21,000 alleged to be due on a promissory note. The Respondent denied the debt and denied the validity of the document sued on. *Messrs. DeGruyther, K. C. and Dubé* appeared for the Appellants and *Messrs. Dunne, K. C. and E. B. Raikes* for the Respondents. Judgment was reserved.

On June 19, judgment was delivered in the appeal from Patna, *Jai Barham v. Kedarnath Marwari*. The appeal and cross-appeal were dismissed and the order of the High Court slightly varied.

The same Board commenced the hearing of the Bombay appeal, *Khatubai v. Md. Haji Abu*. The question at issue in this case was as to the Law which should govern a Halai Memon who has been found by the Indian Courts to be domiciled in Porbandar. It is admitted that the Halai Memons are Mahomedans but the Respondents contend that in matters of succession they are governed by Hindu Law. The case was opened on June 19 and 20 by *Mr. DeGruyther, K. C.* for the Appellant (with him *Mr. C. J. Farwell*) and is still part-heard. *Messrs. Upjohn, K. C., E. B. Raikes and Palat* appeared for the Respondents.

Owing to the inability of certain members of the Board to sit during the ensuing week the further hearing of the appeal has been postponed until July 3rd.

On June 20th, before a Board composed of VISCOUNT HALDANE, VISCOUNT CAVE, LORD PARMOOR and LORD TREVENTHIN the hearing was commenced of an appeal from Bengal, *E. D. Sassoon & Co. v. Ramdutt Ramkissen Das*, which raises a question of irregularity under sec. 9 of the Arbitration Act. *Sir J. Simon, K. C.* and *Mr. Hyam* for the Appellants and *Messrs. A. M. Dunne, K. C. and J. K. Roy* for the Respondents. The case remains part-heard.

21-6-22.

G. D. M.

Notes of Cases CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CHOTZNER, JJ. S. A. No. 1723 OF 1920. DHEERENDRA KRISHNA MUKHOPADHYA, Defendant, Appellant v. MAHENDRA NATH MUKERJI and others, Plaintiffs, Respondents. The 16th June 1922.

The Public Demands Recovery Act (III of 1913, B. C.)—Retrospective effect—Secs. 36 and 37.

The Plaintiff-Respondent brought a suit for declaration of title and recovery of possession of the suit lands after declaration that a certain certificated sale was *ultra vires*. The Plaintiff's case was that no road-cess was due from him, no notice was served and that for some supposed arrears his lands were put up to sale on 20th September 1907 and were purchased by the Defendant. The Defendant got his name registered and obtained possession before 1910. The Defendant-Respondent urged that the suit was barred by limitation and under secs. 36 and 37 of the Public Demands Recovery Act (III of 1913) as under the new Act the suit must be brought within one year from the date of delivery of possession. Both the Courts below found and held that the suit was not barred by limitation and that there were no arrears due from the Plaintiff and that the certificate was *ultra vires*:

Held—That when the suit would not have been barred by limitation under the old Act but only under the new Act, the new Act would have no retrospective effect and the suit was not barred by limitation, 20 C. W. N. 890; 17 C. W. N. 829; (1905) A. C. 369, referred to.

That no arrears being due from the Plaintiff and as such the certificate being not duly filed, secs. 36 and 37 of the Public Demands Recovery Act were no bar to the suit.

Babu Monmatha Nath Ray for the Appellant.

Babu Satis Chandra Chowdhury for the Respondents.

S. C. C. Appeal dismissed with costs.

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Law Courts and protection of citizens against official high-handedness.

The English Law Courts stand high in the esteem of the people because they are so many bulwarks against the encroachment of the personal liberty of the subject by officials. The recent decision of the House of Lords in *Percy v. Glasgow Corporation* (26th May) would illustrate this. The Appellant, in this case, a working man, was travelling in a corporation tram car and tendered a penny in payment of his fare. The conductor refused to accept it because it was slightly battered and upon the Appellant refusing to produce another, the conductor called in an inspector, who repeated the demand but Percy persisted in his refusal. Thereupon the conductor and inspector gave the Appellant into custody on the charge of refusing to pay his fare, although the Appellant had given his name and address. The constable took the Appellant through the street to a police station and charged him there with the non-payment of fare and the tramway inspector further charged him with tendering a defaced coin. The officer in charge of the police station was not for making any mountain out of a mole-hill as the police often do in India and let the Appellant go. The Appellant then brought an action for false imprisonment (wrongful detention)

against the corporation, whose servants had given him into custody. The bye-laws of the corporation provided that a person who refused to pay his fare and whose name and residence was unknown to the officer or servant of the corporation may be arrested. The Court of first instance declined to allow the case to go to trial as in its view the corporation was not responsible for the officer's or servant's wrongful action. Thereupon the case was taken on appeal to the House of Lords.

Lord Haldane in delivering judgment on behalf of his colleagues (Lords Finlay, Dunedin, Cave and Wrenbury) declared in favour of the Appellant and held that if the conductor and inspector were acting within the scope of what they were employed to do, their employers were liable. He quoted with approval the following passage from the classical work of *Story on Agency* regarding the liability of the principal for wrongs committed by agents:—

The principal is liable to third persons in a civil suit for the frauds, deceptions, concealments, misrepresentations, torts, negligences, and other malfeasancess or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even he forbade the acts, or disapproved of them.

Our contemporary of the *English Law Journal* says that this does not create any new law and cites *Finlay v. South Metropolitan Tramway Co.*, (48 T. P. 329) and *Moore v. Metropolitan Ry. Co.*, (11. R. 8 Q. B. 36) as laying down the law in somewhat similar lines. But our legal contemporary congratulates the Appellant for carrying his case to the House of Lords as it is very necessary that the officials should be reminded, now and again, that private citizens have rights as well as duties, and that public bodies who employ such

officials should be kept alive also to their responsibility. The Law Courts in India would also be equally held in high regard if they would show the same concern to protect the rights and liberties of the subject, no matter how poor or humble he may be, against official high-handedness. Some members of the Bench believe that interference with executive high-handedness will make the empire go to pieces. But our apprehensions are quite the other way.

PRODUCTION OF DOCUMENTS IN COURT.

(By MR. KHETTRA NATH SINGH, MUNSIF,
RANCHI.)

The following observations have reference to an article on the above-mentioned subject which appeared at page cxviii (118 notes) of the current volume of the Calcutta Weekly Notes.

The first enactment on the production of documentary evidence in Court was contained in sec. 128 of Act VIII of 1859. The first part of this section is reproduced in sec. 138 of Act XIV of 1882 (old C. P. C.) with the following main addition and alteration, viz., (1) "the first hearing in the suit" has been changed into "the first hearing of the suit;" (2) the words "all documents which the Court at any time before such hearing has ordered to be produced" were added for the first time in sec. 138 of the 1882 Code.

As pointed out by Blackburn, J., in *Docks v. Cameron*, 11 H. L. C. 443 (480), "where an Act of Parliament has received a judicial construction, putting a certain meaning on its words and the legislature in a subsequent Act in *pari materia* uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before, and unless there is something to rebut that presumption, the Act should be construed, even if they were such that they might originally have been construed otherwise (see 26 C. W. N. at p. 707). The above being a well-known canon of interpretation of statutes, it appears that the change from "in the suit" into "of the suit" (though verbal) had been made by the Legislature to bring the law into harmony with the interpretation put upon the section by Ainslie, J., in *Gour Huree v. Pran Huree*, 21 W. R. 42. According to that learned Judge, the words "first hearing in the

suit" are defined by sec. 139 of Act VIII, 1859 and do not mean the "first hearing on the issue." The head-note of that ruling which represents the actual decision of his Lordship runs thus:—"A party is bound under Act VIII of 1859, sec. 128 to be prepared at all points with his documentary evidence, and as soon as the Court has framed the issues which it thinks proper to lay down, at once to tender (if called upon) the documentary evidence bearing thereon." Now, did the Legislature in Act V of 1908 (new Code) make any change in the procedure under Or. XIII, rr. 1, 2? The only material change in the latter is that the words "shall produce" have been substituted for the words "shall bring with them and have in readiness at the first hearing of the suit to be produced when called for by the Court" which occurred in sec. 128 of the 1859 Code and in sec. 138 of the 1882 Code. By this change, the parties, now-a-days, shall have to produce all documentary evidence in their possession and power at the first hearing of the suit, and not merely to bring with them and to produce only when called for by the Court, as required by the provisions of the old Code. This mandatory rule appears to have been overlooked by the Subordinate Courts of this Province, as it appears from the following General Letter addressed by the Registrar of the High Court of Judicature at Patna to all District Judges:—". . . "I am directed to say that notwithstanding the instructions contained in the Courts' General Letter No. 15, dated 18th December 1919, the Judges have remarked with regret that the provisions of Or. XIII, rr. 1 and 2 of the C. P. C. are not strictly observed in many Subordinate Courts. As these provisions are mandatory, I am to request that you will be so good as to take such measures as may be necessary to ensure that the instructions contained in the Courts' General Letter above referred to are strictly observed in future." Thus, except the mandatory words mentioned above, there has not been any change in the new provision and the interpretation of the words "first hearing" made by Ainslie, J., appears to be still good law under the new Code.

(To be continued.)

Correspondence.

DRAFTING OF LAWS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

DEAR SIR,

In the year 1920 the Indian Legislative Council amended certain provisions of the Limitation Act, 1908, the amendment in substance being understood by everybody (including the Hon'ble Member in charge of the Bill) to reduce from six months to 90 days the periods of limitation prescribed by Arts. 176, 177 and 179 of the Indian Limitation Act, 1908. It has now been judicially decided last week by a learned Judge (Harrison, J.) of the Lahore High Court, on a true interpretation of the Amending Act of 1920, that the period of limitation under Art. 177 (for an application to implead the legal representatives of a deceased Defendant or Respondent) is still six months and has not been reduced to 90 days. This decision is of a very far-reaching effect, and upsets a view of the law that has been universally maintained, not only by the Legislative Department of the Government of India, but by the profession in general and by the leading text-writers.

This is one more instance where the Legislature by their bad and unskilful drafting of an Amending Act have failed to carry out their real intention. It was only recently that Mr. Justice Marten of the Bombay High Court, while disposing of a testamentary suit between executors (*Nawazbai v. Dimbai*), commented upon the great inconvenience which is caused to legal practitioners (in which phrase he included himself), if important and useful alterations in the law are effected in a slipshod manner. His Lordship had had occasion to comment upon the inconvenience thus caused in one or two other cases. In one of them all the leading text-books of that period had actually overlooked the amendments which had been made by the Legislature. In another the amendment escaped the vigilance of a leading text-book writer on the subject.

It is very unfortunate that the Legislature cannot say quite clearly what it intends. One or two lines would put the matter beyond any question or argument.

LAWRENCE ROAD,
LAHORE,
11-7-1922.

Yours truly,
K. J. RUSTOMJI,
Barrister-at-Law.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CHOTZNER, JJ. S. A. No. 1449 of 1920. GANES RAM, Plaintiff-Appellant v. GANPAT RAI and another, Defendants-Respondents. The 14th June 1922.

Suit for specific performance of contract to sell—Variation between pleading and proof not allowed.

The appeal arose out of a suit for specific performance of a contract to sell a house alleged to have been entered into by an agent of Defendant No. 1, Ganpat Rai, with the Plaintiff, Ganes Ram. The house, it was alleged, was subsequently sold to Defendants Nos. 2 and 3. The Defendant No. 1 repudiated the allegation, while the Defendants Nos. 2 and 3 claimed protection as *bona fide* purchasers for value without notice. In the trial Court, the Plaintiff produced a document which was marked Ex. 1 and purported to embody the agreement which the Plaintiff sought to specifically enforce. The trial Court held that the said document was not in existence at the date of the suit and that it had been manufactured in the course of the trial and dismissed the Plaintiff's suit. On appeal the District Judge affirmed the decree of the trial Court holding that the agent of the Defendant No. 1 had no authority to complete the contract and he did not do so. The Plaintiff appealed to the High Court.

Babus Dwarka Nath Chakravarti and Kalkinkar Chakravarti for the Appellant invited the Judges to examine the correspondence between the parties which preceded the execution of the document and to hold that they disclose a completed contract between the parties.

Babus Ram Chandra Majumdar and Mahes Chandra Banerjee for Respondent No. 1— and *Babu Mrityunjay Chattopadhyay* for Respondents Nos. 2 and 3 objected on the ground that such a course would be to allow the Plaintiff to change his case and the result would be a variation between pleading and proof.

Held—The Plaintiff should not in any case, specially in a case for specific performance of contract, be allowed to depart from the case

made in the plaint in *Handkins v. Maltby* (1867) L. R. 3 Ch. 188 and *Mundy v. Jolliffe* (1839) 5 My. and Cr. 167, referred to.

S. C. C. *Appeal dismissed with costs.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CHOTZNER, JJ. S. A. No. 1883 OF 1920. SABITRI DESHI-ANI, Appellant *v.* CHINTAMANI *alias* JUNDO DESHIANI, Respondent. The 19th July 1922.

Hindu Law, Deshis of Maldah, whether governed by—Partition between widows of joint brothers.

The Plaintiff-Respondent brought a suit for partition of inmoveable property inherited by her from her husband Gyan Deshi against the widow and minor son of Dhuba, brother of Gyan Deshi alleging that the parties were governed by the Dayabhag School of Hindu law and as such she was entitled to 8 annas share of the joint property. The Defendant's contention was that the parties were not Hindus governed by the either School of the Hindu law but their inheritance was governed by special custom by which females do not inherit but the properties pass by survivorship to the male members and that even if the partition were allowed the interest of the minor Defendants' reversioners should be safeguarded. The first Court found the title with the Plaintiff but held that it was a fit case that the partition should be disallowed to safeguard the interest of the 'minor Defendants' reversioners. On appeal partition was allowed.

Held—(1) That there being nothing to the contrary the parties must be held to own Hindu religion and as such to be governed by the Hindu law, (2) that the Defendant had failed to prove the special custom and the parties being residents of District Maldah where the Bengal School of law prevails the Courts below were right in holding that the parties were governed by the Bengal School of Hindu law and that the Plaintiff was entitled to get partition of the property.

Babu Bijoy Kumar Bhattacharji for the Appellant.

Babu Nisith Nath Ghatik for the Respondent.

S. C. C. *Appeal dismissed with costs.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CHOTZNER, JJ. R. A. No. 61 OF 1921. RAM KAMAL SHAHA BANIK, Plaintiff-Appellant *v.* SYAMA SUNDER SHAHA BANIK and others, Defendant-Respondents. The 12th April 1922.

Limitation in suit for construction of Will—Whether Art. 120 applicable—Sec. 42 of the Specific Relief Act—Interpretation of.

The father of the Appellant-Respondents died after having executed a Will. By the said Will after making certain provisions by way of his maintenance he devised his estate to his grandsons (son's sons), to be taken by them in certain shares. The Defendant-Respondents Syama Sunder and two others were appointed executors who shortly after the death of the testator took probate of the Will about the year 1899. The other two executors died and Defendant Syama Sunder, the surviving executor was in possession as such. In 1919 the Plaintiff instituted a suit for the construction of the Will. His case was that as all the grandsons were not born during the life-time of the testator, there was partial intestacy. The executor while admitting that the estate was not yet fully administered pleaded limitation and that the suit was barred under sec. 42 of the Specific Relief Act. The Subordinate Judge held that sec. 42 of the Specific Relief Act was a bar as the Plaintiff being able to claim partition had not done so. On the question of limitation he held that Art. 120 was applicable and that time ran from the date when probate was obtained. He accordingly dismissed the suit. The Plaintiff appealed to the High Court:

Held, firstly, that Art. 120 was applicable but that time ran from day to day till the administration was complete. The suit was not therefore barred by limitation. Secondly, that sec. 42 of the Specific Relief Act did not require a Plaintiff to seek all the reliefs he is entitled to.

Babus Rupendra Coomar Mitter, Navadwip Chandra Shaha and Romaprosad Mukherjee for the Appellant.

Dr. Sarat Chandra Bysack, Kanai Lal Shaha and Promotha Nath Banerjee for the Respondents.

S. C. C.

*Appeal allowed;
Case remanded.*

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The late Sir George Knox.

We note with regret the death of Sir George Knox, the distinguished Judge of the Allahabad High Court. His record was absolutely unique in the annals of public service in India. He was the senior-most member of the Indian Civil Service and actually sat as a Judge of the High Court for over thirty years. He entered the Indian Civil Service in the year 1864 and retired in January 1921 after having put in 56 years of service. He was appointed a Judge of the High Court in 1890 when Sir John Edge was the Chief Justice and during his term of office extending over three decades, he officiated as Chief Justice on many occasions. Besides being a sound lawyer, he had the reputation of having a fair knowledge of Sanskrit. His intimate knowledge of the customs of this country proved of incalculable advantage in the discharge of his duties. On more than one occasion Sir George was the Vice-Chancellor of the Allahabad University and in recognition of his services as such the University conferred on him the degree of Doctor of Law. After retiring from the Bench he still remained in India and passed the remainder of his life at Nainital.

The Law Membership of the Government of India:

It has been announced in a Simla communique that the Hon'ble Mr. Tej Bahadur Sapru will shortly retire from the office of the Law Member to Government of India. A good deal of speculation is rife as to his likely successor. It is not our practice to discuss hearsay statements. "Measures not men" is a

motto that we have tacitly followed in our journalistic career. We are not interested in any particular person who may be appointed to this office but in the principle on which such appointments should be made. Nomination to this office is to this day made on the rather obsolete principle, that the Viceroy, very likely assisted by the Members of his Executive Council, has an unfettered discretion in the selection of a colleague of his Cabinet Council. But this anomaly must go. The time is fast approaching when the Legislative Assembly will insist that the Members of the Executive Council, who may be selected by H. E. the Viceroy, must command the confidence of the Legislature or, in other words, that the principle of responsibility be introduced in the Cabinet Council of the Government of India. We may predict that the next general election in India would be fought out over the question of securing provincial autonomy for the provinces and responsibility in the Central Government. We believe that on this occasion the selection of a Member of the Executive Council in the place of the Hon'ble Mr. Sapru will be made on the principle of the distribution of patronage by the Government of India on some favoured Indian lawyers selected by turns from the different provinces of India by rotation. Bengal, Behar, Madras, United Provinces have had their turn and so it is now Bombay's chance. The Government of India is still wedded to the *ma bap* tradition of a paternal Government and treat us as children by giving us a slice of cake by turns. We pity the giver, and the taker no less.

The Advocate-Generalship of Bengal.

We are glad to note that Mr. S. R. Das, Bar-at-Law, has been appointed to officiate as the Advocate-General of Bengal. He was the Standing Counsel to the Government of Bengal for sometime past. Since his election to the Bengal Legislative Council he took leave and Mr. B. L. Mitter, Bar-at-Law, was officiating for him. After Mr. S. R. Das was elected to the Bengal Legislative Council, the question arose as to whether the Standing Counsel of Bengal could remain in office and at the same

time retain his seat as an elected member of the Local Legislature. The question was referred to the Attorney-General in England and he was of opinion that only whole-time officials were barred from seeking election to the Local Legislature and that the Standing Counsel was not an official in that sense. Mr. S. R. Das resumed his office of Standing Counsel after that on Mr. B. L. Mitter's proceeding to England. Now that Mr. S. R. Das has been appointed to officiate as the Advocate-General of Bengal and Mr. B. L. Mitter has returned from England, it is only appropriate that he has been appointed to officiate in the place of Mr. S. R. Das.

It must not be supposed that the highest law offices in Bengal have gone to the Indians out of any preconceived policy on the part of the Local or the Imperial Governments for the Indianisation of the services in this country. It is a well-known fact that the Indian Members of the Calcutta Bar, commencing with Lord Sinha and his contemporaries, worked their position up as leaders of the Calcutta Bar by sheer merit. The Calcutta Bar had long before that been a reserve for the European Members of the English Bar. When they were replaced by Lord Sinha and his Indian colleagues, the Advocate-Generalship was first offered to Lord Sinha as a special favour. It is worthy of note that the late Mr. W. C. Bonnerjee, a man of towering ability and personality, an acknowledged leader of the Calcutta Bar, who for many years was the Standing Counsel, was never appointed by the Government even to officiate as Advocate-General of Bengal.

When Lord Sinha became Law Member a fresh effort was made by the Government of India to revert to the old tradition that this prize appointment of the Calcutta Bar should go to a European. No European of the requisite qualification and standing being available locally, Mr. Kenrick, a devil of an English Solicitor-General was brought out. He was no doubt well-versed in English law but he felt somewhat like a fish out of water in dealing with cases which involved questions of land tenure or of the personal laws, usages and customs of the people of this country. A lawyer, however eminent, who has not practised in the Indian Law Courts, also feels somewhat out of his element in dealing with the codified law of the country.

The Government of India were loath to attribute his short-comings to such causes and perhaps thought that an unhappy selection was made. On the termination of his office, Government decided to make a further experiment rather than give it to a qualified Indian. Mr. Gibbons was then brought out. He was a good speaker, a man of very amiable qualities and equally well-versed in English law but he too experienced the same difficulties in doing justice to himself and the responsible duties of his office and for identical reasons. As Mr. Gibbons' term of office is about to expire, the Government of India is now convinced that the nomination of an Advocate-General of Bengal direct from the Bar in England is neither fair to the Member of the English Bar so appointed nor to the Members of the Calcutta Bar or to the interest of the Government or the people of this country. In Madras, the position of the Advocate-General has been held for a long time past by the Vakil-Advocates of the High Court. In Calcutta after Lord Sinha, this is the second occasion on which an Indian Member of the Calcutta Bar has been appointed to officiate as the Advocate-General of Bengal. Mr. S. R. Das is a very sound lawyer and also an able advocate and we are quite sure that he will be made permanent in the office.

PRODUCTION OF DOCUMENTS IN COURT.

(By MR. KHETTRA NATH SINGH, MUNSIF,
RANCHI.)

(Continued from p. cxxxviii.)

The meaning of the "first hearing" as used in the new Code has been interpreted by Greaves, J., in *Taran v. Raj Chandra*, 50 Ind. Cas. 296. His Lordship observes that those words mean the date when for the first time the case is called on for hearing and is really gone into. It is ruled by their Lordships of the Privy Council in 45 Cal. 878 at p. 889 that r. 1 does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage and that in the case before their Lordships, the books had been filed presumably in another Court and when produced on a particular date (*i.e.*, 27th June) they were accordingly ordered to be placed with the records. I think that what the Hon'ble Mr. Justice Greaves meant to say was that the meaning of the first hearing of a suit has to be ascertained with reference to the context,

viz., for the hearing of that particular matter which is specified in the order of the Court and that it may be interpreted differently according to the context. In sec. 34 of the 1882 Code (corresponding to Or. I, r. 13), the words "first hearing" occurred and these words were not interpreted literally by the Hon'ble Chief Justice in 14 All. 524 at p. 526, but held to mean the "earliest opportunity." It is interesting to observe that the latter words have not been substituted in the corresponding provisions of the new Code, *i.e.*, Or. I, r. 13. Hence the words "first hearing" were never construed too literally. The following observations of the Hon'ble Acting C. J. (Sir Jwala Prasad) at page 655 of 6 Pat. L. J. 650 indicate why the ambiguous word "hearing" has not been defined in the Code:—

"... it is obvious that it is used in the different rules with a view to state the different purposes for which a date for hearing of the suit is fixed. Now in Or. IX, r. 1 read with r. 3, it would appear that after the institution of the suit when the summons is issued upon the Defendant calling upon them to appear upon a particular date, that date is the first hearing of the suit, and if the parties fail to appear when the suit is called on for hearing on that date the Plaintiff's suit is dismissed for default. Various steps have to be taken by the parties in a suit in order that it may be ready for final hearing, which means the examination of witnesses, the tendering of documents, and the hearing of arguments. At the intermediate stage in order to enable or compel the parties to take necessary steps in the prosecution of the case, the Court may fix date for some particular action to be taken. Those dates are dates for the hearing of that particular matter which is specified in the order of the Court." Hence it appears that the first hearing of the suit as contained in Or. XIII, r. 1 cannot be moulded into an artificial definition. But stripped of all context, those words (according to Ainslie, J., mentioned above) are clearly defined by Or. XIV, r. 1 (5) and the parties must be ready with documentary evidence on the day the written statements are filed and issues framed. This is the ordinary rule but the Plaintiff is not expected to know the defence of the Defendant until issues are framed and hence the Court allows further time to produce documentary evidence primarily by the Plaintiff and as a matter of practice, by the Defendant also, whose duty was to have been ready with documentary evidence on the day

the issues were framed. That the Court has power to order the parties to file documents on a particular day appears from the concluding line of Or. XIII, r. 1 (1) which was added for the first time in the 1882 Code and reproduced in the above rule. Hence the practice of the Mofussil Courts to give a precise date solely for the production of documentary evidence on a date subsequent to the framing of the issues, is not repugnant to the provisions of the Civil Procedure Code, though not expressly sanctioned by it.

That the mandatory provisions of Or. XIII, r. 1 are subject to the discretion of the Court, appears, of course, from r. 2, and it is commonplace to say that this discretion does not mean the mere caprice of the Judge but is one which should be judicially exercised. As it has been repeatedly pointed out, the main object of this rule is to prevent parties from manufacturing evidence pending the trial and not to shut out true, good and valuable evidence. If the evidence is of the latter character, the Court should always receive such evidence, provided the opponent is not taken by surprise and further opportunity is given to the latter to rebut the same; otherwise, Courts would degenerate into mere instruments of discipline instead of being what they are intended to be, tribunals for determining matters in controversy between the parties.

(Concluded.)

Correspondence.

DRAFTING OF LAWS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
DEAR SIR,

Mr. K. J. Rustomji's letter, *re*, "Drafting of Laws" appearing in Issue No. 35 of your valuable journal is very interesting, but, I am afraid, when all the facts and circumstances of the case are considered, (I say this with all deference to Harrison, J., of the Lahore High Court and Mr. Rustomji), the view set forth in the above letter is not perhaps correct and for the following reasons:—

Before the amendment by Act XXVI (I. C.) of 1920, the entries in the second column relating to the articles in question stood as follows:—

Art. 175	. . . . .	Six months.
„ 176	. . . . .	Do.
„ 177	. . . . .	Do.
„ 178	. . . . .	Do.
„ 179	. . . . .	Do.

By the amendment above referred to, it was directed that "in Arts. 176, 178 and 179 for the word 'Ditto' in the second column, the words 'ninety days,' 'six months' and 'ninety days,' respectively, shall be substituted."

The entries would consequently now appear as follows:—

Art. 175	Six months.
" 176	Ninety days.
" 177	Do.
" 178	Six months.
" 179	Ninety days.

Now Mr. Rustomji seems to think that since "Ditto" of Art. 177, as it originally stood, meant six months and was not mentioned in the amending Act, it must be deemed to stand even now for what it stood for then, *viz.*, "Six months."

That this is not a reasonable view is evident from two reasons:—

(1) It must be conceded that the word "Ditto" has and can have no independent meaning of its own, and what significance it can have may be only by reference to the immediately previous entry. It simply means "the same as the immediately previous entry," whatever that immediately previous entry may be. As the list stands at present the immediately previous entry is "Ninety days" and I do not think it will be permissible to skip that one and refer the "Ditto" of Art. 177 to the "Six months" of Art. 175.

(2) Then, again if the "Ditto" of Art. 177 means "Six months," the same argument must hold good of the "Ditto" of Art. 178. Why, then, is this "Ditto" of Art. 178 distinctly amended into "Six months," while the "Ditto" of Art. 177 is left untouched? If it had been the intention of the Legislature to keep the entries of Arts. 177 and 178 at "Six months," nothing could have been easier (and more reasonable to expect) than amending the "Ditto" of Art. 177 into "Six months" and leaving the "Ditto" of Art. 178 unaffected, thus making the latter refer to the entry against Art. 177.

I believe the view of the amendment "as understood by every body (including the Hon'ble Member in charge of the bill)" is the correct view.

Yours truly,
BIMALACHARAN DEB.
Vakil.

KIDDERPORE,
CALCUTTA,
25th July 1922.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION. Before C. C. GHOSH and CUMMING, JJ. CRIMINAL REFERENCE No. 56 of 1922. KING-EMPEROR v. AMRITA *alias* TINCOWRIE DHOA, Accused. The 21st July 1922.

Cr. P. C., sec. 401—Presumption of accused's mental derangement although no such plea taken in the Lower Court—Matter brought to notice of Local Government.

The deceased child, Pulin, and Jiten his cousin were taken by Swarnamani their grand-aunt to stay in her daughter's house for Dolejatra festival. When they were coming back they were accompanied by her daughter Jadoomoni and Pulin Chandra Halidar. In the way the boys went ahead of the women. Suddenly the accused Tincowrie jumped out of the garden and tried to snatch away the bundle of clothes that Jiten was carrying. Jiten cried out and ran away. Tincowrie held Pulin by the legs and dashed his head 2 or 3 times on the ground and ran away. The child died instantaneously. Swarnamani immediately gave chase; the accused jumped into a tank close by and was caught by Swarna by throwing her Sari round the neck of the accused. The Sessions Judge of 24-Perganas disagreeing with the unanimous verdict of the jury referred the case to the High Court.

It was held that although there was no plea of insanity taken in the Lower Court, having regard to the extraordinary circumstances of the case, the presumption arises that he must have been suffering from very serious derangement of brain.

He was sentenced to transportation for life. It was directed that this should be, under sec. 401, Cr. P. C., brought to the notice of the Local Government who will decide if he should be kept under observation.

Mr. J. W. Orr appeared on behalf of the Crown in support of the rule.

Mr. Amulya Chandra Sen appeared on behalf of the Accused.

S. C. C.

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REPORTS (See Index.)

American Chief Justice Taft's speech at a Banquet by the English Bench and Bar.

Chief Justice Taft of the United States was given a banquet by the English Bench and Bar in the historic hall of the Middle Temple on Wednesday, the 5th of July last. There was a brilliant gathering. The speeches delivered by the Lord Chancellor of England and the Attorney-General were complimentary and there was nothing in them which deserves any special notice. But the reply of the American Chief Justice is both instructive and interesting. He freely acknowledged how America was indebted to England for her institutions which breathed of freedom, liberty and justice but at the same time emphasised how they had developed in America on quite independent lines since the separation. He had come to England on a self-imposed mission to see for himself how the speed of justice could be accelerated in his own country without deteriorating its quality. There are suggestions in the speech which the executive, the judiciary as also the lawyers in this country will do well to ponder over and adopt as guiding principles in the administration of the law and the development of the constitution.

Chief Justice Taft said :—

"From his earliest boyhood he had venerated the British Bench and the British Bar. His father was on the Bench, and believed in the English law reports (laughter)—and he used him in his library at home to gather the citations. Therefore he became, even before he knew any principles of law, familiar with British law reports and judgments. But never in the wildest imagination of an ambitious boy did he conceive of standing where he did that night and receiving from the Great English Bench and the English

Bar such a welcome. Nowhere else in the world was a gathering like that possible. That was the shrine of English justice which had done so much in the civilization of the world. He spoke of what he knew, for he was engaged for years helping to discharge the 'white man's burden.' He was in the far Orient, and he knew how much Great Britain had contributed to the civilization of the world in the uplifting of its backward people by teaching them that under the aegis of their Empire there was such a thing as justice between man and man which was blind, a justice which had no regard to Government policy and was regardless of favour or other ulterior consequences."

We are always ready to acknowledge our indebtedness to Britain for introducing in this country a better system of administration of justice, ideas of liberty, freedom and equality in the eyes of law and in respect of civic rights, as also a wider outlook of knowledge but we deny that the gain has been one-sided only. The West is much richer to-day materially, morally and spiritually because of its prolonged contact with the East. The idea that the Orient is a "white man's burden" is, however, a myth. It is in self-interest that the West has exploited the East for centuries and is continuing to do so even to-day. It is this organised economic and political exploitation of the East by the West that has cast a "burden" on the Orient under which she is groaning for relief. The unrest in the East is but an expression of this feeling. Many of the institutions such as the law Courts and the machinery of Government with their avowed merit are much too costly for the poor people of the East. Then again the equal justice between man and man regardless of Government policy or favour about which the Chief Justice and ex-President of the United States is so very keen, exists in the Indian Empire as a matter of theory to which little regard is paid when there is any political struggle between the people and the executive for securing greater political freedom or racial equality by the former. If what Chief Justice Taft says has any reference to the existing state of things in India, it is yet

far from true. If it is put forward as an ideal, we would say, that both the Government and the people ought to make an earnest effort to work up to it. Chief Justice Taft when speaking of the Orient was evidently referring to the Philippines which he visited for conferring self-government on the Philipinos.

The next portion of Chief Justice Taft's speech proceeds on firmer grounds and will prove instructive to the people of this country and dispel much unreasoned prejudice against the valued British institutions which have contributed so much to the constitutional rights and liberties of the American people and the development of democratic form of Government throughout the civilized world. The Chief Justice said :—

"In America they had inherited that ideal and a confidence that could be realized. They had inherited the Common Law and its spirit. The old maxim *caveat emptor* illustrated that special quality of the Common Law and indicated its spirit. It meant that every Englishman and every American who was adult and in his right mind, must stand on his own foot and look out for himself. It was that spirit of independence in the law which made men fit for self-government. That was the reason why they had succeeded so marvellously in being the greatest Colonial Empire in the modern world. What was it that characterised British and American guarantees of liberty? What was it that characterised the rights they had derived from Magna Charta, from the Petition of Rights, from the Habeas Corpus Act, the Bill of Rights and the Act of Settlement? Was it glowing eloquence and declarations in favour of individual liberty and freedom? Not a bit of it. It was the provision of the machinery by which a man might defend himself before the Courts of his country. Those declarations of rights were adjective law; they were not substantive law. They illustrated the practical character of Anglo-Saxon Government, and explained how it was that in a thousand years they had hammered out individual liberty and free government and why under the same tutelage, and following the same course, Americans were joint heirs of it. In England they had no written constitution and it might be said that in adopting one, America had departed from their great example. But they had given to America in her colonial days a written Charter under which the Government was conducted and embedded in that Charter was the doctrine of *ultra vires* from which they had developed the theory of their constitution and their Courts."

Then the learned speaker explained how this doctrine of *ultra vires* served as a constitutional check against the local and the supreme legislatures exceeding their powers. The incident out of which this constitutional safe-guard against the legislature encroaching upon the fundamental rights of the subject was evolved, is very interesting indeed. When America was a British colony, the Connecticut legislature by passing a law had sought to deprive one Mr. Winslow of a landed estate which he

had inherited as heir. Winslow proposed to move the Privy Council and have the law declared *ultra vires* on the ground of its being contrary to the fundamental laws of the land. The local legislature thereupon put him into prison. But he escaped, moved the Privy Council and had the law declared *ultra vires* and the local legislature obeyed. Thus originated the constitutional check which the superior Courts in America still exercise over the local and supreme legislatures. But the jurisdiction of the American Courts in this respect is subject to strict limitations, the chief of which is that the Courts have no power to adjudicate on the laws as such. There must be a concrete case of rights affected by the law in question in which the validity of the law itself may be tested. Mr. Taft says that one of the great advantages of this system is that it has gone to promote self-restraint amongst the people as they have got accustomed to recognise that the state Courts are there to obviate local prejudice and guard against sectional interest. The law Courts in England and America have played a great part in the development of constitutional Government in both countries. We cannot see eye to eye with a school of politicians in India who would not fight against the improper use and application of some of the more arbitrary laws through the law Courts or bring pressure to bear on the legislature for their repeal. In all contests between the people and the executive, the legislature and the law Courts have in all countries and at all times vindicated public rights. The notorious Star Chamber has in course of time been transformed into the Privy Council. It is all through the love of liberty, freedom and justice amongst members of the legal profession that such bloodless battles have been won. Mr. Taft concluded his speech by paying a glowing tribute to the services rendered by American Barristers to their mother-land, "Lawyers were subject to great criticisms. . . Between 1770 and 1775 there were 150 men who entered the Inns of Court on this side from the Colonies, and out of them came the galaxy of lawyers who gave America the Declaration of Independence and Constitution and the whole Government system (cheers). Therefore it was well to be proud of their profession. When some Jack Cade said 'we would hang all the lawyers' they could say: 'well, if we are banged you will have to get more lawyers to fill our places.'"

Reviews.

THE LAW AND PRACTICE OF INCOME TAX with commentary. By A. V. Viswanath Sastri, B.A., B.L., High Court Vakil, Madras. Price Rs. 6. Commercial Press, Madras.

It was early part of this year that a consolidating Act was passed by the Indian Legislature repealing earlier legislations relating to Income Tax and consolidating some of the more recent legislation and modifying the same on some of the approved principles of the English law on the subject and departing from them in certain respects, having regard to the personal laws that obtain amongst the Hindus and Mahomedans in this country. This Act also repealed the Super-Tax Act of 1920 but embodies practically all its provisions therein. The Act does not fix the rate at which income tax and super-tax are to be charged but leaves it to the Indian Legislature to fix it according to the financial requirements of the year. It was thus after the budget provision for the year 1922-23 was passed by the legislature that this Act came into operation. It is therefore very commendable that this elaborate commentary on the Act has been compiled and published within the space of three months. The annotations of the sections are both systematic and exhaustive. Quite a lot of valuable information is given with regard to the practice and procedure followed by the Income Tax Department of Government. The principle on which taxations and rates are levied on individual profits as also of trading concerns and companies are explained and supported by English and Indian decisions. The *Calcutta Turf Club case* and other more recent decisions have been incorporated in appropriate places. Exemptions that may be claimed under the Act are similarly treated. The expression "agricultural incomes" is one of the very knotty points and at the very outset of the Act, we find that the author has spared no pains to disentangle its intricacies. Below each section a synopsis of its chief elements are given and each is taken by turn and elaborately dealt with. We feel no hesitation in saying that the work will be found of great help not only by lawyers and businessmen but also by revenue officers.

THE LAW OF SANCTION TO PROSECUTE. By Sripati Roy, Bar-at-Law. Price Rs. 7.

This is the fourth edition of Mr. Roy's well-known book. The book has been thoroughly

revised and some parts have been rearranged. The book will be found up-to-date in every respect and we have no doubt will be well-received by the profession.

Correspondences.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

I beg to send the following few lines to be inserted in your much-esteemed Weekly Notes.

The decision of the Hon'ble Mr. Justice Greaves *In the goods of Jnanendra Nath Ray*, 26 C. W. N. 799, brings into prominence some anomaly in the Hindu law as it stands now owing to the policy of the Government not to interfere, in the matter of that, with the religion of the Hindus on the one hand and the apathy of the community concerned to reform its religion or the religious rites with the advance of society on the other. One broad fact in the decision referred to stands out clear and prominent, viz., that persons who do not profess the Hindu religion are nevertheless Hindus. The humour of it is apparent to the student of the Hindu law. Now the decision of the Hon'ble Judge is unexceptionable as we find in the Civil Marriage Act itself, though it is not referred to in the judgment, that the parties must not be related to each other in any degree of consanguinity or affinity which would according to *any law to which either of them is subject*, render a marriage between them illegal [Act No. III of 1872, sec. 2 (4)]. This clearly shows that the Civil Marriage Act was enacted not for the "Brahmos" but for the Hindus who do not profess the Hindu religion in certain respects. Now, how long will this state of things continue?

By the by, the ruling will open a new chapter in the Hindu law. Because, if it is not overruled, it will not be necessary to move the Legislature to pass an enactment for legalizing inter-caste marriage amongst the Hindus. The Special Marriage Act will enable the Hindus to contract such a marriage without losing the status of a Hindu.

I remain,

Sir,

Yours truly,

LALIT MOHAN INDRA,

Pleader.

KRISHNAGAR.

DISTRICT NADIA,

The 15th July 1922.

A POINT OF STAMP LAW.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

Is an instrument both insufficiently and improperly stamped admissible in evidence and how?

This question sometimes presents itself and it is not always easy to find a satisfactory answer.

Sec. 37 of the Stamp Act is obviously of no application as it contemplates only the cases of instruments bearing a stamp of sufficient amount though of improper description.

Can such an instrument be dealt with under sec. 35 of the Stamp Act? To do so, we must regard it as insufficiently stamped or unstamped. If the instrument is regarded as insufficiently stamped and the deficit duty (plus, of course, the penalty) be realised, no duty could, by parity of reasoning, be then realised in cases coming under sec. 37 of the Act. If duty paid in stamps of an improper description constitute a part-payment of duty under sec. 35 of the Act duty so paid ought to be regarded as a full payment under sec. 37 of the Act in cases coming under the purview of that section. The existence of sec. 37 in the Act therefore precludes the extension of the words "insufficiently stamped" in proviso (a) of sec. 35 so as to include cases of instruments both insufficiently and improperly stamped.

To regard such an instrument as unstamped would, I suppose, be putting a forced construction on the sections, inasmuch as the same instrument might then have to be regarded as unstamped for the purposes of one section and stamped for the purposes of another. An instrument, for example, coming within the purview of sec. 37 would, when and if dealt with under sec. 35 of the Act, have to be regarded as unstamped altogether. Was this the intention of the Legislature?

If it is not regarded as unstamped and if the case of an instrument both insufficiently and improperly stamped be held to be outside the scope of sec. 35 altogether, what other section is applicable? Or, is it a *casus omisus*?

ENQUIRER.

DHUBRI,
29th July 1922.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL - APPELLATE JURISDICTION. * Before RICHARDSON and SUHRAWARDY, JJ. S. A. No. 947 of 1920. RAJA BHUPENDRA NARAYAN SINHA BAHADUR, Plaintiff-Appellant v. MIDNAPUR ZEMINDARY CO., LTD. and others, Defendants-Respondents. The 1st June 1922.

Cess—Payable under Act IX of 1880 (B. C.), sec. 41—Cess if Rajaswa.

The Plaintiff sued the Defendant Company for arrears of road-cess for the period of 1322-25 B. S. The Company held a *putni taluk* under the Plaintiff. The Zeminder was entitled to Rs. 80-6-3 per annum under the Cess Act but he claimed a further sum of Rs. 15-6-3 per annum on the basis of a *kabuliyat*. This further sum was claimed because the Zeminder was liable to pay to the Government Rs. 95-9-6 and he contended that by the terms of the *putni kabuliyat* the *putnidar* was bound to pay to the Zeminder the whole of the amount and not a part only. The main question was the correct interpretation of the terms of the *kabuliyat* executed 13 years before the passing of the Cess Act—whether any demand on the Zemindery for any new amount on account of "राजस्व" (which would be payable according to the terms of the *kabuliyat*) could be interpreted to include the cess under sec. 41 of Act IX of 1880. There was also the question whether the conduct of the parties should be looked into in construing the *kabuliyat*.

Held—That the conduct of the parties could be looked into in case of any ambiguity in the terms of the document. In this case the terms being reasonably clear evidence regarding the conduct of the parties was not admissible; that राजस्व meant revenue payable to sovereign authority and as such included cess and that the meaning of the word राजस्व could be brought within the provision of sec. 41 of Act IX of 1880.

Babus Mahendra Nath Roy and Pramatho Nath Banerji for the Appellant.

Mr. N. Sen Gupta (with Babus Khitish Chandra Chakravarty and Amulya Ch. Sen) for the Respondents.

S. C. C. Appeal allowed with costs.

THE Calcutta Weekly Notes.

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[No. 38]

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REPORTS (See Index.)

Misnomer of Jurymen, if vitiates trial.

The Criminal Court of Appeal in England in dismissing Bottomley's appeal from the conviction and exemplary sentence passed against him has decided that when a jurymen was summoned under a wrong name that did not vitiate the trial. The facts were that one Symonds, who carried on business under a different name, was summoned under his business name and served in the jury under this pseudonym. Coleridge and Roche, JJ., held that as he was the man intended to be summoned, the irregularity was immaterial and did not vitiate the trial. They relied on the dictum of Darling, J., in *Wakefield's case* (13 Cr. App. R. 56) that "mere irregularity in calling together the jury, mere misnomer of a jurymen, is not sufficient to avoid the proceedings." This has been the law in England from the time of James I (21 Jac. I., Ch. 13, sec. 2). The *English Law Journal* points out, have gone far beyond this and on more than one occasion, even when the jurymen was not the man meant to be returned, have refused to declare the trial void. In *Hill v. Gates* (12 East. 229) a son answered to the father's name and served on the jury. Lord Ellenborough observed that if this sort of mistake were allowed to interfere with verdicts, the Court "might have to set aside half the verdicts in the Assizes." In a note to the same case, *The case of a Jurymen*, one Robert Curry answered to the name of Joseph Curry, and the

Court refused to interfere. In the appeal of *Reg v. Mellor* (7 Cox. C. C., 154), heard by fourteen Judges, the Judges decided by a majority of eight to six that where one Thornby and Thorne were both on the panel, and Thorne was called, but Thornby (who was not called) answered and sat as the jury, there was no ground for interference by the Court.

Findings of fact and findings of law.

The last issue of the *English Law Journal* has a very outspoken article on the practice which is very common in every Court of Appeal of refusing to interfere with the decision of the Court below, when they are disinclined to do so, on the simple ground that it is based on findings of fact. But the same Appellate Court would at other times allow an appeal when it does not agree with the decision of the Court below and would upset the findings of fact alleging that the findings are not supported by any or sufficient evidence or are based on misconception of particular words or expressions of a statute, which are regarded as questions of law. Or, in other words, when it pleases the Appellate Court it rejects an appeal on the ground of its involving findings of fact and at other times it allows an appeal upsetting findings of fact interpreting them as questions of law. The occasions for the remarks of our contemporary are furnished by the decision of a Division Court of the Kings Bench, in the case of *Tendering Guardians v. Woolrich Guardians*.

This is what our contemporary says :—

The distinction between questions of fact and questions of law is not easy to define. One generally finds, however, that, when the High Court considers the decision of a bench of Magistrates wrong, they will, without much difficulty come to the conclusion that the question they wrongly decided was a question of law. If, on the other hand, they agree with the decision below, they usually say the question was one of fact which cannot be interfered with by the High Court. The meaning of the words used in statutes is a question of law, and the question where there was any evidence justifying the decision of the inferior Court is also one of law. These two propositions afford an easy loophole of

escape from the contention that the High Court has no 'jurisdiction' to interfere with Magistrate's decisions when that contention is regarded by the High Court as inconvenient in any particular case. For, even if there is no doubt about the meaning of a statute, and the Magistrates have, in the opinion of the High Court, wrongly brought or refused to bring a particular case within that statute, the High Court will say that there was no evidence upon which the Magistrates could have based their decision. The practical result, therefore, seems to be that, if you persuade the High Court that the Magistrates have gone very wrong, you will win, whether your point is strictly one of law or fact, but that, if you can only introduce an element of doubt about the matter, you will lose.

The writer concludes by saying with reference to the case in question that if the High Court agreed with the findings of the Magistrates, they would say they had no jurisdiction to interfere. If they were of contrary opinion, they would either say that the Magistrate had misconstrued the statutory words or that there was no evidence justifying the finding. This method of reasoning, the writer observes, seems to savour very much of a "quibble" and it would be much better if the High Court were given a free hand to deal with all appeals from Magistrates, where any point of real substance is raised, without having to resort to these dubious devices.

Correspondence.

DRAFTING OF LAWS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
DEAR SIR;

I have read with interest Mr. Deb's letter in your issue of 31st ult. *re* the period of limitation under Art. 177 of the Indian Limitation Act, 1908, and I hasten to reply to it as the matter is of considerable practical importance. I cannot do better than give a few extracts from the judgment of Harrison, J., of the Lahore High Court.

"The Act of 1920 amends and alters the period of limitation under three Arts. 176, 178 and 179 making the first 90 days, the second 6 months and the third 90 days respectively. In the Unrepealed General Acts of the Governor-General in Council (1909 Ed.) the Schedule of Act is so printed that Arts. 175 to 179 all appear on the same page. In the second column opposite Art. 175 the words are 'six months.' Opposite following four articles the word 'ditto' is printed and it is contended, and this has doubtless been the view taken hitherto, that because the word 'ditto' occurs opposite Art. 177 the meaning of the Amending Act is that the limitation for

Art. 176 being changed to 90 days it follows as a matter of course, the word 'ditto' being left unaltered, that the period for Art. 177 is automatically changed to three months also. On the other side, reliance is placed on the Act as printed in the Government of India Gazette in 1908 in which against Art. 177 the words 'six months' occur. I find that the official text of the Act of 1908, which has to be read with the Amending Act, is that contained in the Government of India Gazette of that year and inasmuch as the words 'six months' there occur opposite Art. 177 and there has been no amendment of Art. 177 in the subsequent Amending Act the period of limitation under this article is still six months and remains unaltered."

It cannot be denied (and I have said so elsewhere) that the Amending Act of 1920 is very unhappily worded and has actually misled everybody, including, I am afraid, the Legislative Department of the Government of India and the Hon'ble Member who was in charge of the Bill.

Yours truly,
K. J. RUSTOMJI.

LAHORE,
2nd August 1922.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WALMSLEY and B. B. GHOSE, JJ. APPEAL FROM APPELLATE DECREE No. 1645 of 1920. JITENDRA NATH ROY, Defendant-Appellant *v.* ASHUTOSH GOSWAMI and others, Plaintiffs-Respondents. The 20th July 1922.

Abatement of rent—Ouster by title paramount—Diara proceeding.

The facts material to this report are these:—

The Plaintiffs sued the Defendant for recovery of arrears of rent due from 1320 to Aswin *kist* of 1323 B. S., in respect of a *kaimi jama* at an annual rent of Rs. 583-10-2½ p., with cesses and damages, total claim being laid at Rs. 2,776-8-10½ p. The defence, *inter alia*, was that 30.65 acres of land of Moujas Barankula and Ganganandapur appertaining to his tenancy were wrongly resumed by the Government in a *Diara* proceeding, and Rs. 80 was assessed as rent on those lands, and the Gov-

ernment by issuing certificates realised the said rent from the Defendant and as such the Defendant was entitled to an abatement of rent to the extent of Rs. 80. The Subordinate Judge of Faridpur held that 30.65 acres of land comprised in the Defendant's tenancy were wrongly resumed by the Government in a *Diara* proceeding in 1912 inasmuch as those lands formed the bed of the river Barasia at the time of the Revenue Survey and were permanently settled land included in the tenancy of the Defendant; that notices of the *Diara* proceedings were served upon the Plaintiffs, but they did not raise objection to the resumption proceedings, and as a result thereof were getting *malikana* from the Government at the rate of 5 per cent. of the rent assessed upon the *Diara* land, that a separate *taluk* had been created by the Government regarding these *Diara* lands, that the Plaintiffs did not appear to take settlement, and the Government was realising Rs. 80 as rent from the Defendant under the Public Demands Recovery Act. The Subordinate Judge allowed the Defendant abatement of rent to the extent of Rs. 80 for which the Defendant had been made liable to the Government, and so gave a decree to the Plaintiffs for Rs. 1,932 and odd.

On appeal by the Plaintiffs, the Additional District Judge agreeing with the findings of the Court of first instance held that both the Plaintiffs and the Defendant seemed to be under the impression at the time of the *Diara* proceedings that there was nothing wrong in it and they made no objection to the proceedings. The Judge, however, was of opinion that the Plaintiffs were absentee landlords and the Defendant knew the lands better than the Plaintiffs, and it was the duty of the Defendant to maintain his right and possession against trespassers, and that the Defendant should bring a suit to set aside the *Diara* proceeding. In this view the Judge disallowed the Defendant's claim for abatement of rent, and decreed the Plaintiffs' suit for Rs. 2,758 and odd, and directed the Plaintiffs to refund the amount received by them as *malikana* to the Defendant. Against this decision the Defendant preferred this second appeal.

It was contended for the Appellant that the proceedings under which he had been compelled to pay the sum of Rs. 80 per year as rent to the Government for occupying the resumed lands amounted to an ouster by a title paramount from a portion of the tenancy and that

he was entitled to abatement of rent to the extent of the sum of Rs. 80.

The Respondents contended that the act of the Government was a mere trespass and as the landlord was not bound to protect the tenant from unlawful eviction by a trespasser the Defendant was not entitled to any abatement of rent as against the Plaintiffs:

Held—That under the circumstances of the case when the Plaintiffs themselves had admitted the superior title of the Government to take possession of the lands by proceedings taken under the law, the Plaintiffs could not now turn round and say that it was a mere act of trespass on the part of the Government to dispossess the Defendant from his tenure and that the Defendant was entitled to no relief; in substance it was an ouster of the Defendant from a portion of the tenancy under the Plaintiffs by a title paramount and the Defendant was therefore entitled to an abatement of rent.

The appeal was allowed; the decree of the District Judge was set aside, and that of the Munsif restored with proportionate costs in that Court as recorded by that Court. The Defendant was allowed full costs in this Court as well as in the lower Appellate Court.

Babu Surendra Chandra Sen (with him *Babu Hemendra Chandra Sen*) for the Appellant.

Babu Sib Chandra Palit (with him *Babu Mani Lal Bhattacharjee*) and *Babu Upendra Narain Bagchi* for the Respondents.

H. C. S. *Appeal allowed with costs.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CHOTZNER, J.J. APPEAL FROM APPELLATE DECREE NO. 2771 OF 1920. KUNJA MOHAN CHAKRAVARTI and another, Defendants-Appellants *v.* MANINDRA CHANDRA ROY CHOWDHRY and another, Plaintiffs-Respondents. The 20th July 1922.

Suit for rent—Cause of action—Jurisdiction of Court to entertain suit—Sale—Civil Procedure Code (Act V of 1908), sec. 20—Bengal Tenancy Act (VIII of 1885), sec. 144—Rent suit may be instituted in Court where Defendant resides—Sale to be held in Court where tenure or holding is situate.

The facts material to this report are as follows:—

The Plaintiffs sued the Defendants in the Munsif's Court at Kurigram to recover *khas* possession and *udsilat* upon the establishment

of Plaintiffs' right by auction purchase of the Defendants' *kayemi* holding. The defence, *inter alia*, was that the Plaintiffs were not entitled to *khas* possession and *wasilat*, that they could get only the annual rent due to their share, and that the Plaintiffs fraudulently obtained a decree for rent in a different Court, and that the said decree and the sale thereunder were not binding on the Defendants.

The Court of first instance, found the following facts:—Plaintiffs obtained an *ex parte* rent decree in the Munsif's Court at Rangpur against the Defendants, and purchased the land in suit in execution of their rent decree for a nominal price of rupee one only. The land in suit is within the jurisdiction of Kuri-gram Court. The decretal amount was realised by attachment of the Defendants' moveables.

Upon these findings the Munsif held that though the Defendants might reside in Rangpur town but as the land in suit was outside the jurisdiction of the Rangpur Court, the Munsif at Rangpur had no jurisdiction to try the rent suit, and as such the decree and the sale of the Defendants' holding in that rent suit were void for want of jurisdiction, and that the Plaintiffs acquired no title by his alleged purchase. The Munsif, therefore, disallowed the prayer for *khas* possession and *wasilat*, and gave the Plaintiffs a decree for rent for the period in suit.

On appeal by the Plaintiffs, the District Judge of Rangpur reversed the decision of the Munsif and gave the Plaintiffs a decree for *khas* possession. He held that the defect of jurisdiction in the previous rent suit could not be gone into in the present suit.

Against this decision of the District Judge, the Defendants preferred this second appeal.

Their Lordships allowed the appeal, and held that the Court at Rangpur had jurisdiction to try the rent suit, but had no jurisdiction to bring the property into sale and the sale was without jurisdiction.

Their Lordships held as follows:—

Cls. (a) and (b) of sec. 20 of the Civil Procedure Code allow a landlord to institute a suit for rent where the tenant resides. This must be limited to cases where the landlord seeks a decree for money. Where, however, the landlord seeks a decree for rent as also ejectment under sec. 66, Bengal Tenancy Act, the suit must be treated as one for recovery of immoveable property within the meaning of cl. (4) of sec. 16 of the

Civil Procedure Code and can consequently be instituted in the Court within the local limits of whose jurisdiction the property is situate.

The suit was consequently brought in a Court which had jurisdiction and the decree cannot be successfully impeached on that ground.

6 Bom. H. C. Reports 29, referred to.

Sec. 144, Bengal Tenancy Act merely defines the expression "cause of action" as applied to suits between landlord and tenant for the purposes of the Code of Civil Procedure.

I. L. R. 30 Cal. 453 : s. c. 7 C. W. N. 402, referred to.

The Court at Rangpur had jurisdiction over the person of the Defendant but not over the property. That Court, therefore, was not competent to bring the property into sale, and the sale was held without jurisdiction and was a nullity.

I. L. R. 38 Cal. 639 at p. 668, referred to.

It is an elementary principle of law that if a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities and may not only be set aside at any time by the Court in which they are rendered but may be declared void by every Court in which they are presented. These principles apply not only to original Courts but also to Courts of appeal.

Jurisdiction cannot be conferred upon a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction.

13 I. A. 134 : s. c. I. L. R. 9 All. 191; I. L. R. 11 Mad. 26; I. L. R. 36 Cal. 193, referred to.

When the Judge has no inherent jurisdiction over the subject-matter of a suit the parties cannot by their mutual consent convert it into a proper judicial process although they may constitute the Judge their arbitrator, and be bound by his decision on the merits when these are submitted to him.

The appeal was allowed. The decree of the District Judge was set aside and that of the Court of first instance restored with costs both in the High Court and the lower Appellate Court.

Babus Surendra Chandra Sen and Dwijen-dra Krishna Dutt for the Appellants.

Babu Mohini Mohan Chakravarti for the Respondents.

H. C. S. *Appeal allowed with costs.*

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Preventive powers of Magistrates.

The sections in Part IV of the Code of Criminal Procedure which are intended to prevent the commission of offences confer some very drastic powers on the Magistrates and on the police. This is necessary for the preservation of law and order but at the same time these sections should be applied with great care and caution inasmuch as they contemplate in many cases the restraining of a person in exercise of his lawful rights. Taking for example sec. 144 of the Code this section empowers a Magistrate to interfere with the performance of a lawful act when the consequence of such an act is in his opinion likely to produce the results mentioned in the section. It is the first duty of a Magistrate to secure to every person the enjoyment of his rights under the law and by measures of precaution to deter those who seek to invade the rights of others, but if he apprehends that the lawful exercise of a right may lead to civil tumult and he doubts whether he has a sufficient force available to repress such tumult or to render it innocuous, regard for the public welfare allows him temporarily to interdict the exercise of such rights.

Reported cases show that Magistrates are inclined to make use of a summary and final order under sec. 144 when the matter should have been properly dealt with under sec. 133 or 145. The matter has been very carefully and elaborately discussed in a recent judgment of the Patna High Court (*Sheobalak Singh v. Kamaruddin*, 1922 Pat. 241). As observed by Jwala Prasad, J., when in the course of a proceeding under sec. 144 of the Code of Criminal Procedure, the Magistrate finds that there is a

bonâ fide dispute as to possession of a land likely to cause a breach of the peace he is bound immediately to take action under sec. 145. Sec. 145 is imperative and enjoins upon the Magistrate to start an enquiry under that section whenever he is satisfied from the police report, or otherwise, such as an enquiry under sec. 144, that a dispute exists regarding some land or water. The Magistrate cannot refuse in such a case to initiate a proceeding under sec. 145 for in that case he will be refusing to exercise jurisdiction vested in him by law and shirking the duty enjoined upon him by the section. In such a case the retention of the order under sec. 144 must lead to an irreparable injury to one of the parties who must be in actual possession of the land by his possession being interfered with, though for a short period, for "one of the objects of" sec. 144 is to prevent an obstruction, annoyance or injury to any person lawfully employed. This will obviously be an improper use of sec. 144 and an abuse of the process of the Court. This is undoubtedly the correct view of the matter although cases like *Karoolal Sogarlal*, 9 C. W. N. 864 and *Shoraj Roy*, 10 C. W. N. 288, strike a discordant note. In the coming revision of the Code the Legislature ought to settle the point so that one section may not be applied where there is another in the statute especially adapted to the occasion.

This is a matter of much greater importance than appears on the face of it. It is the valued right of a citizen in every civilised country that his person and property are not to be interfered with in any other way except in strict conformity to the law of the land and it is such unlawful interference that more than anything creates dissatisfaction in the minds of people whose natural bent of mind is to be loyal and law abiding. So far as the Magistracy is concerned it is their bounden duty to avoid abuse of the process of law which does not in any sense mean that they are not to enforce the law strictly when occasion requires but all that is wanted is that they should enforce it in strict compliance with the intentions of the statute.

LAND ACQUISITION BILL.

In view of the Bill which has been introduced in the Legislative Assembly by Mr. Ramayya Pantalu with the object of effecting a change in sec. 6 of the present Land Acquisition Act and other co-related matters, and of the opinion entertained by many that the whole Act requires careful revision in the light of the experience which has been gained since the passing of the present Act in 1894, two questions stand out very prominently for consideration by the public and the Government. The first question is whether there should be any enquiry by a statutory body of competent persons who may decide as to the suitability of any land proposed to be acquired under a declaration for its acquisition, for the purpose mentioned therein, as also, as to the reality or otherwise of the declared purpose which may have been put forward as a public purpose, for which the land is proposed to be acquired. The second question is whether if about the time of acquisitions or shortly thereafter, the declared purpose fails of its achievement, what action the Government should take with regard to the land which has either been actually acquired or is about to be acquired at public expense.

As regards the first point the Bill introduced by Mr. Ramayya Pantalu aims principally at an adequate enquiry as to the existence of any public necessity for the acquisition of the land before Government finally decides upon its acquisition. In the statement of objects and reasons in connection with his Bill, Mr. Ramayya stated that his object was to provide against "unlawful or vexatious acquisition of land." He stated that in his part of the country, *i.e.*, in the Madras Presidency, this evil was felt as a real grievance, and while introducing his Bill, he specifically mentioned, in course of his speech, cases where private individuals who wanted to have channels cut through another's land for purposes of irrigating their own fields, applied to the Public Works Department for acquisition of lands for purposes of such channels, and the Public Works Department often took it upon themselves to acquire lands for such purposes under the Land Acquisition Act, for the sake of private individuals and at their expense. Mr. Ramayya added that this had been done in a large number of cases without the aggrieved party having any remedy whatever against a wrong application of the Act made at this

initial stage of the proceedings. He has mentioned cases also where land has been acquired by Government for building temples and mosques on them, Government contributing only one anna towards the cost of acquisition, the main cost being borne by the party interested in the acquisition.

Speaking of other parts of India cases may also be cited where the Land Acquisition Act has been made use of for an alleged purpose which cannot be deemed to be public; or at any rate which makes its utility for the public at large, extremely doubtful. In the course of the debate in the Legislative Assembly in 1894 in respect of the Bill which ultimately became Act I of 1894, the question was raised whether the expression "public purpose" to be found in sec. 6 and some other sections of the Act, should be defined or not. But, while the necessity for a definition of the expression was felt by some of the Executive Officers of Government engaged in the practical working of the Act, the Council, upon a consideration of the whole question, came to the conclusion that it would be better not to attempt any definition at all in that connection. At the instance, however, of the Governments of Bombay, the Punjab and Burma, a provision was made by the Select Committee, which is now sec. 3, cl. (f) of the Act, which enables the Local Government to apply the Act for the acquisition of village-sites in those parts of the country where it may be customary for the State to provide village-sites. At the same time, it was stated in the Select Committee's Report in question, (dated 23rd March 1893)—"the Committee are in concert with the great majority of the authorities consulted, in declining to recommend any further extension of the Act."

It will perhaps, be interesting to recall the fact, that the Hon'ble Mr. Lee-Warner moved in course of the debate an amendment to the said provision in the Bill, [now sec. 3, cl. (f) of the Act], the object of which was to give a free hand to the Government to acquire land for village-sites whenever they considered it necessary to do so, irrespective of the existence of any custom or practice for the Government to provide such village-sites, as required by the said section. But there was a strong body of opinion including that of the highest authority in the realm, against the grant of such a discretionary power to the Executive Officers of Government on the ground, (to quote the Hon'ble Mr. Lee-Warner's words), of "the general principle of the policy of limiting the

power of the executive to interfere with private property, and of the consideration that the sacred rights of property would be invaded, in the case put, for the benefit of a small community." This opinion of the majority prevailed by a narrow margin, and Mr. Lee-Warner's amendment was lost. It will thus appear how the Legislature, which passed the present Act intended to protect private rights of property in cases even where it was necessary to acquire land for public purposes. The general intention of the framers of the law seems to have failed, however, of its purpose in the long run, in the absence of anything in the Act itself controlling the expression "public purpose," in the practical application of the Act by Executive Officers of Government. The result of the course taken, has been sufficiently indicated by Mr. Ramayya in his speech referred to above while introducing his Bill in the Legislative Assembly during its last session.

From my own experience I can refer to at least one case which happens to be of a far more serious nature than those referred to by Mr. Ramayya, where the Executive Officer concerned has, in his zeal to save money, attempted to acquire land under colour of the Act, knowing perfectly well that the public purpose alleged in the declaration under sec. 6 was not the real purpose, but barter of land on terms favourable to Government.

Yet, in the face of all these happenings, sec. 6 of the Land Acquisition Act places a practically insuperable bar against an aggrieved party going behind the declaration and agitating any question of importance in his favour by enacting that "the said declaration shall be conclusive evidence, that the land is needed for a public purpose or for a company, as the case may be."

No further words are necessary to demonstrate the extreme necessity of having some provision in the Act whereby, in a proper case, the reality or otherwise of a public purpose set forth in the declaration, or as to the necessity for acquiring any particular piece of land for such a purpose, can be tested by an extraneous authority. As has been pointed out by Mr. Ramayya, the grievance that exists in this connection is very real indeed.

JOGENDRANATH MUKHERJEE,
M.A., B.L., M.L.A.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

25-7-22. Canadian appeals have monopolised the time of the Judicial Committee for several weeks now and it is doubtful whether the remainder of the Indian list will be cleared off this term.

On the 13th and 14th July the hearing was resumed and concluded of an appeal from Bombay, *Nur Mohamed Pceerbhoy v. Dinshaw Hormasji Motiwalla*.

Judgment has not yet been delivered.

The suit was for specific performance of a sale of land, the agreement for sale having been made pending attachment of the property in suit which was eventually sold at an execution sale.

The Appellant who was the purchaser was represented by *Sir George Lowndes, K. C.* and *Mr. E. B. Raikes*, the Respondent who was the Plaintiff was represented by *Messrs. L. DeGruyther, K. C.* and *Kenworthy Brown*.

14-7-22. A Board composed of LORDS PHILLIMORE and CARSON, SIR JOHN EDGE, MR. AMIER ALI and MR. JUSTICE DUFF dismissed the appeal from Bengal of *Bholanath Sen v. Balaram Das*.

The suit out of which the appeal arose was a mortgage suit instituted by the Respondent. The Subordinate Judge passed a decree for the debt alone, the High Court on appeal made a decree for sale in the ordinary form.

Mr. E. B. Raikes for the Appellant.

Mr. Kenworthy Brown for the Respondent.

25-7-22. Before VISCOUNT CAVE, LORD PHILLIMORE and the LORD JUSTICE CLERK. *Mr. W. H. Upjohn, K. C.*, *Sir George Lowndes, K. C.* and *Mr. B. Dubé* obtained special leave to appeal to the Privy Council from the decree of the High Court at Allahabad in the suit of *Narsingh Rao & Rani Kishori*.

Leave had been refused by the High Court on the ground that the Indian Courts had found concurrently on questions of fact.

For the Petitioner it was urged that further evidence became available after the decree of the High Court had been passed, and that the burden of proof had been wrongly placed.

In the suit of *Lingangowda Dod v. Basangowda Bistangowda Patil*, *Mr. Kenworthy Brown* obtained special leave to appeal from a decree of the High Court at Bombay. He contended that the High Court had erred in directing that the Appellant was out of time in apply-

inor for a certificate and indicated an important question of law with regard to "*res judicata*" on which the decision of the Privy Council was invited.

26-7-1922.

G. D. M.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WALMSLEY and B. B. GHOSH, JJ. SECOND APPEAL No. 2492 OF 1919. MADAN TALUKDAR, Plaintiff-Appellant *v.* HACHAN FAKIR and others*, Defendants-Respondents. The 10th July 1922.

Custom of oral sale—How far valid.

The Plaintiff sued for recovery of possession of two plots of lands against the Defendants Hachan and others, alleging that one of these plots belonged to him and the other he got by purchase and release from its former owner Mamtaz and that he had been dispossessed by Hachan from both these lands. Hachan's defence was that Madan orally contracted with the Respondent to sell to him that plot which belonged to Madan and that with regard to the other plot Hachan was a *Bargadar* under Sarat Fakir to whom it was orally sold by Mamtaz's guardian when Mamtaz was a minor. Hachan brought a separate suit for specific performance of contract for sale of the first plot and contended that there was not only an oral contract but there was an actual sale for Rs. 138 by custom, by delivery of possession. The first Court dismissed Hachan's suit and decreed the suit of Madan holding that there was not an oral sale. The Appellate Court reversed the decision of the first Court with regard to both the plots excepting a portion of Plot No. 979 holding that there was nothing improbable in an oral sale by custom in a particular locality.

Babu Momatha Nath Mukerji (with him *Babu Panna Lall Chatterji*) for the Appellant contended that there could not be an oral sale under the Transfer of Property Act.

Babu Satis Chandra Chowdhuri for the Respondents urged that with regard to Hachan's suit for specific performance of contract it was not a question of oral sale but of oral contract of sale and a suit for specific performance of such a contract was maintainable (*Walsh v. Lansdale*); as regards the other plot the Ap-

pellant was bound by the facts found by the first Appellate Court.

Held—That as a custom cannot override any statute law, the order of the Appellate Court as to Madan's suit must be set aside. But Hachan should be at liberty to enforce the decree of the Lower Appellate Court regarding his suit for specific performance.

S. C. C.

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and RANKIN, JJ. R. A. No. 161 OF 1922. KALIKRISHNA ROY and another, Appellants *v.* MAKHAN LAL CHATTERJEE, Respondent. The 10th August 1922.

Probate and Administration Act (V of 1881), secs. 19, 21 and 22—A legatee if entitled to letters of administration in preference to heirs of the testator.

One Bidhumukhi Debi executed a Will whereby she gave, out of her *stridhan* property, Rs. 1,400 to several persons including Rs. 50 to one Makhanlal, the priest of her husband's family, and directed that the executor after paying the said amount (Rs. 1,400) and paying expenses for her *Sradh*, would spend the balance for the worship of the idol Sree Sree Iswar Lakshmi Janardan established by the ancestors of her husband. The executor was further directed to conduct the *sheba* of the idol by preserving the property dedicated for such *sheba*. The executor did not take any probate and after his death a cousin of the testatrix took out letters of administration. On his death Makhanlal, the priest, applied for letters of administration, which were granted to him. Subsequently the grandsons of the brother of the testatrix applied for the revocation of the grant on the ground that they were heirs of the testatrix and had no notice of the proceedings. It was decided by the Lower Court that Makhan was the residuary legatee and as such would have preference over the heirs.

Held—That Makhan was not entitled to get letters of administration. Makhan was simply a priest. He could not be a *shebait* nor a residuary legatee. The fact that he got Rs. 50 under the Will did not raise his status higher and he ought not to have been granted letters of administration.

Babus Rupendra Kumar Mitra and *Amulya Chandra Sen* for the Appellants.

Babus Probodh Kumar Das and *Panchanan Ghosal* for the Respondent.

J. N. R.

Appeal allowed with costs.

PRIVY COUNCIL.

[APPEALS FROM MADRAS.]

LORD ATKINSON.

LORD CARSON.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1921,

Heard, 9, 12, 13, 15 &

16, December.

1922,

Judgment,

7, March.

K. RAMALINGA
ANNAVI and anr.,
Appellants,
v.
NARAYANA AN-
NAVI and ors.,
Respondents.

Hindu Law—Mitakshara—Partition, clear expression of intention to separate, if effects—After notice expressing intention to separate, joint family if liable for marriage expenses of members—Father's right to give money to daughter.

Under the Hindu law, it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family.

Under the law of the Mitakshara, an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severally has the effect of creating a division of the interest which until then he had held in jointness. No obligation therefore lay on the joint family to provide for the expenses of the marriage of some of the Plaintiffs which took place after the latter had given to their co-parceners a notice clearly expressing such an intention but before a decree for partition was made in their suit in the Court of first instance.

The father has undoubtedly the power under the Hindu law of making, within reasonable limits, gifts of movable property to a daughter and in one case the Judicial Committee upheld the gift of a small share of immovable property on the ground that it was not shown to be unreasonable.

These were two consolidated appeals from a decree of the High Court of Judicature at Madras, dated the 19th April 1915, which varied a decree of the Subordinate Judge of Tinnevely, dated the 23rd December 1912, in a partition suit instituted by Narayana Annavi and his sons Ramakrishna Subramanian and Krishnan.

The pedigree of the family and the facts leading up to the institution of the suit are fully set out in the judgment of the Board.

The three brothers, Muthuswami, Ramalinga and Lakshmivaraha constituted a joint Hindu family. Their uncle Raman adopted Ramalinga's son Ananthanarayana and the latter's widow Ramal Ammal adopted Ramakrishna (Defendant No. 2). This adoption was declared invalid by the Court in a suit instituted in 1863 but Ramal continued in possession of her husband's property until her death in 1891.

The Plaintiffs in the present suit were Lakshmivaraha's son and grandsons, and they claimed a half share in all the suit properties, which consisted of, outstanding debts of the family money-lending business, and of houses, lands, and jewels.

The present Appellants K. Ramalinga Annavi and Dharmi Ammal in their written statements stated that the joint family had been broken up in 1895 when a complete partition was effected of everything partitionable, some few immoveables which were incapable of severance being merely retained under joint management. They further contended that although Ramakrishna's adoption had been declared invalid he had nevertheless become incapacitated from sharing equally with the Appellant (Defendant No. 1).

The Subordinate Judge held that there was no complete partition in 1895 although the money-lending business was

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then wound up and the outstandings divided and he decided that Ramakrishna was entitled to his share on partition. Properties acquired jointly after 1895 were divisible in proportion to the purchase money paid.

The High Court affirmed the finding that the family remained joint after 1895 but held that the Plaintiffs were entitled to a half share in the after acquired properties while the first Defendant took a fourth and the remaining fourth went to the second Defendant and his son.

Sir George Lowndes, K. C. and Mr. B. Dubé for the Appellants (Defendants Nos. 1 and 6).—In 1895 there was a partition—whether wholly or in part, it was at any rate an actual partition of all choses in action and an agreement was made to hold the immoveables in severalty. The adoption of Ramakrishna is accepted by the family as invalid so far as his rights of property are concerned but ceremonially they treat him as a member of the family and this accounts for the somewhat unusual form of partition.

As regards Defendant No. 2 the fact that property was sold to him in 1888 by his father is inconsistent with his being a member of the joint family. Moreover he resided separately. Both lower Courts have held that there was an actual separation in 1895 as to three choses in action and the Subordinate Judge has found in my favour in three other instances. He referred to *Parbati Devi v. Naunihal Singh* (3).

Messrs. A. M. Dunne, K. C. and Kenworthy Brown for Narayana Annavi and his two sons.—Ex. IX on which the Appellant relies is by no means conclusive.

The fact that although it was divided up the property came back again to the

joint family shows that it was always intended to be joint.

Both Courts have found that the family status was never changed.

If a member of a joint family acquires property while the family is joint there is a presumption that the acquisition was for the joint family. That presumption has never been rebutted.

Parbati Devi v. Naunihal Singh (3) is not in point. Ex. IX was not signed by me and there was no agreement here.

There may have been a partial division of the property in 1895 but that does not amount to a partition as the corporate character of the family was never dissolved.

Munni Ram Awasthy v. Sheo Churn Awasthy (4).

Reference was also made to *Hyder Hossain v. Mahomed Hossain* (5), *Eshenchunder Singh v. Shamachurn Bhatto* (6) and *Baboo Doorga Pershad v. Mussumat Kundun Koowar* (7).

Messrs. DeGruyther, K. C. and Narasimham for Ramakrishna Annavi (Defendant No. 2).—Contended that he was entitled to share in the joint family property as a member of the joint family since his adoption had been held to be invalid. There was no power to make the gift to Ponnu.

Bachho Hurkissondas v. Mankorebai (8).

Mr. R. M. Parikh for Ponnu Ammal was not called upon.

(3) L. R. 36 I. A. 71 : s. c. I. L. R. 31 All. 112; 13 C. W. N. 983 (1909).

(4) 11 M. I. A. 114, 116 : 7 W. R. P. C. 29 (1846).

(5) 14 M. I. A. 401, 404 : 17 W. R. 185 (1872).

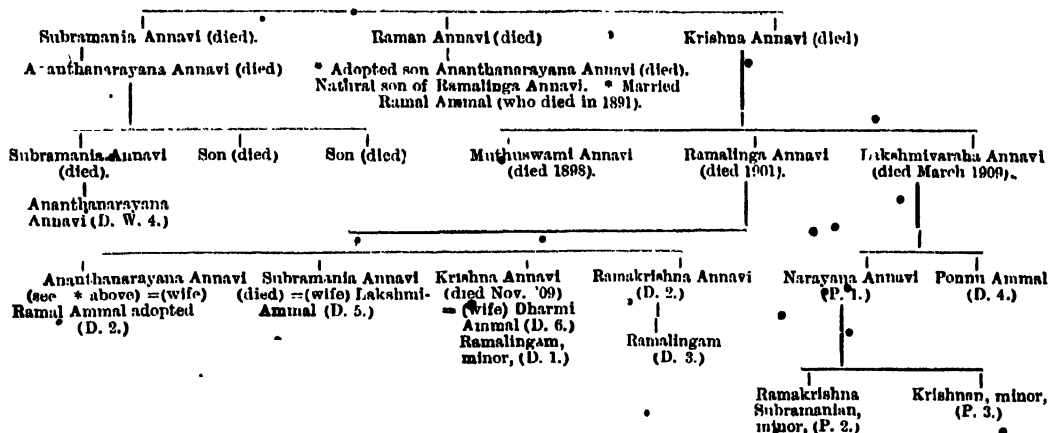
(6) 11 M. I. A. 724 : 6 W. R. P. C. 57 (1866).

(7) L. R. 1 I. A. 55; 13 B. L. R. 235; 21 W. R. 214 (1873).

(8) L. R. 34 I. A. 107 : s. c. I. L. R. 31 Bom. 373; 11 C. W. N. 769 (1907).

(3) L. R. 36 I. A. 71 : s. c. I. L. R. 31 All. 112; 13 C. W. N. 983 (1909).

the 31st January 1910, for a decree for partition in respect of certain moveable and immoveable properties together with outstandings of a money-lending business on the allegation that they and the Defendants Nos. 1, 2 and 3 formed members of a joint undivided Mitakshara family. The following pedigree will explain the relative positions of the parties and their respective contentions.



Ramal, however, remained in possession of Anantha's property until her death in 1891, when it was divided among his reversionary heirs of whom the three sons of Krishna Annavi No. 1 were the principal sharers. Subramania, the fourth son of Ramalinga, appears to have died without issue, leaving Lakshmi Ammal, his widow, who is Defendant No. 5. Rama Krishna's adoption having been set aside, he remained a member of his branch of the family and is now constituted as Defendant No. 2 in the present action for partition. His son, Ramalinga No. 2, is joined with him as Defendant No. 3. Defendant No. 1 is the son of Krishna No. 2, the second son of the first Ramalinga who died in 1909. The Defendant No. 1 was an infant at the time of suit and appears by his mother, Defendant No. 6. Muthuswami died in 1898, and Lakshmivaraha in 1909. The Plaintiff

K. RAMALINGA ANNAVI v. NARAYANA ANNAVI.*

No. 1 is the son of Lakshmi-varaha and the other two Plaintiffs are Lakshmi-varaha's grandsons. Besides the immoveable property the family held from the time of Krishna No. 1 and what they acquired after Ramal Ammal's death, they appear to have carried on a profitable money-lending business. Ramalinga had assigned to Rama Krishna (Defendant No. 2) certain properties, apparently owing to the failure of his adoption. Lakshmi-varaha had also in his life-time made certain gifts to his daughter, Ponnu Ammal, Defendant No. 4, the first Plaintiff's sister. The Plaintiffs' case is that these assignments and gifts are ineffective and inoperative, and they seek to have the properties assigned to Defendant No. 2 as above and the monies given to Defendant No. 4 by Lakshmi-varaha, included in the partition. And they allege that they are entitled to a half share; and the Defendant No. 1 and the Defendant No. 2 (with his son) to the other half. The Plaintiffs also claim that in the partition a sum of Rs. 2,000 should be allotted to them out of the joint assets for the marriages of the second and third Plaintiffs. The Defendant No. 6 is the mother of the minor Defendant No. 1 and the widow of Krishna No. 2. She is made a party to the action, on the allegation that she has appropriated to her own use a large amount of joint family funds.

In 1895, which was the crucial period in the case, there were large outstandings due to the family in respect of the money-lending business which appears to have been mainly in the hands of Krishna, the father of Defendant No. 1, as he was a man of intelligence and knew something of law. The first Defendant alleges in his written statement that in that year there was a complete division among the three brothers, the sons of Krishna No. 1, of the family properties both moveable

and immoveable, including the outstandings. He accordingly maintained that the present suit for partition is unfounded. He also denied the right of the Defendant No. 2 to any share in the family properties. His case is set forth clearly in para. 14 of his written statement as follows:—

“About 16 or 17 years ago, during the life-time of Muthuswami Annavi, Lakshmi-varaha Annavi and Ramalinga Annavi mentioned in para. 4 of the plaint, they became divided. At that time, considering the facts that since the 2nd Defendant's adoption had been adjudged to be invalid, some provision should be made for him and that the said Muthuswami Annavi was unmarried and childless, and considering the welfare of the family, Rs. 5,000 was given to Muthuswami Annavi in lieu of his share and a sum of Rs. 20,000 was given to the 2nd Defendant out of the remaining outstandings only. And it was settled that the father of the 1st Plaintiff and the grandfather of the 1st Defendant should equally divide between themselves the rest of the outstandings as well as the immoveable properties and they gave effect to it even during their life-time.”

Defendant No. 2, in his written statement, alleges that in 1895 the money-lending business carried on by the joint family was wound up so far as it was a joint business, and the outstandings which belonged to the joint family were divided among the different members; but that the immoveable property was not divided, nor was there a disruption of the joint family. He claims that the properties which stood in his name prior to 1895 and what he himself has acquired since belong to him exclusively. Defendant No. 4 asserted that the gifts to her were valid and could not be questioned by the Plaintiffs.

Defendant No. 5, widow of Subramania, claimed that provision should be made for her maintenance in the partition proceedings.

Upon these contentions twenty-six

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issues were raised for trial in the first Court. For the purpose of the present judgment, however, they resolved themselves into four main questions: (1) Whether, as the Plaintiff alleges, the family continued joint until its severance on the institution of the suit, or as the High Court seem to hold on the decree of the Subordinate Judge directing partition; (2) whether, as the first Defendant alleges, there was a complete partition between all the members of the joint family in 1895; (3) whether the second Defendant was a member of the joint family and entitled to take a share on partition; and (4) whether the properties acquired after 1895, were held jointly, as the Plaintiffs allege, or whether they were acquired and held by the members according to specific shares in proportion to the contributions made by each towards their acquisition. To these main questions should be added the following subsidiary points for determination, viz: (1) Whether the Defendant No. 2 was entitled, as he alleges, to the properties which were held in his name before 1895 and those he personally acquired after that date; (2) whether the gifts by Lakshmivahara to Ponnu Ammal are valid; and (3) whether the Plaintiff Narayana was entitled to have certain sums allotted to him on partition for the marriage of his sons?

The Subordinate Judge, on the consideration of the oral and documentary evidence, decided against the Plaintiffs in respect of his allegation that the family continued absolutely joint in all respects until the present claim. As regards the first Defendant's contention, he held that there was no complete partition in 1895, and that the arrangement in that year related only to the winding up of the family money-lending business and to the division of the outstandings. He held that there was no disruption of the joint

status and that they continued undivided in respect of all the immoveable property, though the houses which each of the members occupied were allotted to the parties occupying the same. He held further that the Defendant No. 2 was entitled upon partition to his share in the joint property, and that the properties that had been held in his name prior to 1895, together with those he had acquired since, belonged to him. He held also that the properties which had been acquired after 1895 in individual names belonged to the particular person in whose name it was purchased; but that the properties which were acquired by the parties jointly were divisible in three parts in proportion to the purchase money paid by each, or where that was not indicated in proportion to the shares in the rents and issues enjoyed by each. With regard to the gifts to Ponnu Ammal by Lakshmivahara, he held them to be valid; and in respect of the claim of the Plaintiff No. 1 to have a sum of Rs. 1,000 set apart for each of his sons' marriage he held it to be untenable.

Respecting the properties in Schs. XI and XIII attached to the plaint, which the Plaintiffs had claimed as exclusively their own and in their possession, the trial Judge, towards the end of his judgment, said as follows:—

"As to the properties in plaint Schedules XI and XIII, there is no evidence on Plaintiffs' side to show that they belong to the family. Defendants 1 and 2 do not claim any right in them. If the Plaintiffs are in possession of these properties exclusively, they may enjoy them. They will be excluded from the decree."

These properties were, accordingly, not included in the decree for partition made in the first Court.

The Plaintiffs appealed to the High Court from this decision, and the Defendant No. 1 preferred a cross-appeal and one

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of the contentions he raised had reference to the properties in Schs. XI and XIII. It was alleged on his behalf that the Subordinate Judge was in error in holding that the first Defendant did not claim any right to them; and it was further urged that if, by any omission on the part of his guardian, no claim in fact had been preferred, he should not be prejudiced thereby. This contention was supported by an affidavit. Their Lordships will deal with this point later, after they have considered the conclusions at which the learned Judges of the High Court arrived on the main facts of the case. They have held that the claim of the Plaintiffs that the family remained joint in every respect after 1895 was well founded; and that in 1895 only three specific items of the outstandings were divided among the parties jointly entitled to the same. They held further, differing from the first Court, that although the properties acquired after 1895 in individual names belonged exclusively to the person in whose name they stood, those that had been acquired in joint names were divisible in three shares as acquisitions by members of a joint family. In other words, the learned Judges held that in these after-acquired properties, as in the ancestral immoveable properties left undivided in 1895, the Plaintiffs were entitled to a half share, the first Defendant to a one-fourth, and the second Defendant, with his son (Defendant No. 3), to the remaining one-fourth. They affirmed the decree of the Subordinate Judge in respect of the claim of Defendant No. 2 and upheld the validity of the gifts to Ponnu Ammal. Regarding the claim of the Plaintiffs to have separate provision made for the marriages of the second and third Plaintiffs, they disallowed it in respect of the Plaintiff No. 3, but allowed it in respect of Plaintiff No. 2, as he was

married after the institution of the suit but before the decree of the Subordinate Judge; they being of opinion that the severance of the joint status did not take place until the decree for partition by the first Court.

With regard to the properties in Schs. XI and XIII, they held, apparently on the affidavit filed by Defendant No. 1, as follows:—

“The Plaintiffs claim a share of the properties in Schedules XI and XIII. The Defendants did not claim in the Lower Court any interest in them. On the ground that the Plaintiffs did not prove them to be properties belonging to the family, the suit was dismissed. We think the properties should be divided between the parties. The decree will be modified accordingly.”

They accordingly modified the decree of the Subordinate Judge and further directed that:—

“According to our findings, the houses and *Manaikats*, which belonged to the family in 1895-1896 will be divided as family properties. All parties bear their own costs.”

The High Court made their decree on the 29th April 1915. On the 28th March 1917, there was an application on behalf of the Plaintiffs for review of the judgment. And on the fresh arguments advanced on the review, the learned Judges amplified and enlarged their findings in favour of the Plaintiffs and made a decree in accordance with these findings. From this decree these two appeals have been preferred to His Majesty in Council, one on behalf of the first Defendant, the other on behalf of the Plaintiffs and both appeals, as already stated, have been consolidated.

The concurrent finding of the Courts in Indja that the family continued joint after the division of the outstandings in 1895 and remained in joint possession and enjoyment of the ancestral immoveable properties is not impugned now; but the decision of the High Court in respect of

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the transaction of 1895 is strongly challenged on behalf of the first Defendant, the son of Krishna No. 2.. It is contended on his behalf that the conclusion of the High Court that in 1895, only three specific items of the outstandings were divided is against the weight of evidence and inconsistent with the general scheme of the transaction. And it is urged that the reasoning on which the division is supported in respect of the three items, applies with equal force to all the other items. It is also urged that the view the Judges of the High Court took in respect of the shares of the parties in the acquisitions made after 1895 is not in accordance with the evidence and does not proceed on right inferences from the facts.

On the Plaintiffs' side it has been contended that as it is found that the family continued to be joint, the division of the respective interest of the parties in certain outstandings in 1895 could not affect the business as a whole : or discharge the properties acquired with the monies so divided from the obligations that attached to them as acquisitions of the joint family. The Plaintiffs have also re-urged their objections to the gifts to Ponnul Ammal and pressed their claim to a provision for the marriages of the Plaintiffs Nos. 2 and 3.

It seems to their Lordships that in the debate before the Board the difference between a complete "partition" in a joint undivided Hindu family and a partial division of interest in respect of some specific property or part of the joint properties has been overlooked. This distinction has been clearly pointed out in the judgment of Lord Westbury in the well-known case of *Appovier v. Rama Subba Aijyan* (1), and, although the

passage has often been cited, it is desirable to reproduce it here.

"But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away, from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

It will thus be seen that, under the Hindu law, it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family.

Both the Courts in India held as a question of fact that whatever took place in 1895, did not create a disruption of the family status. The Subordinate Judge found upon the evidence in the case that the worship had remained joint. The parties undoubtedly lived in separate dwellings, but that circumstance is explained by the fact that the family had increased in number and the original building could not accommodate all. The Subordinate Judge also points out that there was no cesser of commensality, inasmuch as all the members of the family drew their provisions from one store-room or granary as stated in the evidence.

The sole question for determination thus resolves itself into an enquiry as to the character of the division which took place in 1895-1896. Was it a mere division of three items of outstandings, or did it relate to the whole money-lending business as a joint family business? The Defendant No. 1, in support of his allega-

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tion that there was a complete winding up of the family money-lending business and a complete division of the outstandings has rested his case on Ex. IX on the record, which is a list of outstandings due to the family at that time. That list covers 27 items and consists of 4 parts; Part 1 deals with the actual outstandings, the other three deal with the allotment of the shares to the three persons who were entitled to the monies at the time and among whom, after allotment of a large sum to Defendant No. 2, the outstandings were divided. It begins with the statement: "List of outstandings due to the sons of Krishna Annapi," and goes on to say, "particulars of the total amount belonging and due to Muthuswami, Ramalinga and Lakshmivaraha, sons of Krishna Annapi"; List 2 shows the sums set apart for a certain worship; List 3 gives the particulars of the monies allotted to Muthuswami, the eldest brother; List 4 contains the particulars regarding the sum of Rs. 32,039 allotted to the share of Ramalinga; List 5 relates to the allotment of Rs. 32,038 to the share of Lakshmivaraha; and List 6 shows the particulars relating to the Rs. 21,359 allotted to Defendant No. 2. With regard to the method of division the Subordinate Judge states as follows:—

"The 1st Defendant's case is that, as Muthuswami Annapi was unmarried, he took Rs. 5,073 out of this amount and that in lieu of the 2nd Defendant's share in the family immoveable properties, he was given Rs. 21,359-14-10. A sum of Rs. 1,000 was reserved for payment as Stridhanam (to whom, it is not stated) and a sum of Rs. 524 was set apart for charity. A sum of Rs. 500 was reserved for payment of family debts. The balance, Rs. 64,000 and odd, was divided almost equally between Lakshmivaraha Annapi and Ramalinga Annapi. The total amount of outstandings set apart to Ramalinga Annapi consisting of 37 items as stated in sheet 6 of Ex. IX came to Rs. 32,039-

5-9. The total of outstandings set apart to Lakshmivaraha Annapi consisting of 26 items as stated in the 7th sheet of Ex. IX came to Rs. 32,038-10-11. The particulars of the outstandings set apart to the 2nd Defendant, Ramakrishna Annapi, are given in sheet 8 of Ex. IX. The particulars of the three items, amounting to Rs. 5,073, set apart to Muthuswami Annapi are given in the 5th sheet of Ex. IX. Ex. IX (a) purports to be the rough draft from which Ex. IX was copied."

Out of the amounts which were allotted to Ramalinga and Lakshmivaraha, the Subordinate Judge took the six principal items in order to consider the nature of the division and the circumstances connected with the subsequent application of the monies received in the transaction of 1895 by the individual members. His examination of the facts is so close and his method of treatment so clear and detailed that their Lordships feel themselves relieved of the necessity of discussing at length the mode in which the parties dealt with the different items; but a few remarks seem necessary to indicate the considerations which have weighed with their Lordships in the determination of these appeals. The largest amount shown in the list is a sum of Rs. 22,150, which was owing from a Mutt in the Tanjore District. The division of this sum was made in the following way: Rs. 8,700 were allotted to Ramalinga, Rs. 8,300 to Lakshmivaraha and Rs. 5,150 to the second Defendant. After stating these facts the Subordinate Judge proceeds to show how this money came into the hands of the persons, to whom the several sums were allotted and how these sums were applied. With regard to this amount of Rs. 22,000 the learned Judges of the High Court agree with the Subordinate Judge that the division was effective and the various sums allotted to the three parties was applied

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Position of Civil Service under responsible Government.

Mr. Lloyd George in advocating the cause of the Indian Civil Service overstepped the mark and made some observations which are inconsistent with the fundamental principles of responsible Government. Responsible Government means that the executive shall be responsible to the legislature. In the provinces in India under the "dyarchical" form of Government, the ministers are responsible to the legislature. The members of the Executive Council, though not individually or collectively directly responsible to the legislature, are also in a manner indirectly responsible. As the whole of the provincial budget is open to discussion by the Legislative Council and may be voted upon by the members, the legislature indirectly exercises control over the acts and measures of the members of the Executive Council. It is only by certification that the Governor can restore the grants so withheld. The executive head of the Government never likes to be at loggerheads with the legislature. If he does he is bound to come into conflict with the legislature, and in such conflicts, the legislature is bound ultimately to win. Dyarchy has been introduced in the provinces as a transitory measure. At the next stage of development the Executive Council is bound to go. What would then be the position of the Indian Civil Service in the Provinces? They will cease to be a part of the executive and they will be entirely replaced by ministers as has been the case in the Dominions.

If some of them occupy the position of secretaries, they are bound to be under the direction of the ministers. Others in less responsible positions are also bound to be subordinates of the ministers. So the members of the Civil Service with the development of

responsible Government in the provinces and later on, in the Central Government are bound to be reduced to the position of subordinate ministerial officers as they are in England and the Dominions. So Mr. Lloyd George's talk of their being the steel-frame on which the constitutional superstructure would rest is neither logical nor rational. It is mere figure of speech which we are not at all disposed to take very seriously. In no country has a structure of constitutional Government been built with such materials. Should the pushing Premier attempt any such experiment, the structure will go to pieces in no time through the pressure of public opinion in India. The Prime Minister is well-known to juggle in words and he does so sometimes to please the people of India and at other times the Indian Civil Service. But, we are sure, that neither take him very seriously. The O'Donnell circular is a much more serious and a reasonable document. The spirit of it, so far as we have been able to follow, is that as the provinces advance towards autonomy, they would prefer to organise provincial services for being self-contained and also for purposes of economy. Then there will be very little occasion for having All-India Services. So the Indian Civil Service is bound to die out in the natural course of events. Not all the eloquence of Mr. Lloyd George will be able to save it.

The present Prime Minister is a great time-server and he makes speeches to please those who can influence the colleagues of his Cabinet to bring pressure on him. In 1917 when the fate of the war was hanging in the balance, when London was in panic through frequent air-raids and the present imperialist members of the Cabinet were as conscious as every commoner in England that the war could not be won but for the help of India, Mr. Lloyd George and his colleagues were profuse in their promises for the grant of responsible Government to India. But after the war was won they have taken to quibbling over their promises and professions. Mr. Lloyd George has pursued exactly the same policy with regard to Turkey and the Moslem community

in India. The more sensible section of the intellectual classes in England do not put more faith in Mr. Lloyd George's policy than we do here. Persistence in it will only mean disaster to the Empire. Since Mr. Montagu's resignation, the influence of the Sydenham party has been paramount in the British Cabinet and that would account for the irresponsible talk that the Prime Minister indulged in on the occasion of the Civil Service debate in the House of Commons.

The recent article on "Indian Problems" by Coles Pasha, C.M.G., in the June number of the *Contemporary Review*, shows what men who have more intimate knowledge of the East think of the Prime Minister's Indian and Eastern policy. The learned writer, referring to Mr. Montagu's resignation, thinks that it has raised him in the estimation of the Moslem leaders in India and any change of his policy by Viscount Peel will be regarded with suspicion throughout India. Then he goes on to say :—

But no matter what India may think of Mr. Montagu, statesmen like Lord Sydenham, and other Imperialists cannot forgive him for the part he played in the introduction of the Indian Reform Act, which they maintain is largely, if not entirely, responsible for the existing unrest. On the other hand, there are many, claiming to know their India equally well, who hold that but for Mr. Montagu and his reforms, our position in India would be even more critical than it is at present. Again, there are not a few who are convinced that the mishandling of the Turkish Treaty has brought about all our troubles, not only in India but throughout the Mohamedan world.

The above fairly sums up the different shades of English public opinion regarding Indian problems. In the same article the learned writer says that it is the Prime Minister and not the Cabinet who is chiefly responsible for the Turkish Treaty and it is he and not Mr. Montagu who is responsible for Indian unrest. He says :—

Although the Cabinet must be held to be collectively responsible for the Turkish Treaty, it is the Prime Minister, hypnotized by Venzeloos, who took the leading part in drawing up the conditions, forcing his views, as we now learn, on both the French and Italian Governments. We may safely conclude, therefore, that as far as the Indian Moslems are concerned, it is Lloyd George and not Mr. Montagu who is responsible for the Indian unrest.

The learned writer views the situation in the right perspective, and although we are not

prepared to accept his suggestions, is the best means of doing away with the dual control at present exercised by the Indian Legislatures and the Indian Civil Service, yet there can be no question that with the growth of responsible Government in India, the duties of the Indian Civil Service will be, as he says, "clerical rather than governmental." The observations of this eminent writer will show how absurd is Mr. Lloyd George's steel-frame theory of the Indian Civil Service :—

In the not very distant future the duties of the Indian civilian will be clerical rather than governmental as much of the work now performed by the Civil Service will be in the hands of the elected politicians. It may possibly be necessary to create, as in England, a "superior" and "inferior" Civil Service, but in a poor country like India the cadre of the "superior" service should certainly not correspond with the cadre of the existing Indian bureaucracy, which was framed to attract highly educated Britishers to pass a long period of their lives in foreign and not too healthy surroundings. Rather than encourage Indians to enter the existing covenanted service it would be far better to create a new service with a cadre calculated to meet the new conditions; to this newly created service Indians only should be admitted. At the same time, recruiting for the covenanted service might be limited, and reserved exclusively for Britishers who may be required to fill gaps during the transition stage, and the young men joining should be given clearly to understand to what an extent the service has been modified and what the future has in store for them. Every encouragement should be given to men actually serving to complete their periods of service, as India now requires experienced men to teach and inspect rather than young men for executive duties. It will assist if certain districts were reserved exclusively for Britishers, rather than mix British and Native executive officers in every unit. By this means the younger men can still learn their work, whilst the senior men's services can be utilised as Inspectors in districts officered entirely by natives. The Government is apparently afraid to publish the names of the civilians who are asking to go and the Press deplors the fact that so few British students are now offering to compete. This is not surprising, as little has been done to encourage the older men to remain, and the young civilians going out to India may find themselves posted to a district with constantly increasing numbers of native executive officers as their sole companions for hours of recreation or sport during the rainy season. What is required is a well-thought-out scheme of service during the transition stage, a scheme which will give the British civilians much congenial occupation for many years to come, until in fact the old order has entirely passed away.

It is not for a moment contended that India of the future will be better governed than it has been by the Covenanted Civil Service of the past, but as we are pledged to follow the policy of Home

Rule, it seems to be idle now to argue that the Indians will in the long run be the sufferers. Let them find it out for themselves. At the same time it should be clearly demonstrated by both word and deed that the initiative rests with the British Government. We should refuse to be stampeded by Gandhis or allow the clock to be stopped by Die-hards who will not recognise that nations grow up as children and prefer to walk by themselves even if they occasionally fall.

His answer to the opponents of Indian Reforms in England on the ground that it has set up an oligarchy, is also very suggestive and interesting. He goes on to say :—

It is these Die-hards who are loudest in their condemnation of the Montagu Reform Act, which they maintain merely transfers our control to an oligarchy largely composed of Brahmins, and that in reality the masses are no nearer self-government than they were before Mr. Montagu went out of his way to stir up their peaceful slumbers. These gentlemen, however, fail to realise that governments cannot be anything else but oligarchies, sometimes composed of Liberals, sometimes of Conservatives, and probably in England in the near future, of Labour. The sole advantage which we in England possess is that there is always an alternative oligarchy ready at hand. When the "man in the street" gets fed up with the one he can by his vote select another, but an oligarchy of some sort he must accept, whether he likes it or not. Hitherto in India the native oligarchy has always been in opposition and has never had a chance of demonstrating its capacity to govern. In the future the trouble will be that, for some time at all events, there will be no opposition oligarchy to come to the assistance of the man in the mud-hut when he feels that the governing oligarchy is not giving him all that he is entitled to. Time and experience will remedy this, but it seems clear that until you have a native Government of some description you cannot expect a native opposition. The solution of the problem lies in creating a government oligarchy, but fostering at the same time an opposition oligarchy to keep the government oligarchy from abusing its powers. Moreover, until this opposition oligarchy is capable of taking care of the interests of the underdog, the powers of the government oligarchy must be restricted by the paramount Power. This Mr. Montagu endeavoured to do by creating the Dyarchy form of government—another way would have been by the reservation of power, taking a horizontal rather than a vertical form, and creating a nominated Chamber of Council to control the Lower House composed of elected members. This, in the opinion of the writer, would have been the better method, and it is interesting to note that, if we may judge from the reports in the Press, it is the method the Egyptian Commission revising their constitution is adopting. It is sincerely hoped that the Egyptian experiment will succeed, but fostering the opposition must not be lost sight of, even to the length of recalling Zaghlul Pasha (contrite, let us trust) to lead the opposition. Such

a precedent might prove of value to India when the followers of Gandhi drop the non-co-operation movement.

LAND ACQUISITION BILL.

(Continued from p. cliv)

The question therefore at once arises what should be the machinery for testing the matter? Mr. Ramayya's Bill has no doubt been adversely commented upon from different view points. It has been allowed, by the Government of Bengal, however, that there is no provision in the Act for checking an improper acquisition, and that they would like to have a definition of the expression "public purpose" if legislation was to proceed on the lines indicated by Mr. Ramayya in his Bill but, at the same time they have gone the length of saying that so far as they are aware, there is no real grievance in Bengal on this account. It is no wonder that the grievance should fail to attract the attention or notice of the superior officials of Government because sec. 6 of the Act stifles all scrutiny of the matter by any constituted extraneous authority, at the instance of the aggrieved party, and it is extremely unlikely that the subordinate officials who bring about such cases of improper acquisitions of land, should whether they consider their proceedings to be right or wrong, themselves go out of their way, and bring forward irregularities of their own creation to the notice of Government. As a rule, therefore, the illegality or impropriety of an acquisition, wherever it exists, lies buried in the forgotten pages of the office records.

Rules no doubt have been made for the guidance of executive officers of Government in the matter of acquisition of land for a public purpose, as in other matters, but it is unlikely that the rules themselves should lay down anything that is not in the body of the statute itself or should go to clear up doubts which may enshroud cases on the border line. The officers of Government entrusted with an undertaking, have also the inclination of their own minds to reckon with which tend to reduce uniformity of principle in the practical application of the Act.

It has been stated by an officer under the Bengal Government, just as it was said when the Bill of 1894 was under discussion that "the best test of a public purpose would be one which would justify the expenditure of public funds," and therefore a Local Government

would be the best judge in the matter. For one thing, is this not arguing in a circle? Rules and good intentions notwithstanding, experience tends to shew that unless there is some extraneous authority to test, in a suitable case, whether there has been an error or not in their application in practice, lapses are bound to occur with greater frequency, and once a precedent is created, it will tend to create fresh precedents, and the provisions of the Act, interpreted in this manner will, unless otherwise checked, go to undermine what has been described as the "sacred rights of property." Further, the executive officers having once launched upon an undertaking of doubtful public purpose, are not likely to retrace their steps, and stultify themselves, as it were, by so doing. One is thus able to see how the chances stand.

Suppose W, X, Y and Z are properties which are situate side by side. W is acquired for the purposes of Government in one branch of the administration which may be described by the letter A. Declarations are issued separately for the acquisition of properties X, Y and Z, on different dates, for purposes of another administration B. But further proceedings are thereafter suspended for some two or three years. During this period of suspension circumstances change, and property Z with other properties are given up and withdrawn for acquisition under the altered circumstances, under the new conditions. W is also no longer necessary for the purposes of administration B, but is retained by Government, along with X and Y. Some five or six years after the original declaration under sec. 6, suppose the Collector under the Land Acquisition Act proposes that in order to save payment in respect of the valuable structures and other things on property Y, let property Z be again acquired putting forth in the declaration that it is wanted for purposes of administration A, but in reality to make over X to the proprietor of Y at a valuation, in exchange for that part of Y on which there are valuable structures, etc., and induce administration B to give up X, for which administration it was declared to be under acquisition, and to take Z in place of X, though the administration B cannot put property Z to any use in the immediate future; and all this is to take place under private arrangement, in lieu of money compensation. By this means and under colour of the Land Acquisition Act, some lakhs of rupees are gained by Government. Will such a proceeding come under the expres-

sion "public purpose," under the Land Acquisition Act? All this seems strange, but truth is sometimes stranger than fiction.

JOGENDRANATH MUKHERJEE,

M.A., B.L., M.L.A.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

3-8-22. The Judicial Committee concluded the hearing to-day of the appeal from Lahore, *Khawaja Muhammed Hamid v. Mian Mahmud*, and their Lordships have now risen for the Long Vacation. The next sittings are expected to commence about October 17th.

The above appeal was argued before the Board for six days and raises questions of considerable interest with regard to the religious institution at Tannsa near Deva Ismail Khan. Muhammad Suleman came to Tannsa as a young man towards the close of the 18th century and was detained by the Pir of Mahor in Bhawalpur and lived as an ascetic and teacher until his death. His grandson Allah Baksh who was apparently a very business like as well as a saintly man, had a marble mosque erected at Tannsa, and a family tomb, and other costly buildings. These buildings and other property of considerable value had been acquired from offerings made by pilgrims and paddy from a trade and agricultural pursuit in which Allah Bukhsh interested himself. In September 1901 Allah Bukhsh died, having before his death ordained his sons Hafiz Mian Musa and Mian Mahmud. Disputes arose between these two as to the right of becoming Sajjada-Nashin and as to the partition of the property. The disputes were submitted to arbitration, but before they were finally settled Musa died, and disputes arose between his son, the Appellant and Mian Mahmud the 1st Respondent which ultimately resulted in the present suit. The main points in issue were as to the right to be Sajjada-Nashin, and whether the property in dispute had been dedicated as wakf or not.

Messrs. DeGruyther, K. C., Besant Petman and Dubé for the Appellants.

Sir G. Lowndes, K. C., Messrs. E. B. Raikes and A. Reshid for the Respondents.

Judgment was reserved.

G. D. M.

Sir John Woodroffe, Kt.

Mr. Justice Woodroffe's retirement from the Bench of the Calcutta High Court is not only an irreparable loss to the High Court but also to the country at large. He was not only an eminent Judge but also an Orientalist of no small merit. In the earlier days of the British rule when Englishmen came out to India, they had, in the then conditions of locomotion, to adopt India as their second home. Those amongst them who were of an intellectual turn of mind took to studying Oriental literature and the world is indebted to many of them for adding to its fund of knowledge, ideas and thought. Jones, Colebrooke and Wilson studied Sanskrit with the help of Brahmin Pandits on this side of India and the pioneer work that they did for popularising Sanskrit study amongst European scholars will never be forgotten. The name of Sir John Woodroffe also will go down to posterity as of one who has not lived in India in vain. To young Woodroffe when he came out to India, India was not an alien country. His father Mr. J. T. Woodroffe, who spent the best part of his life in this country, served in various capacities from a Small Cause Court Judge to that of the Advocate-General of Bengal. His ability as an advocate was next to that of none at the Calcutta Bar, where he amassed a large fortune. Young Woodroffe after completing his education at Oxford, got called to the English Bar and came out and joined the Calcutta Bar in 1889. He never felt himself out of his element in India. He was descended on his mother's side from a European family long settled in India. His uncle Mr. Hume, the public prosecutor, was a familiar figure to many of us. Mr. J. G. Woodroffe, naturally, needed no introduction when he joined the Calcutta Bar. However talented a junior may be, he does not get on at the Bar as a house on fire. He was from the very start a very industrious, earnest and determined sort of a young man. When he had no Court work one found him quietly sitting at a corner of the inner room of the Bar Library compiling his "Law of Evidence." Such an industrious and plodding young man was bound to make headway at the Bar. In 1904, when still a junior of much promise and quite young in years, he was offered and accepted a Judgeship. It was a very wise choice on his part. But for it he could not have acquired the literary reputation he has. He is the author of many legal works, amongst which, his commentaries on the Evidence Act and the Code of Civil Procedure,

and his treatise on the Law of Receivers and Injunction are best known. Those who knew him as a mere lawyer and a Judge, knew very little of him. It is only his friends who know that the artist, the philosopher, and to a certain extent, the spirit of the schoolman preponderated in him. For many years he made a special study of the Vedantas and the Tantras with the help of a Brahmin Pandit. He took special care to appreciate and interpret Hindu culture from its very fountain head. He deplored English educated Indians neglecting the great culture that their ancestors had attained in the different avenues of intellectual life and accepting the modern materialistic strife as the end of this mortal life. Although we did not always see eye to eye with him as an exponent of Hindu culture yet we always appreciated the sympathetic spirit with which he interpreted it to the world. People are apt to think that he was perhaps a recluse. But those who know him intimately know that he was far from it. He was of a very cheerful and lively disposition in his private life. The natural amiability of his character, his wide culture, his artistic and literary taste gathered round him a very wide circle of friends from every community and notably from amongst the intellectuals in Bengal. He was a great patron of Indian arts and crafts and made many valuable collections of them. We wish those amongst us who claim culture and education were equally keen about them.

As a Judge, he was eminently sound and always avoided the tendency so very common amongst crude lawyers of showing off his learning. He was always patient and courteous to members of the Bar and in his own quiet way extraordinarily independent on the Bench. At times his judgments ran counter to popular views of facts as in the Midnapur case. But we doubt whether in coming to the conclusions he did, he took a partisan view. We strongly commented on his judgment, and we have reasons to believe that our comments were resented by some of his colleagues but never by him. We had a laugh over the matter when we met afterwards. He was as keen about maintaining the independence of the judiciary and safe-guarding the fundamental rights and liberties of the subject as any other Judge as his judgment in Stallman's case will show. We wish him a happy and long life and a useful career. He is now only 57 years of age.

[SIR JOHN WOODROFFE.

AREWELL AT HIGH COURT.

Sir : Sir John Woodroffe was presented with a farewell address by the members of the Vakils' Association at the High Court on Thursday last. At eleven o'clock all the Judges assembled in the Chief Justice's Court which was packed with members of the various branches of the legal profession and the public.

Babu Basanta Coomar Bose, President of the Vakils' Association, read the address which was as follows :—

MY LORD—It is with feelings of the deepest regret that we, the Vakils of this Hon'ble Court, approach your Lordship to bid you farewell on the eve of your retirement from the Bench. During your connection with this Court first as an Advocate for 15 years and then as a Judge for 18 years, you have, by your suavity of manners, your attainments and, above all, your sympathy with the people of this country, earned the esteem and gratitude of all who came in contact with you. Your strong common sense and thorough knowledge of the principles of law, combined with your unfailing courtesy, strict impartiality, and an earnest desire to do justice, made you an exemplary Judge. Your retirement will be a decided loss to the High Court of Calcutta, nay, to the whole country. Amidst your arduous duties on the Bench, you have also found time to enrich legal literature by many valuable contributions, both as commentaries and as original works. We cannot on this occasion omit to express our grateful appreciation of the good work done by you to our country in other spheres of action. The Indian Society of Oriental Art which has recently secured the recognition of the Government will bear testimony to your solicitude in the cause of the neglected arts and crafts of the East and of Indian painting and sculpture. In the domain of religious philosophy, your labours have removed the ignorant obloquy from the Brahmanic Scriptures known under the name of the Tantras, and the erudition and scholarship you have brought to bear upon your exposition of this abstruse subject cannot fail to excite wonder and admiration even of those outside the Brahmanic fold. It is not possible to enumerate here all that you have done, but we cannot help mentioning one other matter, viz., the fearless impartiality with which you repelled the aspersions cast on the civilisation of India, with its historic past, and the thoroughness with which you have done it.

In conclusion, we beg to assure you that your large heart and even temper have earned for you the name of Ajata-Shatru. We heartily wish you a long happy and brilliant future—a future in which, we doubt not, you will make further contributions to the advancement of truth and to the welfare of India.

Mr. S. R. Das, Advocate-General, on behalf of the Bar associated himself with all that was stated in the address.

Babu Mohini Mohan Chatterji, President of the Incorporated Law Society, felt it a privilege and an honour to be associated with all that had been said.

The Chief Justice said : My learned brothers and I have already on another occasion expressed our sentiments towards Mr. Justice Woodroffe. It would not therefore be seemly for me to repeat that which we have already said to him. We are glad however to have this opportunity of associating ourselves with what has been said by those who have spoken on behalf of the different branches of the legal profession. It is with great regret that we regard the retirement of our learned brother not only from the personal point of view but also from the public point of view. His retirement will undoubtedly cause a great loss to the Court. We have however the confident assurance that though he personally will not be with us, the good work which he has done in the Court and in India will provide a fitting and a lasting memorial of a learned and an upright Judge. We join with you in wishing him many years of life, in which he may enjoy the repose, which he has so well earned.

Sir John Woodroffe said :— I thank you for the address with which you have honoured me. I am indeed sorry to leave a country in which I have lived the greater part of my life, that is for some thirty-three years and which is for this and other reasons a second home to me. Though circumstances compel me to retire, I am glad that I do so with a knowledge that my work as a Judge has satisfied you and that for those and other reasons I have your good wishes. If I have been able to carry on my judicial work it is because you have been my collaborators. I thank you for your help and courtesy. What I have done is with your assistance, for the relation of Bench and Bar is that of co-operators in the work of justice. You have also spoken of my work in the propagation of a right understanding of the great civilisation of India. This also is a work of justice though in another sphere. I have been moved to undertake it

by reason of my affection for the country as also because of my great debt to it both material and intellectual. This is to use a Sanskrit term my "Arsha Rina." Justice is here also correct judgment, that is the discrimination of what is true and false, of what is worthy of praise or reprobation with complete impartiality and freedom from all racial, national and credal prejudice. What I owe to India cannot be fully expressed here. I thank you for your good wishes for my future which wishes I heartily reciprocate, trusting also that I am not to-day saying a last farewell to you and your country, but that I may see both in some neighbouring years. If unhappily this be not so, I will say good bye and wish it I ask you to accept my good wishes and my thanks.

LAND ACQUISITION BILL.

(Continued from p. clx.)

Before coming to a consideration of the remedy which may go to meet the situation, attention may be invited to another aspect of the question, which also seems to require serious consideration. It is, that lands are sometimes acquired for a purpose mentioned in the official declaration, but it so happens that Government have no money in hand to carry out the project, and the land for this or some other reason, sometimes lies unused for years together, after being acquired. In the meantime, the value of land, specially in the vicinity of trade centres and in and about growing towns, goes up in many instances, and the original owner is deprived, in the name of some work of public utility which may not materialise in the near future, of the benefits which might have accrued to him from his possession thereof, by carrying on his business upon it, or otherwise. A feeling is sometimes present in official circles that, where land, though it may not be put to some immediate use for the public, has the chance, at some later period, of being put to public use, it would be better for the sake of public economy that it should be acquired before prices go up. Those who entertain such an idea forget that Government has the absolute right under the law to compel a private owner to part with his property at a price to be determined practically by their own officers; and therefore, for the sake of safety of the private rights of property, commercial considerations should not enter into the matter at all. Such considerations would be permissible only if Government were carried

on on communistic principles and not on principles which characterise British administration. I can refer to cases where lands were acquired, say 10 or 12 years ago, for the alleged purposes of accommodation of an existing Railway, but are still lying vacant, with only a chowkidar's shed on it.

This matter is one which has an intimate bearing on the second point mentioned at the outset. But in this connection again, the acquisition of all lands being centralised in the hands of Government, and companies organised for a definite purpose, (not being independently authorised in India to acquire lands for their own purposes, as they are in England by Acts of Parliament), the solution of the questions which arise in the practical application of the Act, becomes difficult from more than one point of view. There are special provisions in the English Statute (The Lands Clauses Consolidation Acts, 1845, 1860, 1869) whereby companies having surplus or superfluous lands are required by law to sell them within the prescribed period, or where no period is prescribed within ten years from the time limited by the Special Act in question and to apply the sale proceeds to the purposes of the Special Act in question; and in default thereof, all such superfluous lands remaining unsold at the expiration of such period must thereupon vest in and become the property of the owners of the land adjoining thereto, in proportion to the extent of their lands respectively adjoining the same, etc. A right of pre-emption is also given to the original owner. [Vide Secs. 127, 128, 129 and 130 of the Lands Clauses Consolidation Act, 1845. (8 and 9 Vict: c. 18)]. By sec. 35 of the Railways Clauses Consolidation Act 1845, (8 and 9 Vict. c. 20), power is given to an owner to object on the ground that some other lands near by ought to be taken, being more fit for the purpose in view, and such an objection when raised has to be decided by two Justices of the Peace. Sec. 37 provides for procedure for the hearing of such objections.

JOGENDRANATH MUKHERJEE,
M.A., B.L., M.L.A.

(To be continued.)

THE Calcutta-Weekly Notes.

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The Premier's speech.

No one need regret the resolution moved in the Council of State by Professor Kale or the decision of the Council upon it. The resolution urged the Governor-General in Council to convey to the Secretary of State for India and through him to the Government of His Imperial Majesty an expression of the keen sense of apprehension and disappointment created in the public mind in India by the Premier's speech. No attempt was made even by European members, official as well as non-official, to conceal their view that the speech of the Premier was unfortunate and had better not been made. Sir William Vincent's speech was, like those of the Viceroy's before him, apologetic. The Premier, he said, had not the remotest idea of going back upon or withdrawing from the pledges, so often given and in circumstances of such solemnity, of assisting India in obtaining responsible government, which, he defined, was government responsible to the elected representatives. The Premier's speech he affirmed was not a threat as some people thought but a warning to a party hostile to Government and hostile even to the policy of winning responsible government for India which was embodied in the pledges now said to be jeopardised by the Premier's speech. To the complaint that the official interpretation of the Premier's speech left severely alone the passages which spoke of maintaining the rule of the Civil Service in perpetuity, Sir William replied that

the question of the British services would solve itself with the growth of responsible government in India. "If" he said, "You once have the assurance that you are going to have responsible Government, then everything else must follow as a matter of course. The development of self-governing institutions is the declared goal and the tendency must be for the services to adjust themselves more and more to the new and altered conditions." The Civil Services, he assured the House, would always work for the success of the Reforms. Will they? This indeed is the crux of the whole situation; and but for the clamour raised in the supposed interests of these Services in England, the Premier's speech would never have seen the light of day. Sir Alexander Murray spoke more to the point when he said he regretted that the Premier should have taken advantage of a debate in the House of Commons on the Appropriation Bill to deliver himself of a speech so liable to misinterpretation and capable of mischief-making in this country. He attributed the speech roundly to the Premier's well-known, "gift of the gab (as they say in Scotland)" which led him beyond the specific point raised in the debate and indeed beyond his knowledge of recent changes in India, and he was of opinion that the sooner the unfortunate speech was allowed to sink into oblivion the better it would be for all concerned. The uneasiness, he added, with regard to the future of the services, their pay and pensions, which naturally arose as a result of great constitutional changes and the open hostility of a certain section of the Indians in the mind of those who had worked the old system had to be removed and it was with that object that the Premier made his speech. Professor Kale who was pressed by both these speakers to withdraw his resolution having declined to do so, the resolution was put and lost. The debate made it clear that in the opinion of the Council of State the pledge of the British Government to assist India in the way towards attaining responsible

government holds in spite of the Premier's speech, that the two quarters from which there was apprehension of an attempt to wreck the Reforms were the non-co-operators on the one hand and the disgruntled members of the British Services on the other, and the Council appears for the time being at any rate to have accepted Sir William Vincent's assurance that these Services as a whole were not inimical to the Reforms—and this perhaps may be taken to represent the general sense of the people of the country who have had the opportunity of studying the Viceroy's speeches taken along with that delivered in the course of the debate by the Home Member.

The issue of the debate on the Premier's speech in the Legislative Assembly was to outward appearance dissimilar to that reached in the Council of State; and reading it as reported in the papers, one cannot resist the inference that this was due mainly to the tone of the speeches delivered from the official bench. Sir William Vincent, according to the report, "deprecated the language used with reference to that great leader of men, the Premier of Great Britain, and said that to refer to him in that way was ungrateful on the part of the Assembly which owed its existence to his Government." "Was it fair," he continued in the same pedagogic vein, "that the Premier who had paid such compliments to the Assembly should be condemned by them in return;" and not content with this, he declared that the Assembly in condemning the speech would be "biting the hand that fed them." Sir William's assurances in the Assembly with regard to the Civil Service which went further than those he gave in the Council were apparently overlooked in the atmosphere created by these *maladroit* demands upon the gratitude of the Assembly towards the Premier personally. The Premier's reference to the Civil Service, the Home Member thought, was intended to guard against such a collapse of the executive machinery in India as had followed the sudden removal of the organised Civil Services in Russia and Austria. Otherwise, he added the policy of Indianisation stood where it was, and His Majesty's Government's decision to retain a substantial element of the British Civil Service was not intended to conflict with the policy of the increasing association of Indians in that Service. "The steel frame," Sir William said, "consists of steel made in Eng-

land as well as in India, but it will have to be of approved capacity." Sir Malcolm Hailey gave sound advice when he said that the purpose of the House in expressing dissatisfaction over the general tenor of the Premier's speech had been served and it was not necessary to express it in the form of a resolution, but its effect was spoiled by being coupled with the threat that the British people (who did not care how they talked about their leaders at Home) would resent an outside attack on such a great leader as Mr. Lloyd George, who held a unique position in Europe. The Assembly naturally refused to be treated as school children and passed the following resolution: "This Assembly recommends to the Governor-General in Council that he may be pleased to convey a message from this Assembly to His Majesty's Government through the Secretary of State for India that it views with grave concern the pronouncement made by His Majesty's Prime Minister in the House of Commons on the 2nd of August 1922 and that it considers that the tenor of the whole speech and the sentiments therein are subversive of the declarations made by His Majesty and His Majesty's Ministers and that it is calculated to create serious apprehensions in the minds of this Assembly and of the people of this country both in the matter of attaining *Swaraj* and of the Indianisation of its services."

LAND ACQUISITION BILL.

(Continued from p. clxiv.)

According to the Indian Land Acquisition Act of 1894, Government have to acquire the land for the purposes of a company, and make over possession thereof to it, and thereafter, cease to have any control over the proceedings of this company in respect of the land so acquired compulsorily. The Indian Act has no provision in it, corresponding to those of the English Statutes, and a company after it gets possession of the land, can make any commercial use of it it likes, afterwards, at the cost of the original private proprietor. This is also a point which the legislature should take in hand with a view to meet grievances that may exist in connection therewith. It must be remembered that from one point of view all companies exist for the good of the public. At the same time it is perplexing to draw the line between classes of companies which are for public purposes, and those which are not.

Complaints are sometimes heard about the Government acquiring land for public bodies, the purpose for which such bodies have been constituted not being deemed to be public in the sense in which the word is understood by many.

What is the remedy? Is Mr. Ramayya's Bill calculated to meet the situation?

It seems that the objections raised against its scheme of procedure may be classified as follows:—

(a) That the question of the purpose for which the land is proposed to be acquired, if left to the decision of the Civil Courts, will cause great delay in the acquisition proceedings, out of all proportion to the benefits, if any, that may be expected from the procedure suggested.

(b) That, generally speaking, the Civil Courts are not themselves sufficiently equipped with the necessary knowledge for a proper exercise of the functions, with which they are proposed to be entrusted in respect of the public character of the declared purpose itself, or the suitability of the land to the purpose of the acquisition. It may be noted that any evidence that may be adduced before a Civil Court with regard to such matters, is bound to be of a conflicting character, being based upon personal opinion of individuals ranged on one side or the other to a large extent. The trying Court will not, in all probability, derive much enlightenment under the circumstances from the evidence before it.

(c) The general impracticability of the scheme of Mr. Ramayya's Bill.

It must be conceded that a great deal can be said with justice in favour of the objections which have been raised against the scheme of procedure in Mr. Ramayya's Bill, although there is a body of official opinion in favour of some points in it. Whether this Bill fails to get through or not, there should, it seems clear, be a movement without delay for removing the grievances which arise out of the compulsory acquisition of lands under the existing scheme of procedure, from which the public now suffer. Any other Bill aiming at piecemeal legislation is not also likely to meet the situation. The whole machinery of the Act of 1894 seems to require revision. Government should therefore appoint a committee to investigate into the matter. In this connection the English Statutes are likely to afford helpful guidance to the Indian Legislature.

Under the new Government of India Act, local bodies are bound to spring into existence in larger numbers than before. In respect of the acquisition of land by such bodies, local committees or boards properly constituted for the purpose, should be the judges as to the public purpose necessitating the acquisition within a specified area, also, as to the suitability of any piece of land proposed to be acquired to the purpose in view, but under the executive control of the Provincial Governments. These local bodies should also decide disputes between one party and another as to whether one's land is more fitted for the purposes of the acquisition, as in England. As for larger projects such as railways, canals, or similar undertakings which are continued from one Province to another, there should be a deliberative body for the whole of India, with competent co-opted members from the Provinces, or local areas likely to be affected by the proposed acquisition, according as the need for such members may arise from time to time. As regards acquisition of land for local purposes a scheme similar to the above obtains in England. Generally speaking, there, land is acquired for a public purpose by an Act of Parliament which gives authority either to the State or to a company to acquire land for its own purposes, and the general provisions of the Lands Clauses Consolidation Acts, 1845, 1860, 1869, etc., settle particular incidental questions as they arise in course of the acquisition proceedings. The preamble to the Lands Clauses Consolidation Act, 1845 (8 and 9 Vict. c. 18) explains the expediency of the scheme of the Statute by stating that "it is expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings, as for ensuring greater uniformity in the provisions themselves." In India lands not being acquired by private Acts of the Legislature, but by an executive order of Government, the need for settling disputed questions by extraneous committee, concerning the declared public character of the purpose for which the lands are acquired under circumstances similar to those in England, as also, for considering the fitness of the land itself for the declared purpose, seems to be

much greater. If machinery is provided in the English Statutes for the determination or decision of incidental questions which are bound to arise in course of acquisition proceedings, there does not seem to be any reason why His Majesty's Indian subjects should be left without it in another part of the Empire.

JOGENDRANATH MUKHERJEE,

M.A., B.L., M.L.A.

(Concluded.)

Reviews.

MAYNE'S HINDU LAW AND USAGE. Ninth Edition. Revised and edited by V. M. Coult's Trotter, M. A., Bar-at-Law, one of His Majesty's Judges of the Madras High Court. Higginbothams, Ltd., Madras. 1922.

We welcome this new edition of what is to this day the standard work on Hindu Law. We congratulate the author in not attempting to improve upon the historical and ethnological sketch of the original author with which the work opens. Much of it may not be, strictly speaking, of any legal value but one who wishes to appreciate Hindu Law as it is to-day and how it came to crystallise in its present form will find it both useful and suggestive. In the previous edition, the opinions and observations of John D. Mayne in this connection were in many places altered, modified or added to by the last editor, perhaps, because, they were not acceptable to him. But Mayne's opinions as such have a value of their own and the present editor has done wisely in restoring the original text of the author. With regard to the legal portion of the work, we also thoroughly approve of the plan followed by the present learned editor in keeping to the method of the treatment of the subject by the original author. Mayne built up his treatise on Hindu Law from the case law on the subject. He culled the cardinal principles of Hindu Law from the leading cases and also traced their development through later decisions. The present editor has done well in keeping to this plan and discarding the obsolete portions from earlier decisions. He has brought the work up to date not only by reference to recent decisions but by frequent consultation with the Indian members of the Madras Bar. He has had the advantage of discussing every point of importance with Mr. K. S. Krishna-

swami Ayyangar and the learned editor says that the Chapter on Inheritance is more the work of this learned Sanskritist and eminent lawyer than his own. We have not a number of excellent works on Hindu Law but in our view both to the student and the lawyer Mayne's Hindu law is invaluable. The work is handy, thorough and a quite safe guide on all crucial questions of Hindu Law.

THE LAW OF CIVIL APPEALS IN BRITISH INDIA. By Dr. Nand Lal, B.A., LL.B. (Cantab), LL.D.; Lahore. Lahore Law Journal, 14, Fane Road, near High Court. 1922.

This is a portly volume of over 750 pages and deals with Appeals from Original Decrees, Appellate Decrees, Appealable Orders, Appeals to the King in Council, Pauper Appeals, Appeals from Decrees based on Awards, Letters Patent Appeals and Appeals under Special Imperial and Local Acts. It possesses all the merits and all the defects of a treatise which seeks to combine in itself both a commentary and a digest of cases. The portion dealing with appeals under Special Imperial and Local Acts in particular might have been left out with advantage (the provisions of the various Civil Courts Acts excepted), because they are entirely disconnected and cannot for that reason lend themselves for scientific treatment, and the case-notes are not, as they hardly could be, without increasing the bulk of the book beyond all reasonable limits, exhaustive. As to the rest of the work we would have preferred a treatise which dealt more intensively with principles and less extensively with individual decisions. As it is, however, the book is a monument of industry and application. There is plenty of precious metal lying about, still awaiting to be separated from an abundance of dross. Presumably the spade-work the author has accomplished in this the first edition will be followed in the next by a real commentary on the Law of Civil Appeals in British India.

THE LAW OF LEGAL PRACTITIONERS IN BRITISH INDIA. By Harendra Chandra Sinha, Pleader. Published by Bandyendra Nath Palit Vakil, 9-1, Musumanpara Lane, Calcutta. 1922.

At this moment when a proposal for establishing a self-contained Bar for British India is

pendin. consideration by the Government and the Legislature and is engaging the attention of all branches of the legal profession in the country, the appearance of a book which seeks to put together the scattered provisions of general and local statutes and statutory and other rules of practice bearing on the subject in a coherent and orderly manner is very opportune. The subject is dealt with under the following heads: (1) Enactments relating to Legal Practitioners in British India, (2) Different classes of legal practitioners, and their functions, powers and duties, (3) Qualifications, Admission and Certificates, (4) Unqualified legal practitioners, (5) Employment of legal practitioners, (6) Touts, (7) Removal and suspension, (8) Authority to bind clients, (9) Privileges, (10) Disabilities, (11) Liabilities, (12) Remuneration, (13) Taxation of fees and costs, (14) Attorney's lien for costs. There are four appendices bearing on (i) Qualifications and admission, (ii) Fees on Taxation, (iii) Recognised clerks and (iv) Petition writers. A carefully prepared subject index completes a treatise of great merit.

DESAI'S POINT-NOTED INDEX OF CASES, JUDICIALLY NOTICED. 1811—1921. *Prepared and published by Balwantrai R. Desai, Barrister.* 7th Edition., 1922. Price Rs. 17.

DESAI'S Index of Cases needs no introduction. To the busy practitioner, it is literally indispensable. A new edition of it cannot but be welcome.

THE LAW OF APPROVERS. By V. P. Mahadeva Aiyar, B.A., B.L., Madras. *Published by the Law Printing House and the Lawyer's Companion Office, Mount Road.* 1922.

This is a handy and useful publication, dealing as it does in a systematic and orderly manner with the whole of the law on the subject. This has been discussed under the following heads:—(1) A General Introduction, (2) Tender and acceptance of pardon, (3) Forfeiture of pardon, (4) Prosecution of Approver for giving false evidence, (5) Corroboration of Approver's Evidence, (6) Value of Approver's Confessions. The treatment is rounded up by a number of appendices followed by a subject index. English precedents have been freely resorted to and light derived therefrom upon

each topic. Altogether it is a compact and useful addition to the Indian Lawyer's library.

ROMAN LAW. By M. C. Naidu, *Barrister-at-Law.* First Edition. Rangoon. The Art Publishing Co. 1922.

Beginners and others preparing for law examinations will find this compact little book, which in many matters strikes out a line of its own helpful. We regret the numerous printing mistakes which disfigure an otherwise well got-up manual.

MEDICAL JURISPRUDENCE AND TOXICOLOGY FOR INDIA. By Rai Bahadur Jaising P. Modi, L.R.C.P.I.S. (Edin.), L.R.T.P.S. (Glasgow). *Published by Butterworth & Co. (India), Ltd. 6, Hastings St., Calcutta.*

We welcome the second edition of Mr. Modi's excellent treatise on medical jurisprudence. When the first edition of this book was published we had occasion to speak of it very favourably and the fact that a second edition has been called for within so short a time amply shows that we were not wrong in the estimate we made of the book. In this edition the book has been thoroughly revised and additions and alterations made so as to bring it up-to-date. We have no doubt that the present edition in which the usefulness of the book has been enhanced will receive the same treatment from the legal and medical professions as the first.

Notes of Cases: CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before WALMSLEY, J. CIVIL REVISION NO. 217 OF 1922. THE INDIAN GENERAL STEAM NAVIGATIVE AND RY. CO., LTD., Defendant, Petitioner v. ABDUL RAHMAN SAWDAGAR, Plaintiff, Opposite Party. The 30th August 1922.

Carriers Act, sec. 9—Liability of common carriers—Proof of negligence—Onus.

The Plaintiff consigned on 19th May 1921 several bags of potatoes from A. S. Ghat, Calcutta, by the Defendant's steamer to Chittagong *via* Chandpur. The steamer reached Chandpur on 24th May 1921. Owing to the strike of the A. B. Railway Company, the steamer company could not make over the goods to the Railway Company and on the same day the goods were carried by the steamer to Naraingunj where upon an examination of the goods by a doctor on 1st June 1921 the major portion of the potatoes was condemned and the rest was sold on the next day by public auction. The price fetched was offered to the Plaintiff who refused to accept the same and instituted a suit in the Small Cause Court of Chittagong for recovery of the price of the goods sent by him. The Judge held that as common carriers they are liable to pay the price as they were guilty of negligence in not having communicated with the Plaintiff when they could not make over the goods to the Railway Company and in not having daily examined the potatoes and disposed of them at once before the major portion of them became rotten :

Held—(1) That the Company continued to be common carriers as long as the goods were in their custody, (2) and that the onus of proving want of negligence was not upon the Plaintiff but on the Defendant (1921) 1 K. B. Div. 257, referred to.

Bobu Monmatha Nath Mukerji for the Petitioner.

Babus Mohini Mohan Chakravarty and *Paresh Chandra Sen* for the Opposite Party.

S. C. C. *Rule discharged with costs.*

CIVIL REVISIONAL JURISDICTION. Before WOODROFFE and SUHAWARDY, JJ. CIVIL REVISION No. 591 of 1921. MAHAMMAD ISMAIL, Objector, Petitioner *v.* SATYESH CHANDRA SARKAR, Applicant, Opposite Party. The 9th August 1922.

Bengal Tenancy Act (VIII of 1885), sec. 170, cl. (3)—*Transferee of non-transferable occupancy holding, if has an interest voidable on the sale and is entitled to deposit.*

The Petitioner landlord sought to sell the holding of his occupancy raiyat Komorndi Sheikh in execution of a rent decree. The

Opposite Party who claimed to have purchased the holding from the said raiyat applied to make a deposit of the decretal amount in Court under sec. 170, cl. (3) of the Bengal Tenancy Act. The Munsif of Katwa allowed the deposit by his order, dated the 10th May 1920. The landlord appealed. The Subordinate Judge of Burdwan held following the decision in 16 C. W. N. 421, that no appeal lay against that order of the Munsif. The appeal was therefore dismissed on this preliminary ground and the learned Judge did not enter into the merits of the appeal. Against this order of the Subordinate Judge, dated the 2nd May 1921 the landlord preferred an appeal (M. A. No. 244 of 1921) under sec. 47 of the Civil Procedure Code, and also obtained the present rule by an application under sec. 115 of that Code. Their Lordships held that no appeal lay and interfered in revision :

Held—That the Opposite Party was not entitled to make the deposit, and the order of the Munsif allowing the deposit was set aside.

A transferee of a non-transferable occupancy holding not recognised by the landlord derives no interest by transfer as against the landlord, and his interest is not therefore voidable on the sale, and so he is not entitled to make a deposit under sec. 170, cl. (3) of the Bengal Tenancy Act.

Nalin Behari v. Fulmani, 16 C. W. N. 421, followed.

Dayamoyi v. Ananda Mohan, I. L. R. 42 Cal. 172 (F. B.); *Targhdas v. Haris Choudra*, 17 C. W. N. 163; *Ahamadullah v. Haharu Lahu*, 20 C. W. N. 39; *Abdur Rahman v. Promode*, 22 C. L. J. 108, referred to.

Babu Hemendra Nath Sen for the Petitioner.

Maulvi A. S. M. Akram for the Opposite Party.

H. C. S. *Rule made absolute.*

CIVIL REVISIONAL JURISDICTION. Before CUMING, J.—CIVIL REVISION No. 210 of 1922. MATI BISWAS *v.* HARIPADA PAL. The 28th July 1922.

Suit on a hand-note—Hand-note silent as to interest—If oral evidence admissible to show contemporaneous agreement to pay interest.

The Plaintiff, Opposite Party, sued the Petitioner for the recovery of money due on a

hand-note alleged to have been executed on the 9th August 1926 with interest thereon at the rate of 23 per cent per annum. In the hand-note there was no stipulation for payment of any interest, but the Plaintiff set up an oral agreement to show that the Petitioner agreed to pay interest at the rate sued for. The Judge of the Small Cause Court at Krishnagar decreed the Plaintiff's suit in full. The Defendant thereupon moved the High Court and obtained the present Rule.

Babu Mrityunjay Chattopadhyay (with *Babu Sudhiranjan Rai Chaudhury*) in support of the rule contended that the hand-note being silent as to any interest payable in respect of the sum advanced, the Court below was in error in admitting evidence to prove a contemporaneous oral agreement thereof in view of sec. 92 of the Indian Evidence Act. *Lachmi Chand v. Hemendra Prosad*, 18 C. W. N. 1260 and *Banyndri v. Jaganmuth*, 1 Pat. L. J. 71

were cited in support. *Umes Chandra v. Mohini Mohan*, 9 C. L. R. 301 and *Sowdamini v. Spalding*, 12 C. L. R. 163, which seem to support the contrary contention are both distinguishable.

Babu Bireswar Bagchi, in showing cause, stated that oral agreement was admissible in view of sec. 92, Proviso (2) and illustration (c) of the Indian Evidence Act, and contended that *Sowdamini v. Spalding*, 12 C. L. R. 163, which was in respect of a suit on a hand-note and *Lala Himmat Sahai Singh v. Llewellyn*, 11 Cal. 486, supported his contention:

Held—When a document evidencing a contract is formally drawn up, it is not open to the parties to adduce evidence of any contemporaneous oral agreement adding to the document. 18 C. W. N. 1260, followed. 9 C. L. R. 301 and 12 C. L. R. 163, distinguished.

S. C. C.

Rule made absolute.

[END OF VOL. XXVI.]

